

# A DIGEST OF INDIAN LAW CASES;

CONTAINING

HIGH COURT REPORTS, 1862-1900,

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA  
1836-1900,

WITH AN INDEX OF CASES.

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

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IN SIX VOLUMES.

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**Auctioneer—agent bidder—twice**  
*pucca*—*Longs of trade—Custom—Condition of sale*—An agent of the defendants made at an auction sale a bid for certain goods. This bid was not at the time accepted by the auctioneer, but was referred to the owners of the goods for approval and sanction. The agent agreeing to such reference. The condition of sale contained no clause stipulating for such procedure. Previous to any reply being received by the auctioneer from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent. In a suit brought by the auctioneer to recover a loss on a re-sale of the goods the plaintiffs set up a usage of trade, whereby it was allged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneer to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangement had never been repudiated." *Held* that the condition of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law there was no contract between the parties, and therefore that no suit would lie. *MACKENZIE LYALL & Co v CHANDOO SINGH & Co* *(L L R, 18 Calc., 702)*

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**2. Procedure—Sale of under-tenures**  
*—Beng. Reg. VII of 1799—Sales of under-tenures under Act VIII of 1855 for arrears of rent were not*

## SALE FOR ARREARS OF RENT —continued.

### 1. ACT VIII OF 1835—continued.

required to be according to the procedure laid down in Regulation VII of 1799, but according to the procedure prescribed by s. 2 of Act VIII of 1835. *MONOSHEE v. ARDOOL HOSSEIN* . 7 W. R., 297

2. ———— *Effect of sale—Right of purchaser—Itamee tenure.*—When rights and interests in a talukh were sold for arrears of rent under Act VIII of 1835, the purchaser obtained no power to destroy the itamee tenure. *SOOBULCHUNDER PAUL v. ATTUR ALI* . 11 W. R., 32

3. ———— *Right of purchaser—Incumbrances.*—A sale of an under-tenure under Act VIII of 1835 passed only the right, title, and interest of the judgment-debtor, and did not void the incumbrances created by the old tenant. *MANICK CHUNDER DOSS v. DWARKANATH DOSS* . 12 May, 502

4. ———— *Right of purchaser—Act XI of 1859, s. 52.—Semble.*—The purchaser of a holding in a khas mehal sold under Act VIII of 1835 could claim the position of privileges accorded by ss. 37 and 2 of Act XI of 1859 to purchasers of permanently settled estates, or of estates sold in districts not permanently settled, sold for arrears of revenue. *KYLASH CHUNDER SHAHA v. SHURNOMOTEE DOSSEE* . 7 W. R., 318

5. ———— *Incumbrances—Howladari tenure.*—The plaintiff held certain lands in talukh Q under a howladari pottah. Q was sold for arrears of rent under Act VIII of 1835, and purchased by the defendant. After purchase, the defendant dispossessed the plaintiff from his lands, on the ground that he had purchased the talukh free from all incumbrances created by the late defaulting talukhdar. The plaintiff brought this suit to recover possession of his lands from the defendant. *Held* that a purchaser of a tenure under Act VIII of 1835 did not necessarily acquire it free from all incumbrances. Case remanded for trial of the genuineness of the plaintiff's pottah. *JASIMUDDIN v. MANSUR ALI* [6 B. L. R., Ap., 149; 15 W. R., 11

*Contra*, *DWARKANATH DOSS v. MANICK CHUNDER DOSS* . 3 W. R., 197

*RAMJEEBUN CHOWDREY v. PEARY LALL MUNDUL* [4 W. R., Act X, 30

6. ———— *Right of purchaser—Attachment—Tender of arrears.*—In a suit to set aside a sale in execution of a decree for arrears of rent due up to Aghran 12 2, the plaintiff, who claimed under a deed of conditional sale, was held not entitled to a decree on the full wing grounds. He was not a registered tenant at the time of the sale, but as a sezawal was legally in possession. The plaintiff never tendered the arrears for which the sale was made. Under Act VIII of 1835, no separate attachment of a mehal or notification of sale in the mofussil is necessary in order to render the sale valid. In this case, not the rights and interests of the defaulter, but the tenure itself, passed for the arrears

## SALE FOR ARREARS OF RENT —continued.

### 1. ACT VIII OF 1835—concluded.

due upon it. Attachment by the appointment of a sezawal is no bar to a sale for arrears due before such attachment. *FORBES v. PROTAP SINGH DOOGER* [7 W. R., 409

7. ———— *Beng. Reg. VII of 1799—Tuppa right. Extinguishment of.—Semble*—A tuppa right is annihilated by a sale held under Act VIII of 1835 and cl. 7, s. 15, Regulation VII of 1799. *ZENUT BEBER v. RAHATOONISSA* [7 W. R., 243

## 2. DEFAULTERS.

8. ———— *Disabilities of defaulters—Purchase—Beng. Reg. VIII of 1819—Sale of patni.*—A defaulter cannot, under Reg. VIII of 1819, purchase a patni sold on account of his default to pay the patni rent, either in his own name or in that of any other person. *MAHOMED NASSER v. KISHEN MOHUN GOYEE* . W. R., F. B., 92

9. ———— *Purchase—Sale of patni.*—Not merely recorded shareholders, but all actual defaulters (such as joint patnidars), are prohibited from being purchasers of patni. *GOUREE KOMUL BRUTTACHARJEE v. RAJ KISHEN NATH* [5 W. R., 106

10. ———— *Purchase—Right to sue—Suit by another defaulting co-sharer to set aside sale.*—A suit by a sharer to set aside a sale having been dismissed on the ground that plaintiff being a defaulter the suit would not lie, plaintiff brought a second suit to claim possession of his share of the dar-patni talukh, on the ground that the sale must be inoperative, inasmuch as the purchaser, a co-sharer, was also a defaulter. *Held* that, until the sale was set aside, plaintiff was not in a position to claim possession of his share. *GOUREE KOMUL BRUTTACHARJEE v. RAJ KRISTO NATH* . 14 W. R., 369

11. ———— *Purchase—Suit by other defaulters to set aside sale—Joint owners—Dar-patnider—Constructive trust.*—Of three joint owners of a dar patni, two held a 4 annas share and the third an 8 annas share. Default having been made by all three in the payment of the rent, the patnidar brought a suit and obtained a decree for the arrears. In execution of this decree, proclamation was made that the dar-patni would be sold on the 5th of October 1877. Up to the commencement of the sale the 4 annas shareholders were unable to pay their proportionate amount of the decree; the 8 annas shareholder declined paying his share, and, when the sale took place, he became the purchaser of the dar-patni. In a suit brought by the 4 annas shareholders to recover their shares from the purchaser the lower Appellate Court, reversing the decree of the Court of first instance, decided in favour of the plaintiffs. *Held* on second appeal that, the sale having taken place as much through the default of the plaintiffs as through the default of the defendant, the former had no equity against the latter; and that therefore the

# SALE FOR ARREARS OF RENT

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## 2 DEFAULTER—continued

suit should be dismissed. **PAN LOLL MOOKERJEE**  
v. **DEBENDRA NATH CHATTERJEE**

(I. L. R., 8 Cal., 8)

**D. C. RAM LALL MOOKERJEE** v. **JODHNATH CHATTERJEE**  
9 C. L. R., 337

12 ——— Defaulter for period later than that causing the sale—*Suit for damages by zamindar*—Where a patta is sold for default on the part of the patta-dar in paying his rents a zamindar who has paid his rent to the patta-dar for the period to which the default relates may sue for damages, although himself a defaulter for a later period. **MARSH AND MOORE** v. **JOY KUMAR SAHA BHUI**  
6 W. R., 201

## 3 UNDER TENURE—SALE OF

13 ——— **Beng Act VIII of 1855—Application of Act (Chota Nagpur—Bengal Act VIII of 1855 applied to the district of Ichardugga in Chota Nagpur)** **GURIND RAM** v. **BRUPAL SINGH**  
(10 C. L. R., 78)

14 ——— s. 30—“Proceed as”—*Sale*—A sale under Bengal Act VIII of 1855 was a “proceeding” within the meaning of s. 30 of that Act. **DWARAKANATH SINGH** v. **CHANDER MOHUN MITTAR**  
12 W. R., 328

15 ——— **Act X of 1859, s. 105—Sale of transferable tenure—Act X of 1859, s. 151**—The plaintiff sued to bring a transferable occupancy tenure to sale in satisfaction of a decree for arrears of rent, by enforcement of an order passed under Act X of 1859 relating to the execution of the decree. *Held* that, in so far as the plaintiff sought to set aside the order, it was barred by the provisions of s. 151 of Act X of 1859 and was not admissible by reason of the repeal of the Act in so far as it was retrospective of the order, the suit sought to recover the amount of the decree by the sale of the holding on which the arrears accrued, at the time it was instituted s. 105 of the Act had ceased to be law in these provinces, and could not be cited in support of the claim. **RAM HULLOWAN RAM** v. **FOX**  
7 N. W., 239

16 ——— *Purchase by a zamindar of sale in execution of decree of Civil Court*—A zamindar who had obtained a decree against a registered tenant for arrears of rent was fully justified in proceeding to sale under s. 105 of Act X of 1859, notwithstanding the tenure was purchased subsequently to the date of the above decree at a sale in execution of a decree of the Civil Court. **SATTAR-KHANA** v. **SARKAR DHOOPER**  
8 W. R., 384

17 ——— **Under s. 105, Act X of 1859, an under-tenure might be sold in execution of a decree, provided there was an arrear of rent adjudged.** **SATTARCHUNDER ROY** v. **MOHUNMOHUN PAL CHOWDHURY**  
W. R., 1894, Act X, 81

18 ——— *Procedure by proprietor of under-tenure—Act X of 1859, s. 106*—Under s. 106, Act X of 1859, an under-tenure was

# SALE FOR ARREARS OF RENT

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## 3 UNDER TENURE—SALE OF—continued

liable to sale in execution of a decree for arrears of rent for eleven years. Any party wishing to stay the sale on the ground of his being the proprietor of the under-tenure, had to comply with the provisions of s. 105. **DOONGA PRASAD BHOSE** v. **SARKISHTO MOOY SHY**  
W. R., 1834, Act X, 49

19 ——— **Beng Act VIII of 1859, s. 59, 64—Procedure**—Where an under-tenure is sold under the provisions of Bengal Act VIII of 1859 in execution of a decree obtained by the zamindar for rent due to him as the separate proprietor, after satisfaction of a share of the taluk in which the tenure is a sale the sale is properly conducted, not under s. 64 but under s. 59 of the above law. **SURESH SOOY DUTTA DEBIA** v. **SUNDERMOHUN TALUKDAR**  
(22 W. R., 530)

20 ——— *Effect of sale—Right, title, and interest of debtor—Act X of 1859, s. 105*—In a sale under s. 105 Act X of 1859 only the judgment-debtor's property can pass. **MIAN JAY KISHAN** v. **KUSARNA NATH DEB**  
6 B. L. R., 1

21 ——— *“Tenure” Meaning of—Sale on registration of names—Act X of 1859, s. 105*—By the word “tenure” as used in s. 105, Act X of 1859, is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and it is the latter which is sold on a sale under s. 105. Therefore where A at a sale in execution of a decree for debt, bought the right title, and interest of the holder of a transferable under-tenure, and previous to the confirmation of such sale the zamindar sold the tenant for arrears of rent and obtained a decree, under which he sold the tenure to persons who conveyed it to B, and A, under the circumstances, neither registered the transfer to him nor made any deposit of rent as allowed by s. 6, Bengal Act VIII of 1859,—*Held* that he was not entitled to recover possession from B. **SHANKAR CHAND KENDU** v. **PARSOYATH PAL CHOWDHURY**  
(12 B. L. R., F B., 484; 21 W. R., 94)

**GIRISH CHANDER MITTAR** v. **JHAJU**  
(12 B. L. R., 488 note; 17 W. R., 352)

**ASTUD LOLL MOOKERJEE** v. **KALINA PRASAD MITTAR**  
12 B. L. R., 488 note; 20 W. R., 59

**RUGHONBER TALUKDAR** v. **STEEPOOLAN KRAN**  
(23 W. R., 289)

**BANER MADHUB BISHUI** v. **RADHA MADHUB MOZOOMDAR**  
22 W. R., 196

22 ——— *Non-registration of tenants' names—Right of person in permanent possession of tenure*—A sale in execution of a decree for arrears of rent (at an enhanced rate) of a subordinate taluk, which has been obtained against a party who is in possession of the taluk by permission of the owners, but who has no other right or title to it, will not bind those owners, even though their names be not recorded as tenants in the books of the zamindar. **Siem Chand Kunder** v. **Brjo Nath Pal**

# SALE FOR ARREARS OF RENT —continued.

## 3. UNDER-TENURES, SALE OF—continued.

*Chowdhry, 12 B. L. R., 484, distinguished. REDDY KISSAN DUTT v. RAM COOMAR SEN*

[3 C. L. R., 231]

23. ———— *Non-registration of purchase of under-tenure in the landlord's serishtla.*—In a case governed by Act X of 1859, it was held that a person, who had purchased a transferable jote, but who did not get his name registered in the landlord's serishtla, had no *locus standi* against a subsequent auction-purchaser of the jote in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale. *Sham Chand Koondoo v. Brojo Nath Pal Chowdhry, 12 B. L. R., 484; 21 W. R., 94, followed. PATIL SHAHU v. HARI MAHANTI* . . . I. L. R., 27 Cal., 789

24. ———— *What passes at sale of under-tenure—Growing crops—Beng. Act VII of 1869, s. 66.*—At a sale of an under-tenure for arrears of rent under s. 66 of Bengal Act VIII of 1869, the growing crop standing on the land passes to the purchaser at the auction-sale, except when it has been specially excepted by the notification of sale, or a custom to the contrary has been proved. *AFATULLA SIRDAR v. DWARKA NATH MOITRY*

[I. L. R., 4 Cal., 814; 4 C. L. R., 95]

25. ———— *What passes at sale of under-tenure—Certificate of sale.*—B held 1 anna of a 10 annas in a jumma which had been purchased by B L H, and had paid rent to the kutkinadar on such 1 anna share, and had his name registered as owner of such 1 anna share in the sherista of the kutkinadar. The kutkinadar having afterwards brought a suit against B L H alone for arrears of rent of the entire 10 annas, and having obtained a decree and in execution of this decree put up to sale the entire 10 annas share.—*Held* that, as the sale certificate related only to the share of B L H, B's 1-anna share did not pass under such sale. *BUGHERUTH BERAH v. MONEERAM BANERJEE* . . . I. L. R., 4 Cal., 855

26. ———— *What passes at sale of under-tenure—Beng. Act VIII of 1869, ss. 59, 60—Sale certificate—Proclamation of sale.*—*Held* on the construction of a sale certificate and a proclamation of sale, purporting to be made under ss. 59 and 60 of the Rent Act, Bengal Act VIII of 1869, that what passed by the sale was not an under-tenure, but merely the right, title, and interest of the judgment-debtor therein. The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document. *DWARKA NATH v. ALOKA CHUNDER SEAL*

[I. L. R., 9 Cal., 641]

27. ———— *Sale in execution of decree under Civil Procedure Code, 1859—Beng. Act VIII of 1869, ss. 59, 60, 66—Right of purchaser.*—In execution-proceedings under Act VIII of 1869, whether the property attached is an under-tenure or an ordinary leasehold interest, only the

# SALE FOR ARREARS OF RENT —continued.

## 3. UNDER-TENURES, SALE OF—continued.

right, title, and interest of a judgment debtor can be sold; while by virtue of a sale of a tenure under s. 59 of Act VIII of 1869, the purchaser acquires it under ss. 59, 60, and 66 free of all incumbrances which may have affected thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder. *DOOLAR CHAND SAHOO v. LALLA CHABBEEL CHAND. DOOLAR CHAND SAHOO v. LALLA BISHESHUR DYAL*

[L. R., 6 I. A., 47; 3 C. L. R., 561]

28. ———— *Beng. Act VIII of 1869, ss. 59, 60—Right of auction-purchaser.*—Where an under-tenure was sold in execution of a decree which had been passed in the terms of a compromise effected between the landlord and all the sharers in the tenure but one, and the representative of the latter sought to assert his right to his share against the auction-purchaser,—*Held* that, in a sale under Act VIII of 1869, a tenure is sold outright, and that this tenure did not pass to the auction-purchaser with any incumbrances. *GRISH CHUNDER GHOSH v. KALEE TARA* . . . 25 W. R., 395

29. ———— *Right of mortgagee—Right to notice of sale—Adjudication of title, Suit for.*—The right, title, and interest of A in a certain under-tenure was sold in execution of a decree for rent obtained against him by B and purchased by B himself. B at the time held another decree against A for arrears of rent for the same under-tenure. C, to whom A had previously mortgaged the under-tenure, thereupon having foreclosed the mortgage, instituted a suit for possession against A and B and obtained a decree for possession. After this decree, but before C got actual possession, B caused the under-tenure to be sold in execution of his other decree against A and again became himself the purchaser. C, having shortly afterwards obtained possession under his decree, was dispossessed by B, who took possession through the Court under his second purchase. C thereupon instituted proceedings under s. 269, Act VIII of 1869, in which he was successful, and consequently regained possession. In a suit brought by B to set aside those proceedings and for adjudication of title,—*Held* that B had a good title to the under-tenure, and that he was not bound, before bringing the under-tenure to sale under his second decree, to give notice to C. *Nobeen Kishen Mookerjee v. Shib Prosad Pattuck, 8 W. R., 96, considered. LAIDLAY v. GUNNESS CHUNDER SAHOO*

[I. L. R., 4 Cal., 438]

S. C. WATSON v. GONESH CHUNDER SAHOO

[3 C. L. R., 240]

30. ———— *Procedure—Setting aside sale—Material irregularities—Civil Procedure Code. (Act X of 1877), Ch. XIX, ss. 311, 647.*—The procedure to be followed upon the sale of an under-tenure is now that prescribed by the Civil Procedure Code. S. 311 does not apply only to sales made under Ch. XIX of the Code, and the sale of an under-tenure may be set aside upon any of the grounds mentioned

# SALE FOR ARREARS OF RENT

—continued

## 3 UNDER TENURES, SALE OF—concluded.

in that section. **AZIZOONESSA KHATOON v. GORA CHAND DAS** . . . **L. L. R., 7 Calo, 163**

**S. C. AZIZOONESSA KHATOON v. KALLY CHURN SEN** . . . **B. C. L. R., 489**

## 4. PORTION OF UNDEVELOPED SALE

OF.

**31. — Judgment-debtor in receipt of whole rent—Beng. Act VIII of 1869, ss 61 64.**—It is only where the judgment debtor is in receipt of the entire 16 annas share of the rent that in execution of a decree for rent the under-tenure can be sold. **DWARKA NATH CHAKRABARTY v. SUTYRNA NATH CHOWDHURI** . . . **B. C. L. R., 407**

**32. — Sale under decree obtained by sharer in undivided estate.** If a decree is given in favour of a sharer in a joint undivided estate for his share of the rent of an under-tenure situate in such estate he is not allowed by law to put up for sale a portion of the under-tenure. **GOIND CHUNDER ROY CHOWDHURY v. RAM CHUNDER CHOWDHURY** . . . **[22 W. R., 421]**

**33. — s. 108—Effect of sale.**—Where a sharer in an undivided taluk, after obtaining a decree for money due to him on account of his share of the rent, brings to sale a portion of the tenure corresponding with the share of the rent for which he obtained a decree, the sale has no further effect than any other sale in which the rights of the judgment debtor are sold. **NUVD LALL ROY v. GOOROO CHURN BOSE** . . . **[15 W. R., 6]**

**PITAMBURKE CHOWDHURAI v. MORIN KRISTO MOOKERJEE** . . . **18 W. R., 205**

**34. — Act X of 1859, s. 108—Beng. Act VIII of 1865, s. 4—Sale of under-tenure—Execution of decree for rent.**—A suit by a sharer in a joint undivided estate for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate fell within the provisions of s. 108, Act X of 1859. Where the owner of an undivided estate lets his share to a tenant by giving a pottah and taking a kabuliat, a suit for the rent of such undivided share, treated as a separate and distinct under-tenure, came under the provisions of s. 4, Bengal Act VIII of 1865. **DWARKANATH CHUCKRABARTY v. DRUM MOSE CHOWDHURY** . . . **[15 W. R., 524]**

**35. — Right of purchaser on sale of portion of tenure.**—Where a suit was for rent, and the balances due under the decree were on account of a 7 annas rukhum of a tenure, and the sale-certificate passed the right and interest of the defaulting under-tenant, it was held that Act X of 1859, s. 104, was applicable to the case, and that such right and interest only, and not the whole tenure, became vested in the auction-purchaser. **ACKIL CHUNDER MOOKERJEE v. CHUNDER COOMAR MITTAL** . . . **22 W. R., 414**

# SALE FOR ARREARS OF RENT

—continued.

## 4. PORTION OF UNDER TENURE, SALE OF

—continued

**36. — Beng. Act VIII of 1869, s. 64.**—*Right of purchaser—Effect of sale.*—The Full Bench decision in **Sham Chand Kundu v. Brojonnath Pal Choudhary**, 12 B. L. R., 44: 21 W. R., 94, by which the right of a purchaser in execution of a rent-decree prevails over that of an earlier purchaser, has no application to the case of a sale under Bengal Act VIII of 1869, s. 64, which provides for the sale, not of the tenure, but of the right, title and interest of the judgment debtors. **LECHUN RAMMOON DOSS v. RAM HANER ROY** . . . **22 W. R., 67**

**37. — Landlord and tenant—Sale of a portion of a tenure—Beng. Act VIII of 1869, ss 59, 60—Co-sharers—Parties.**—A portion of a tenure cannot be the subject of a sale under s. 64, Bengal Act VIII of 1869, so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60. A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale A, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee, who proceeded to oust A. In a suit by A to recover possession of his half share of the tenure on the footing of his purchase. *Held* that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Bengal Act VIII of 1869, and that, as it appeared that the mortgagor whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers, who were not parties to the suit, A was not entitled to the relief he sought. **REILY v. HEE CHUNDER GHOSH** . . . **[L. L. R., 9 Calo, 722; 12 C. L. R., 308]**

*See SHAMCHAND KUNDU v. BROJONNATH PAL CHOWDHURY* . . . **12 B. L. R., 454**

**38. — Right, title, and interest of registered shareholder in tenure—Effect on joint shareholders.**—Where a judgment-debtor was alone registered in the scribbat of the zamindar as owner of a tenure, but it appeared that his two brothers who were joint in estate with him were entitled to an equal share with him in the tenure, but that the judgment debtor was the manager; and when it appeared that the zamindar, being only entitled to a share in the zamindari, had obtained a decree against the judgment debtor alone for arrears of rent, and in execution thereof proceeded to sell his right, title, and interest under s. 64 of the Rent Act,—*Held* that, as the judgment debtor represented his brothers, and as they were equally liable to pay the amount of the decree upon the principle set out above, the latter were not entitled to recover their share of the tenure which the auction purchaser had obtained possession of in execution of the decree against the judgment-debtor. **Doolar Chand Saloo v. Lalla**

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4. PORTION OF UNDER-TENURE, SALE OF  
—continued.

*Chabeel Chand, L. R., 6 I. A., 47, and Bissessur Lall Sahoo v. Luckmessur Singh, L. R., 6 I. A., 233, commented on. JEO LALL SINGH v. GUNGA PERSHAD . . . I. L. R., 10 Calc., 898*

39. ————— *Sale of right, title, and interest of a registered tenant—Effect of sale of a tenure in execution of a decree for arrears of rent obtained by a co-sharer landlord against the registered tenant alone.*—In a suit brought by the plaintiffs to set aside the sale of a shikmi talukh or in the alternative for a declaration that the sale did not affect their rights, on the allegation that defendants Nos. 3 and 4, who were the proprietors of a certain share of the estate under which the said talukh was held, having obtained a collusive decree for arrears of rent for the years 1298 and 1299 (B.S.) against defendant No. 1, who was a joint owner of the talukh with the plaintiffs, in execution thereof fraudulently caused the disputed property to be sold, and defendant No. 1 purchased it in the benami of defendant No. 2, the defence (*inter alia*) was that the sale was not brought about by fraud or collusion, and that the rent suit having been brought against the registered defendant No. 1, the whole tenure passed by the sale. Held by BANERJEE and HILL, JJ. (RAMPINI, J., dissenting), that inasmuch as it appeared that the share sold away stood in the name of defendant No. 1 alone; that the zamindar used to sue defendant No. 1 for rent for the said share; that the defendant No. 1 used to realize a rateable share of costs, road cesses, etc., which he was bound to pay under rent decrees obtained against him, from the plaintiffs sometimes amicably and generally by contribution suits; and that the defendants Nos. 3 and 4, who were the fractional shareholders of the zamindari, sued the defendant No. 1 as usual for rent for the years 1298 and 1299 B.S., and obtained a decree, the sale, though in terms only a sale of the right, title, and interest of the judgment-debtor, really passed the right, title, and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represented. *Jeo Lall Singh v. Gunga Pershad, I. L. R., 10 Calc., 996, followed. NITAYI BEHARI SAHA PARAMANICK v. HARI GOVINDA SAHA*

[I. L. R., 26 Calc., 877]

40. ————— *Sale of a jumma in execution of a decree for rent obtained against one of the heirs, of the last recorded tenant, from whom the landlord chose to accept rent separately and who was not recorded in the landlord's serishtah—Effect of such a sale.*—An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant. The plaintiffs sued to recover possession of their share of certain rent-paying lands on the allegation that they were entitled to a one-third share of these lands by inheritance from the last recorded tenant, and another one-third share by purchase from one of his heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share;

## SALE FOR ARREARS OF RENT

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that for some years they and the said defendants have been paying rent to the landlord and obtaining separate rent receipts; that the defendants Nos. 2 and 3 in collusion with the landlord allowed a decree to be passed against them in respect of the entire jumma, in execution of which the said lands were sold and purchased by defendant No. 1. The defence of defendant No. 1 *inter alia* was that, as the rent suit brought by the landlord was against the person who was the sarbarikar or manager of the jumma, therefore by the sale in execution of the decree obtained in that suit the entire jumma passed. Held that, as the landlord was bound to recognize the plaintiffs as tenants in the place of the last recorded tenant, and also as he chose to accept rent from the plaintiffs, and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants. *The entire jumma did not pass by the sale, and the plaintiffs' right was not affected thereby. Nitayi Behari Saha Paramanick v. Hari Govinda Saha, I. L. R., 26 Calc., 677, distinguished. ANNADA KUMAR NASKAR v. HARI DASS HADGAR*

[I. L. R., 27 Calc., 545  
4 C. W. N., 608]

41. ————— *Sale of gantidari rights.*—In a suit for arrears of rent, where defendants denied the relation of landlord and tenant to exist between themselves and the plaintiffs, it was found that plaintiff had been the sole owner of an estate which formed a 12 annas share of the under-tenure of a gantidar, who was liable to pay the rent of the other 4 annas to the owner of the neighbouring estate. In execution of a decree for arrears of rent due on the 12 annas share, plaintiff caused the ganti to be sold and purchased it himself, and the proceeds not being sufficient to pay the amount of the decree, he caused the tenant-right of the 4 annas share to be sold and purchased that also. Held that Bengal Act VIII of 1869, s. 64, did not apply, because plaintiff was not a sharer in a joint undivided estate; and that, by his purchase, plaintiff had become the absolute owner of the 12 annas ganti, and had acquired the right, title, and interest of the last registered tenant in the 4 annas share. The result was to place him in the position of holding the 16 annas gantidari right as against the under tenants, who were bound to pay rent to him as *de facto* gantidar. *JOGENDRU CHUNDER GHOSH v. SHONA KALKE*

[24 W. R., 313]

42. ————— *Sale of immovable property—Beng. Act VIII of 1869, s. 65.*—Where one co-sharer obtains a decree for money due to him on account of his share of the rent of an ijara, and in execution of that decree attaches, in the first instance, the immovable property of his debtor, such attachment is void and will not invalidate a conveyance of the property by the judgment-debtor made during its continuance. It is not unless and until all the movable property of the judgment-debtor has been sold and the sale-proceeds are found

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insufficient to satisfy the decree that the judgment creditor can proceed under s. 64 or 65, Bengal Act VIII of 1909 to seize and sell the immovable property of his debtor. **BARODA PRASAD GANGOOY & TATKEE CHUNDER BHUTTACHARYA**

[3 C. L. R., 325]

43. — *Landlord and tenant—Sale of portion of under-tenure—Sale for arrears of rent*—There is nothing in s. 64, Bengal Act VIII of 1909 which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold s. as to render the sale binding upon the judgment-debtor and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civil Procedure Code. Where therefore a plaintiff who was the owner of a share in a zamindari had obtained a decree against X who held a taluk in such zamindari for arrears of rent due in respect of such share and in execution of such decree from him a share of such taluk was sold corresponding with his share in the zamindari, and himself became the purchaser and where such plaintiff subsequently instituted a suit against J who was also the owner of a house and room-holds under the said taluk for arrears of rent due in respect of the share of the taluk so purchased by him, and where it appeared that the sale at which the plaintiff became the purchaser was afterwards confirmed and that he had obtained a sale certificate—*Held* that such suit was not liable to be dismissed merely on the ground that the plaintiff had brought a share of an under-tenure to sale in execution of a decree for arrears of rent under s. 64 of Bengal Act VIII of 1909 and had thereby acquired nothing by such purchase there being nothing in that section to support such a conclusion. **Gulab Chander Roy Chowdhury v Ram Chander Chowdhury** 23 W. R., 421 and **Relly v Har Chander Ghose** 1 L. R., 9 Cal., 792 discussed and explained. **ACHANTILLA ERANBARADUR v RAJESWARA CHANDRA RAU** 1 L. R., 12 Cal., 464

44. — *Act VIII of 1889 ss. 26, 59—Sale for rent—Landlord and tenant—Effect of sale in execution of a decree for rent*—Where two persons, B and I were considered tenants, and on B's death to one was registered in his place, and a sale for arrears of rent was brought against the widow and the executors of the sole surviving registered tenant, and the zamindar was not bound to look for his rent beyond the representative of the surviving registered tenant, and that the entire tenure passed by the sale in execution of a decree for arrears of rent obtained against the representative of the surviving registered tenant. Where the sale proclamation distinctly set out that the sale would be held according to the provisions of s. 63 of Act VIII of 1909 and the property advertised was the tenure and the property sold was the tenure—*Held* that the mere insertion of a statement that the sale was of the rights and interests of the judgment debtor would not have the effect of limiting the sale

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to such rights and interests and not extending to the tenure itself. **MAHOMED SIKHAN v GURISH CHUNDER CHOWDHURY** 3 C. W. N., 251

## 5. EFFECT OF SALE.

45. — *Dissolution of relation of landlord and tenant—Patrial tenure*—The sale of a patrial dissolves the relationship of landlord and tenant between the zamindar and the patriidar. **BRONOVATH SINGH POY v BRUGOVATHI DASSEE**

[1 W. R., 133]

46. — *Unregistered tenant*—A zamindar has a perfect right to bring a tenure to sale for arrears of rent without regard to the rights of the new tenant while he is yet unregistered. **NOBLES KIRNER MOOKERJEE v SHRI PRASAD PATTECK**

[9 W. R., 161]

Upholding on review decision in 8 W. R., 96

47. — *Registered tenant affected by sale*—A zamindar need not ordinarily look beyond the register for sale of a tenure of a registered defaulter. **POHSE v PRADIP SINGH DOOGRA**

[7 W. R., 409]

48. — *Liability of tenant for rent after sale—Non-registration of transfer*—Where a patrial tenure is sold under a decree against the tenant, he is not liable for any rent which may accrue afterwards, notwithstanding the transfer may not be registered. **GOPKISHTO GOSWAMI v RAM COTEL MISTRY**

Marsh., 213

**S. C. RAM COMUL MISTRY v GOPKISHTO GOSWAMI**

1 May, 563

*See also* **HOBOMOHONY MOOKERJEE v RAM COOMAR MITTAR**

1 W. R., 225

49. — *Right of inamholders in respect of debts for arrears of rent*—The paramount rights of Government in respect of debts due to the Crown are not transferred to inamholders (such as inamholders) of Government revenue. If an inamholder fails to recover his rents by any of the special processes provided in the regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of land in execution of a decree for any other debt. **BALAJI NARAYAN KOLATKAR v RANCHANDRA GANESH KILKAR**

11 Bom., 37

## 6. INCUMBRANCES.

50. — *Subordinate tenures, Effect of sale on—Bengal Act VIII of 1919—Sale of patrial taluk*—On the sale of a taluk under the provisions of Regulation VIII of 1819 all subordinate tenures, such as *outset talukhs*, *bowlas*, *nim-bowlas*, did not necessarily lapse if depended very much upon the terms of the pottah or grant under



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## 6. INCUMBRANCES—continued.

which the original talukh was created. DWARAKA-NATH DOSS BISWAS v. MANICK CHUNDER DOSS

[9 W. R., 200

51. ——— Tenures created by defaulter—*Beng. Reg. VIII of 1819—Sale of patni tenure.*—A sale under Regulation VIII of 1819 did not *ipso facto* annul all tenures created by the defaulting patnidar, but the purchaser, if he thought proper, could avoid them. MADHUSUDUN KUNDU v. RAMDHAN GANGULI

[3 B. L. R., A. C., 431: 12 W. R., 383

52. ——— Tenures created by patnidar—*Patni tenure—Act X of 1859, s. 105—Beng. Reg. VIII of 1819.*—The provisions of Regulation VIII of 1819 with respect to the sale of under-tenures for arrears of rent being applicable to sales under decrees for rent made under s. 105, Act X of 1859,—*Held* that, where a sale had been effected of a “patni talukh” under that section, it must be presumed, in the absence of evidence to the contrary, that the tenure was one transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale; in other words, it must be presumed to be a tenure such as is described in the preamble to Regulation VIII of 1819, and the effect of the sale was to annul all incumbrances created by the patnidar. BRINDABUN CHUNDER SIRCAR CHOWDHRY v. BRINDABUN CHUNDER DEY CHOWDHRY

[13 B. L. R., 408: 21 W. R., 324

L. R., 1 I. A., 178

S. C. in High Court, BRINDABUN CHUNDER CHOWDHRY v. BRINDABUN CHUNDER SIRCAR CHOWDHRY

[8 W. R., 507

53. ——— Decree as to liability to enhancement—*Beng. Reg. VIII of 1819—Right of purchaser—Suit for enhancement of rent—Patni tenure.*—The purchaser of a patni talukh at a sale for arrears of rent under Regulation VIII of 1819 sued for a kabuliya at an enhanced rent. The former patnidar had brought a similar suit, and the Court had declared that the rent was not liable to enhancement. *Held* that the purchaser was bound by that decree. TARAPRASAD MITTREA v. RAM NRIHING MITTREA . 6 B. L. R., Ap., 5: 14 W. R., 283

54. ——— Purchase by grantor of patni tenure—*Beng. Reg. VIII of 1819, s. 11, cls. 1 and 3—Rate of rent—Patni tenure.*—The grantor of a patni tenure who subsequently purchases the lands granted by him in patni at the sale of the patni tenure does not revert *ipso facto* to the possession he formerly held as proprietor, and is not entitled to recover rent from the tenants at the rate he was receiving when he granted the patni, without reference to the rents realized by the patni-holder in the interim. MAJORAM OJHA v. NIRMONEY SINGH DEO

[13 B. L. R., 198: 21 W. R., 326

55. ——— Right to annul tenures—*Right of lessee claiming under purchaser—Tenures*

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## 6. INCUMBRANCES—continued.

not annulled by purchaser.—Where an auction-purchaser did not avail himself of the power vested in him by law to avoid and annul a tenure created by his predecessor,—*Held* that it was not open to any person subsequently holding his estates, and still less to a mere lessee claiming under him, to avoid the tenure. TARA CHAND DUTT v. WAKENOOISSA BIBEE . . . . . 7 W. R., 91

56. ——— Power to make incumbrances—*Patni lease, Construction of—Beng. Reg. VIII of 1819.*—A patni lease containing words to the effect that the patnidar could give no dar-patni or mokurari lease at a jumma less than the jumma of the patni was held to confer no such power as that described in cl. 1, s. 11, Regulation VIII of 1819, *viz.*, that of making incumbrances. A portion of a patni tenure cannot be sold under the provisions of Regulation VIII of 1819; and if an auction-purchaser acquires any of the rights of the patnidar, he is bound by the acts of the latter as regards the grant of leases. MOHADEB MUNDUL v. COWELL . 15 W. R., 445

Upheld on review. COWELL v. MOHADEB MUNDUL [17 W. R., 182

See MONOMOTHONATH DEY v. GLASCOTT [20 W. R., 275

SHAM CHAND MITTER v. JUGGUT CHUNDER SIRCAR [22 W. R., 50

Upheld on review . . . . . 22 W. R., 541

57. ——— Right of ejectment—*Right of purchaser of patni tenure—Waiver by acceptance of rent.*—The receipt of rent for fifteen years by the purchaser of a patni talukh sold for arrears of rent under Regulation VIII of 1819 was held to be a waiver on his part of his right to evict the tenant under cl. 2, s. 11 of that Regulation. WOOMANATH ROY CHOWDHRY v. ROGHONATH MITTER [5 W. R., Act X, 63

58. ——— Bengal Rent Act, 1869, s. 66 (Beng. Act VIII of 1865, s. 16)—*Khodkasht rayyats.*—The object of s. 16, Bengal Act VIII of 1865, was to protect, not merely any one class of tenants, but the leaseholder of the particular land leased: the expression “khodkasht rayyats” as used there meaning “resident and hereditary cultivators.” KOONTEE DEBEE v. HIRDOY NATH DURREEPA [16 W. R., 206

59. ——— Purchaser of rights of holder of fractional share.—S. 16 of Bengal Act VIII of 1865 did not apply to the purchaser of the rights and interests of the holder of a fractional share in an under-tenure. HARASUNDARI DAS v. KISTOMANI CHOWDHRAIN [5 B. L. R., Ap., 37: 13 W. R., 257

60. ——— Right of purchaser to eject tenants.—Where the rights and interests of a judgment-debtor were sold in execution under Bengal Act VIII of 1865, the tenure itself did

# SALE FOR ARREARS OF RENT

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## 6 INCUMBRANCES—continued

not pass, much less if it pass free from all incumbrances; and the purchaser was not entitled to eject tenants who had been occupying and cultivating the land for more than twelve years. **RAS KISHOR MOOKHERJEE v. DUKUTH GOOTRODITR** [15 W R., 234]

61 — *Under tenure*  
Sale of—Act X of 1859 s. 10—Under tenure sold for arrears of rent under s. 10 of Act X of 1859 other than tenures upon which the right of selling for arrears of rent had been especially reserved by a partition in the engagements entered into on the creation of the tenures, did not pass free from incumbrances. *Semble*—It was held that s. 16 of Bengal Act VIII of 1860 was enacted. **SHAHABOODEEN v. FATEH ALI B L R., Sup Vol. 648**  
[2 Ind. Jur., N S., 135 7 W R., 280]

**MOHINA CHUNDER DEY v. GOOROO DOSS SEY**  
[7 W R. 285]

**INDUR CHUNDER DOOGHER v. FETTES KOOKABER BIRSE** 7 W R., 378

The above Full Bench decision did not apply where the tenure itself was not sold. **DOOGRA BOODHDEEN DREIA v. DINORCHUDRO KYRTO DOSS**

[8 W R., 475]

62. — *Sale of sub*  
tenure—Beng. Reg. VIII of 1831—Where a sub-tenure had been granted but no power was reserved to the grantor in the sanad to sell the tenure free from incumbrances in case of default in payment of rent.—*Held* that in a sale for arrears of rent under Regulation VIII of 1831 the purchaser did not take free from incumbrances created by the grantor. The decision in **SHAHABOODEEN v. FATEH ALI B L R. Sup Vol., 648** affirmed. **FORBES v. LUTCHMEYER SCION**

[10 B L R. 138 17 W R., 197]

14 MOORS v. I A., 330

**MOHSEN CHUNDER BANERJEE v. CHUNDER MOHSEN DEVI** 10 B L R., 150 note 15 W R., 237

63 — *Beng. Act VIII of 1865*—An auction-purchaser under Act VIII of 1865 was not entitled without notice of his intention to cancel a pre-existing under-tenure or other act on his part to add any incumbrance. **GOSTON CRUYDER BOE v. ANMOODER** 11 W R., 180

64 — *Survival of incumbrances*—The sale of a tenure under s. 16, Bengal Act VIII of 1860, did not ipso facto annul all incumbrances but certain incumbrances were recognized by this section to survive such sale. **UMA SUNDARI DAS v. BIRUL MANDAL**

[3 B L R., A. C., 183]

**S. C. WONGA SOODHDEEN DOSS v. BIRUL MENDUL** 11 W R., 505

65 — *Post-sale incumbrances*—Under Bengal Act VIII of 1865 s. 16 under-tenures became void ipso facto by the sale and

# SALE FOR ARREARS OF RENT

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## 6 INCUMBRANCES—continued

were not merely voidable at the option of the purchaser. **LAKSHO LAKSHY DASS BISWAS v. MOHUNA NATH DASS BISWAS**  
[I L R., 4 Calc., 860 4 C L R., 8]

66 — *Right to set aside incumbrances*—The right which an auction purchaser has under the Rent Law s. 66 to do away with under tenures cannot be executed without a suit first being brought, the mere fact of purchase being insufficient to set aside incumbrances. **PAJ BULLUSH MITTER v. SHEERAM BIRSE**  
[25 W R., 109]

67 — *Patni tenure*  
Dar-patni tenure—Under-tenure—Incumbrance—Beng. Act VIII of 1865 s. 60—The sale of a patni tenure for its own arrears under s. 59 and 60 Bengal Act VIII of 1860 does not per se avoid the dar-patni tenures but only renders them liable at the option of the purchaser. An under-tenure is an incumbrance within the meaning of s. 66, Bengal Act VIII of 1865. **TITU BISI v. MOHSEN CHUNDER BAGCHI** I L R., 9 Calc., 683

**S. C. TITU BISI v. IBRAHIM MOLLAH**  
[13 C L R., 304]

68. — *Druck in house*  
—A brick built house was not an "incumbrance" or a tenure within the meaning of that word in s. 16 of Bengal Act VIII of 1865 which a purchaser at a sale for arrears of rent could remove. **SHIBDAS BANDOPADHYA v. BANMUNDAS MUKHOPADHYA**  
[8 B L R., 237 15 W R., 360]

69 — *Mortgage by defaulting tenant*—Act X of 1859 s. 105—A mortgage created by a defaulting under-tenant on account of a debt contracted by him, could not continue to the prejudice of the auction purchasers of the tenure sold for arrears of rent under s. 105, Act X of 1859. **HALES HAST CROWDER v. POMONER KAPT BATTACHARJEE** 3 W R., 317

70 — *Right of acquisition*—If the holder of an under-tenure allowed his tenant to occupy the land rent-free for more than twelve years the interest thus created in the latter was an incumbrance upon the under-tenure as much within the reason of Bengal Act VIII of 1865 s. 16, as if the holder had made a rent-free grant or given a nominal lease. **MAHOMED ASKER v. MAHOMED WASUCK** 22 W R., 413

71. — *Right of occupancy under Act X of 1859 s. 6—Right of purchase—Incumbrance*—A purchaser of a tenure sold under Act VIII of 1865 for arrears of rent could not under s. 16, eject a tenant who had acquired a right of occupancy under s. 6, Act X of 1859 under the former tenant. **NIKUMADH KARMOKAR v. BHISU PAL**  
[5 B L R., Ap. 18 13 W R., 410]

**PURENDRA SINGH v. PURAN NARAYAN SINGH**  
[6 B L R., Ap. 20 11 W R., 253]

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## 6. INCUMBRANCES—continued.

BHOJANATH GHOSAL v. KEDARNATH BANERJEE  
[19 W. R., 108]EMAM ALI MESTORY v. ATOR ALI KHAN  
[22 W. R., 133]

72. ————— *Intermediate holding—Howla tenure.*—An auction-purchaser at a sale held under Bengal Act VIII of 1865 had a right to get rid of an intermediate holding such as a howla so far as to substitute himself for the howladar in respect of the collection of the raiyats' rents. MOHTOODDEEN MAHOMED v. RAM KISHORE KOONDOL  
22 W. R., 311

73. ————— *Rights of a purchaser at an auction-sale held under Beng. Act VIII of 1865 when in collusion with the former proprietor.*—A proprietor of a talukh, which was about to be sold for arrears of rent, entered into an arrangement with the plaintiff whereby, in consideration of a share in the purchase, he agreed to use his influence to urge on the sale, and to secure the purchase to the plaintiff. Under this arrangement, the plaintiff became the purchaser of the talukh, and the former proprietor obtained a share in the purchase. A suit by the plaintiff to oust the under-tenants was dismissed; the plaintiff took only as a purchaser at an ordinary execution-sale, and did not obtain the benefit of s. 16 of Bengal Act VIII of 1865. SRINATH GHOSE v. HARONATH DUTT CHOWDHRY  
[9 B. L. R., 220 : 18 W. R., 240]

74. ————— *Shikmi tenure.*—Where a shikmi tenure was sold under Bengal Act VIII of 1865 and the shikmidar was found to be the under-tenant of the zamindar, the shikmi pottah not giving the privilege of making incumbrances, the purchaser was held entitled under s. 16 to receive the tenure free of all incumbrances.—e.g., the incumbrances of a jummai tenure of a person who was not a khodkhasht raiyat. HUREE NARAIN CHATTERJEE v. WOONA CHURN MOOKERJEE  
19 W. R., 169

75. ————— *Shikmi tenure.*—At a sale held under Bengal Act VIII of 1865 the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that the property in dispute was a lakhiraj tenure created by the Rajah of Tipperah, and that the plaintiff was owner thereof, partly by purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar, and not the Rajah, had granted the lands in dispute as brahmatar, but not in favour of the person through whom the plaintiff claimed. It, however, passed a decree in favour of the plaintiff, as he had been unlawfully dispossessed. Held that, under s. 16, Bengal Act VIII of 1865, the incumbrances created by the former holder were voidable by the auction-purchaser, and that the plaintiff should show that the former holder could create such right. ISWAR CHANDRA CHUCKERBUTTY v. BISTU CHANDRA CHUCKERBUTTY  
[3 B. L. R., Ap., 97 : 12 W. R., 32]

## SALE FOR ARREARS OF RENT

—continued.

## 6. INCUMBRANCES—continued.

See SRINATH CHUCKERBUTTY v. SRIMANTO LASHKAR

[8 B. L. R., 240 note : 10 W. R., 487]

76. ————— *Incumbrance created with sanction of zamindar.*—In a suit by a purchaser at a sale under Bengal Act VIII of 1865 to get rid of an under-tenure set up by the defendants where, in reliance upon the latter clause of s. 16, it was urged that the pottah under which the defendants held was created by the late holder with the express sanction of the zamindar,—Held that under the strict provisions of that section no sanction of the zamindar would avail, unless the right was vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, or his representatives. ESHAN CHUNDER MOJUMDAR v. HURISH CHUNDER GHOSE  
[21 W. R., 137]

77. ————— *Avoidance of incumbrance—Beng. Act VIII of 1869, ss. 59, 60.*—On a partition of the joint family property, a certain gauti tenure, which had been purchased by the three members of the family at a sale, on the 3rd August 1874, under the provisions of ss. 59 and 60 of Bengal Act VIII of 1869, was allotted to the plaintiff, who brought a suit claiming to be entitled, under the statutory provisions of s. 66 of that Act, to evict the defendant, who was alleged to be in possession by virtue of an under-tenure of the land covered by the gauti tenure. It appeared that the tenure under which the defendant held the land was created, not by the owner of the gauti tenure, but by the superior landlord before the creation of the gauti tenure. Held that, inasmuch as the tenure had not been created by the owner of the gauti tenure, the plaintiff was not entitled to avoid it as an incumbrance under s. 66 of Bengal Act VIII of 1869. DURGA PRASAD GHOSH v. KALIDAS DUTT  
9 C. L. R., 449

78. ————— *Beng. Reg. VIII of 1819, s. 11—Cancellation of under-tenures.* Lands appertaining to a certain talukh which was sold under Regulation VIII of 1819 for arrears were held from the owner of the talukh under a kaimi jumma tenure, under which the plaintiff, who sued the purchaser for confirmation of his title, cultivated the land through persons called burgaits, with whom he shared the profits in some way. Held that under s. 11 of the Regulation the plaintiff's title was cancelled. Compare Unnoda Churn Das v. Muthura Nath Dass, 1. L. R., 4 Calc., 560. 4 C. L. R., 6. Sarnamoyee v. Sultees Chunder Roy Bahadur, 10 Moore's I. A., 123, cited and discussed. MOHINI CHUNDER MOJUMDAR v. JOYMOY GHOSE  
[4 C. L. R., 422]

79. ————— *Beng. Reg. VIII of 1819, s. 11—"Defaulting proprietor"—"Defaulter"—Incumbrances created by previous patnidar—Mokurari lease, Avoidance of—Voidable incumbrances.*—In 1839 a mokurari lease was granted to the predecessors of the defendants by the then

# SALE FOR ARREARS OF RENT

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## 6. INCUMBRANCES—continued

patidar of a patti created in 1819. In 1848 the patti was sold for arrears of rent under the provisions of Bengal Regulation VIII of 1819, but the purchaser at that sale did not interfere with the mokurari. In 1865 the patti was again brought to sale under the same Regulation for arrears of rent the default being made by one of the successors of the purchaser in 1848 and at this sale it was purchased by the plaintiff. In 1890 the plaintiffs sued to set aside the mokurari lease contending that they were, by virtue of their purchase entitled to avoid all incumbrances created by any patidar and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of s. 11 of the Regulation restricted the plaintiffs to avoiding incumbrances the acts of the immediate defaulter and that as the purchaser in 1848 and his successors in title previous to the defaulter in 1845 had not interfered with the mokurari lease the plaintiffs could not have it set aside. *Held* (RAMPHI J. dissenting) that the plaintiffs were entitled to avoid the mokurari. *Held* per GHOSH and BEVERLEY JJ. that having regard to the policy and principle of the Regulation a zamindar is entitled to bring a patti to sale in the same condition in which it was at the time of its creation and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation whether by the actual defaulter or by any of his predecessors. *Per* GHOSH J.—The mokurari lease was an incumbrance upon the patti but inasmuch as s. 11 distinguishes in cl. 1 and 2 between "incumbrances" and "leases" it must be regarded as the latter. If treated as an incumbrance, it must be held to have accrued upon the patti by reason of the defaulting zamindar not having set it aside though entitled to do so within the meaning of those words in cl. 1. If treated as a lease, the words in cl. 2, "holder of the former tenure" are wide enough to include any patidar whether the defaulting or a previous holder. *Per* BEVERLEY J.—The words "defaulting proprietor" used in cl. 1 of s. 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor whose default the tenure is brought to sale, and the word "defaulter" used in cl. 2 of that section must be given a similarly wide interpretation. *JOSEPH ROY CHUNDER MITTAL v. MOHAMMAD HOSSEIN*. I. L. R., 21 Cal., 703

80 ——— cl. (3)—Occupancy or non-occupancy holding, whether an incumbrance—An occupancy or non-occupancy holding if not held by a khodkashid rayat, i.e., a resident and hereditary cultivator, is an incumbrance and not protected from ejectment by the terms of cl. 3, s. 11 of Regulation VIII of 1819 and may be annulled by a purchaser at a sale under the said Regulation. *JOSEPH MARUMDAR v. ANAND MARUMDAR SIKHAR*. [3 C. W. N., 13

81 ——— Bengal Tenancy Act (VIII of 1885), s. 161—Exchange of land—Suit for recovery of possession of land.—*Ex*

# SALE FOR ARREARS OF RENT

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## 6 INCUMBRANCES—continued

an incumbrance within the meaning of s. 161 of the Bengal Tenancy Act. *CHUNDRA SARKI v. KALLI IROSAWY CHAKRABORTY*

[I. L. R., 23 Cal., 254

82 ——— and s. 171—Payment by person interested to prevent sale—Mortgage—Incumbrance—A mortgage created by the operation of s. 171 of the Bengal Tenancy Act (VIII of 1885) is not an incumbrance within the meaning of s. 161 of that Act, and is not liable to be annulled as such at the instance of a purchaser of a holding at a sale in execution of a decree for arrears of rent. *PARUPATI MONAPATRA v. NARAYANI DAS*. I. L. R., 24 Cal., 537

[C. W. N., 619

83 ——— and s. 167—Notice—Mortgage—A sale purporting to be under s. 161 and the following sections of the Bengal Tenancy Act (VIII of 1885) does not *per se* facts cancel incumbrances. Notice must be given under s. 167 according to the procedure laid down in that section. *BENI PRASAD BISWA v. DEWAT LALL*

[I. L. R., 24 Cal., 740

84 ——— s. 167—Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser—Service of notice under s. 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. The incumbrance would be annulled even if the property be not at the time of the service of the notice under s. 167 in the possession of the purchaser but of somebody else. *PRABU LAL ROY v. MOHESWARI DEBI*

[I. L. R., 25 Cal., 551

85 ——— and ss. 65, 148, 161, and 170—Estoppel—Mortgagor and mortgagee—Order in execution proceedings against mortgagee—Res judicata—Decrees obtained before Bengal Tenancy Act came into force—Execution under former Rent Law—Incumbrances—Mode of annulling incumbrance—Sale for arrears of rent—Charge of rent as first charge on tenure—Sale in execution of mortgage-decree—Decree for sale.—By a mortgage-bond dated the 22nd August 1884, and registered, K. created a charge in favour of the plaintiff on six talukhs for repayment of the mortgage-debt, in respect of two of which talukhs suits had been brought by the zamindar for arrears of rent and decrees obtained on the 6th June 1885, before the coming into operation of the Bengal Tenancy Act (VIII of 1885). After that Act had come into force, these decrees were assigned to G, a benamidar for P, for execution, and on his seeking to execute them, he was opposed by K on the ground that, as the transfer of the decree by assignment, and the subsequent application for execution, were made after the Bengal Tenancy Act had come into force, and as G the

## SALE FOR ARREARS OF RENT

—continued.

## 6. INCUMBRANCES—continued.

assignee had acquired no interest in the talukhs, his application for execution could not be granted under s. 148, cl. (4), of that Act. On the 8th July 1886 the Court overruled this objection, and ordered execution to issue, holding that, as the decrees in the rent-suits were passed before the Tenancy Act came into operation, the execution should proceed under the old law. In execution of the decrees, the two talukhs were put up for sale, and purchased by G as benamidar for P. In a suit brought by the plaintiff, the mortgagee, against K and P (and others representing others of the six talukhs), it was contended, so far as the two talukhs were concerned, that the plaintiff, though not a party to the execution proceedings, was bound by the order of the 9th July 1886, made in the course of those proceedings; that P, having purchased the two talukhs at sales for arrears of rent, had acquired them free from all incumbrances; that the plaintiff's mortgage was not a notified incumbrance within the meaning of s. 161 of the Tenancy Act; and that he was therefore not entitled to have his mortgage-lien declared against the two talukhs. *Held* (affirming the judgment of the lower Appellate Court) that the plaintiff was not bound by the order of the 9th July 1886, K, the mortgagor, not representing his interest sufficiently to make that order binding on the plaintiff as mortgagee. *Dooma Sahoo v. Jocnarrain Lall*, 12 W. R., 362; 4 B. L. R., A. C., 17 note; *Tribhobun Singh v. Jhono Lall*, 18 W. R., 206; *Bonomali Nag v. Kaylash Chunder Dey*, I. L. R., 4 Calc., 692; *Madho Pershad Singh v. Purshan Ram*, I. L. R., 4 Calc., 520; and *Sitaram v. Amir Begam*, I. L. R., 8 All., 324, referred to. The proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it; and this distinguishes the case of a mortgagor as representing an estate from that of a Hindu widow, or shebait, who are held to represent the estate so as to bind the reversioner or the succeeding shebait. The interest of a mortgagee in an estate may be greater than that left in the mortgagor, or, as in the present case where it was no part of the mortgagor's interest to protect the incumbrance, the interests of the mortgagor and mortgagee are not identical; the balance of justice and expediency therefore is in favour of not allowing a mortgagee to be bound by an order made against his mortgagor. Nor is there anything in the provisions of the rent-law against that view. A decree for rent of a tenure obtained against the registered tenant binds an unregistered transferee of the tenure, who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure [*Sham Chand Kundu v. Brojonath Pal Chowdhry*, 12 B. L. R., 484; 21 W. R., 94]; but whether any such sale was in sufficient conformity with the rent-law to be operative in annulling a prior mortgage, or other incumbrance, must be determined in the presence of the party claiming the benefit of the incumbrance. *Tirbhobun Singh v. Jhono Lal*, 18 W. R., 206, and *Madho Pershad Singh v. Purshan Ram*, I. L. R., 4

## SALE FOR ARREARS OF RENT

—continued.

## 6. INCUMBRANCES—continued.

*Calc.*, 520, referred to. *Held* also that, though the rent-decrees were passed under the old rent law, the assignment and the application by the assignee for execution having been made after the Bengal Tenancy Act came into force, cl. (4) of s. 148 of that Act applied to the execution-proceedings [*Ranjit Singh v. Meherban Koer*, I. L. R., 3 Calc., 663], and the sale on such an application, which is prohibited by that clause, must be held to be no sale under the rent law. The clause does not affect any vested right. All that it prohibits is an application for the enforcement of the decree by an assignee, and that is a matter of procedure. If any right is affected, it is not a right of the decree-holder, but the right of the assignee of the decree to apply for execution, and in this case there was no such assignee before the Bengal Tenancy Act came into force. The mode provided by s. 167 of the Bengal Tenancy Act is the only mode in which incumbrances can be annulled by purchasers of tenures for arrears of rent, and that mode not having been followed in this case, the incumbrance on the two talukhs was not annulled. S. 65 of the Tenancy Act, which provides that "the tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon," only intends what is laid down in Ch. XIV of the Act, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances; and if in any case the decree for rent either has not been, or cannot be, enforced by the sale of the tenure, the charge created by s. 65 cannot be enforced in any other way. No reason, therefore, could be shown under that section for making the sale in satisfaction of the plaintiff's mortgage, subject to the rent-decree as a first charge. *SOSHI BHUSUN GUHA v. GOGAN CHUNDER SHAHA*

[I. L. R., 22 Calc., 384]

## 86. ——— and s. 165—

*Notice to annul incumbrance, whether necessary, when the purchaser and incumbrancer are the same person.*—After a mortgage-decree was passed, the mortgaged property was sold in execution of a decree for rent and was purchased by the mortgagee decree-holder. The mortgage-decree provided that the mortgaged property should be sold in the first instance, and if that should prove insufficient, other properties would be sold; the mortgagee, however, applied to sell the other properties without proceeding against the mortgaged property which he had purchased. The lower Appellate Court held that there was not sufficient evidence to show that the mortgaged property which had been sold in execution of the decree for rent had been sold with power to avoid all incumbrances, and even if the sale was so held, the encumbrance had not been cancelled by the necessary notices under s. 167 of the Bengal Tenancy Act in spite of the fact that the incumbrancer and the purchaser were one and the same person. The mortgagee decree-holder preferred a second appeal. *Held* that, even if the sale was under s. 165 of the

## SALE FOR ARREARS OF RENT

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## G. INCUMBRANCES—cont. and.

Bengal Tenancy Act the Incumbrance had not been annulled by proceedings under s. 107, and the appeal ought to be dismissed. *GOUDA CHITRAIA DAS v. RAM SURESH SETH* 4 C.W.N., 268

87 —

—“Purchaser,”  
*Messing of Incumbrances, Annulment of, when purchaser himself is the incumbrancer—Transfer of Property Act (15 of 1882) s. 101—The purchaser contemplated by s. 101 is a purchaser independently of the incumbrancer and where the incumbrancer himself purchases the property encumbered to him in execution of a decree for arrears of rent it is not necessary for him to give notice of annulment of his incumbrance under s. 107 of the Bengal Tenancy Act. Under s. 101 of the Transfer of Property Act which is of general application, his incumbrance is extinguished unless he evinces an intention to keep it alive. Where a mortgagee has purchased the mortgaged property in execution of a rent decree, he is entitled to proceed against the other properties of the mortgagor. *Girdhar Chunder Das v. Ganga Dutt* 4 C.W.N., 269, dissented from. *MASTULLAH MANDAL v. Ganga MANDU SAH* 4 C.W.N., 735*

88.

## Madras Rent Recovery Act.

88.—*Incumbrance*—As the tenant of a mortgaged property has no right of occupancy until default in payment of rent and the determination of the tenancy under the provisions of the Rent Act, any incumbrance created by such tenant on the land cannot affect the landlord's statutory power of sale under the Act or the right of the purchaser at such sale. *KANDI MENISAMI CHETTI v. RAK SHANAKUTTI PILLAI* I.L.R., 5 Mad., 371

89 —

## Purchase by

creditor—*Civil Procedure Code 1852 s. 266 & 3.*  
*Sale of tenant's interest by landlord pending attachment by civil Court*—The interest of a tenant in certain land having been attached by a creditor in execution of a decree for money, the landlord attached the same land for arrears of rent brought to sale, and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant which was sold in execution of his decree. Is a sale by the landlord to have the sale to the creditor declared invalid? Held that the landlord's purchase was subject to the creditor's attachment. *CHENNAIAH v. RAJANATH* [I.L.R., 8 Mad., 573]

90. —

## Sale of tenant's

interest—*Prior incumbrance—Rights of purchaser*—A sale by a landlord of a tenant's interest in his holding for non-payment of rent under the provisions of s. 78 of the Rent Recovery Act (Madras Act VIII of 1865) does not defeat existing incumbrances. *MENON v. Duttakannan*, I.L.R. 5 Mad., 371, overruled. *RAJAGOPALAKRISHNAN v. SUBBARAYA MUDALI* [I.L.R., 7 Mad., 31]

See *ZAMINDAR OF RAMNAD v. RAMAIAH AMMAL*, I.L.R., 2 Mad., 234

## SALE FOR ARREARS OF RENT

—continued—

## G. INCUMBRANCES—continued

91. — *Malagun lease*—*Forfeiture of tenancy*—A devised land to B on a malagun lease. B mortgaged the tenancy to A. The rent under the malagun lease fell into arrears, and A obtained a decree against B for the amount. Held that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant. *Rajagopal v. Subbaraya*, I.L.R., 7 Mad., 31, followed. *PADAKAVAYAL v. NARAYANA* [I.L.R., 10 Mad., 268]

[I.L.R., 10 Mad., 268]

## 7. RIGHTS AND LIABILITIES OF PURCHASERS

92. — *Right of purchaser—Right to take possession*—A raiyat's tenant having been sold for arrears of rent under Act X of 1859, the purchaser was held to be entitled to be put in possession of the entire tenancy as it originally stood, notwithstanding that the sons of the raiyat had been receiving rents on the land for more than twenty years. The circumstances that the purchaser happened to be the superior landlord did not diminish his right. *THELLOTTA DESAI v. BROSO LALL SHAMSET* 8 W.R., 476

93. — *Right to sell*—The right to hold nijole lands necessary to pass with the sale to the purchaser. *Joy Dutt Jha v. BATES RAM SINGH* 7 W.R., 40

94. — *Right to rent due at time of sale*—A purchaser of a patta in his execution buys it with all its liabilities, including instalments due to the zamindar and can recover them from the original purchaser. *Kan na DESAI v. D. CHENNAIAH* 10 W.R., 1864, 207

95. — *Right to rent—Liability of purchaser of rent—Rent, Reg. VIII of 1819, s. 8 & 13*—Where a purchaser's possession is disturbed by the zamindar and he is prevented from collecting the rents of certain kura, he is not liable for the same. Where a taluk is sold for arrears, the purchaser who is sold out is not liable for the rent of the kura in which the zamindar presented the petition enjoined by cl. 2, s. 8, Regulation VIII of 1819. *DARIMPA DESAI v. NILAYAR NAYAN DRO* [15 W.R., 180]

96. — *Right to rent—Liability of surety of zamindar*—The purchaser of the rights and interests of a zamindar in a puti taluk sold for arrears of rent, and the purchaser is not liable for whatever claims the zamindar has against it for rent, and has no claim against the surety of the zamindar by reason of the name of the latter appearing as the owner of the taluk in the zamindar's papers or otherwise. He may sue the other shawers for the money which he has paid on their account. *CHITRAIA CHANDRA BHENOPADHYA v. NILAYAR NAYAN DRO* [W.R., 1834, 73]

**SALE FOR ARREARS OF RENT**  
—continued.

**7. RIGHTS AND LIABILITIES OF PURCHASERS—continued.**

**97.** — *Sale under Beng. Act VIII of 1865—What passes at sale.*—As a general rule, when a tenure was sold in execution of a decree under the provisions of Bengal Act VIII of 1865, the whole tenure passed, unless there was some reservation made at the time of the sale. **HURO GOBIND BISWAS v. DEMONTEE DABER** [13 W. R., 304]

**98.** — *Purchaser of shareholder's rights—Sale under Beng. Act VIII of 1865.*—The purchaser of a partnership in a tenure—in other words, of a shareholder's rights—acquired no right to retain possession against a person who bought the tenure itself when sold for arrears under Bengal Act VIII of 1865. **HURO NAHAIN GIRFE v. DURGA CHURN GIRFE** 15 W. R., 319

**99.** — *Purchase by shareholders—Ousut howlas, Effect of sale on Recorded tenants.*—A shareholder is not precluded from purchasing the whole of a howla sold *bona fide* for arrears of rent due from himself and his co-sharer. All ousut howlas created by the co-sharers fall with the sale of a howla unless specially protected by the howla lease. A zamindar may bring a suit for arrears only against the tenant whose name is recorded in his *serishtas*, and in execution of a decree obtained in such a suit the whole tenure may be sold, though others, not recognized by the zamindar as his tenants, may be interested in the lease. **HUREE CHURN ROSE v. MEHARONISSA BIDEER** [7 W. R., 318]

**100.** — *Liability of co-sharers on sale of tenure.*—Where a decree was for arrears of rent due upon a tenure, it was held that, though the sale-proceedings specified that the rights and interests of certain parties were sold, yet the tenure itself was sold, and all the co-sharers were jointly liable. **ALIMOODDEEN v. SABIR KHAN** [8 W. R., 60]

*Contra*, **LALLA SABIR CHAND v. GOODER KHAN** [22 W. R., 187]

**101.** — *Right of purchaser of transferable under-tenure to void leases—Right to enhance rent.*—The purchaser of a transferable under-tenure in execution of a decree for rent may void any lease or holding within the tenure not specially protected by law, and consequently may sue for a *kabuliat* at rates paid for similar lands in the neighbourhood. **SRISHTEDHUR MUSEER v. GOMIN SUTUCKAR** 6 W. R., Act X, 15

**102.** — *Act X of 1859, s. 105—Beng. Reg. VIII of 1819, s. 11—Title created by purchaser.*—Where a tenant committed default, and purchased the tenure when it was sold in execution of a decree against himself, he could not claim the benefit of the law relating to auction-purchasers under s. 105 of Act X of 1859 and s. 11, Regulation VIII of 1819 and asked the Court to set aside the title of a third party which had been

**SALE FOR ARREARS OF RENT**  
—continued.

**7. RIGHTS AND LIABILITIES OF PURCHASERS—continued.**

created by himself. Where he himself has sold to a third party, he is bound to recognize that party's purchase, and also all *bona fide* leases under that party. Where the lease by which a howla tenure is created does not expressly reserve it for sale for non-payment of rent, the rights of an auction-purchaser cannot arise under Regulation VIII of 1819. **MEHARONISSA BIDEER v. HUR CHURN ROSE** [10 W. R., 220]

**103.** — *Principle with regard to purchasers at revenue sales.*—The principle laid down in the case of **Surnamoyee v. Suttles**, **Chunder Roy**, 2 W. R., P. C., 14: 10 Moore's L. A., 123, with respect to the rights of purchasers at sales for arrears of revenue is applicable to sales for arrears of rent under Regulation VIII of 1819. **WOMANATH ROY CHOWDHURY v. ROGHONATH MITTER** 5 W. R., Act X, 63

**104.** — *Rent accrued due against Hindu female heir after death of last full owner—Effect of sale in execution under Beng. Act VIII of 1869.*—Personal execution against female heir.—A claim for arrears of rent against a female heir accrued due after the death of the last full owner is a personal claim against her; therefore by a sale held under the provisions of Bengal Act VIII of 1869 in execution of a decree for arrears of such rent obtained against her by some of the co-sharer landlords, only the limited estate of the female heir passed, unless the said landlords proceeded to bring the tenure itself to sale. **Baijun Debey v. Brij Bhokun Lall**, 1 L. R., 1 Calc., 133: L. R., 2 I. A., 275, and **Mohima Chunder Roy Chowdhury v. Rani Kishore Acharjee Chowdhury**, 15 B. L. R., 142: 23 W. R., 174, followed. **BRAJA LAL SEN v. JIRAN KRISHNA ROY** 1 L. R., 28 Calc., 280

**105.** — *Liability of purchaser—Date from which purchaser's liability for rent commences.*—The purchaser of a tenure at a sale for arrears of rent was held to be liable for rent from the date on which the sale was confirmed, for until confirmation he could not obtain the certificate of purchase. **BEEPIN BEHARER BISWAS v. JUDONATH HAYDAH** 21 W. R., 387

**106.** — *Liability to condition in lease—Right of re-entry.*—A *dur-patni* lease granted upon the payment of a bonus contained a condition that, if the annual rent remained for a longer period than one month in arrear, the lessor should have a right of re-entry. The lessor, upon default in payment of rent, without availing himself of the forfeiture, instituted a summary suit for the arrears of rent, and upon an award therein the lands were sold for each arrear. Held that the purchaser, who bought the *dur-patni* tenure without notice of the condition for forfeiture, was not subject to that condition. **DEENDYAL PARAMANICK v. JAGANNATH ROY** Marsh., 252: 2 Hay, 21

## SALE FOR ARREARS OF RENT

-continued-

7 RIGHTS AND LIABILITIES OF PUR-  
CHASERS—continued

107 — *Liability to decree an ejectment suit—Previous purchase by mortgagee of portion of tenures—Right of purchaser to question as to the validity of decrees for ejectment of not a party to the rent suit.*—In a suit for arrears of rent by a mukurandar against his dar-mukurariar, a decree was passed ejecting the latter and as a consequence, the tenure of the dar mukurandar was cancelled. Held that a mortgagee from the dar-mukurariar, who had, previously to the rent suit, obtained a decree on his mortgage and purchased himself at the auction-sale and who had not been made a party to the rent suit was entitled to question by suit the validity of the decree obtained in the rent suit ordering ejectment of the dar mukurandar. MADHOO PROSHAD SINGH v. PRASHAN LAL. [I. L. R., 4 Calc., 520]

108 — *Priority of auction-purchaser—Sale set aside by an ex-parte decree and afterwards confirmed—Notice.*—The plaintiff and the defendant purchased the same tenure at successive sales, held in execution of two decrees under the provisions of a 5<sup>th</sup> of Act VIII of 1859, for arrears of rent due in respect of different periods. Defendant's sale was first in point of time, but was set aside on the judgment-debtor obtaining an ex-parte decree against the defendant. The suit was, however, restored and ultimately dismissed, and the defendant's purchase remained undisturbed. In the meantime, however, after the ex parte decree but before the dismissal of that suit the tenure had been again sold for further arrears of rent, which had accrued before the defendant's purchase and was bought by the plaintiff. Held that the defendant's title must prevail, being prior in point of time and that the defendant was under no obligation to discharge the arrears of rent for which the second decree was obtained, or to give notice of his purchase to the plaintiff. RAM CHANDER SADDU KHAN v. SAMIR GAZI. I. L. R., 20 Calc., 25

109 — *Patni tenure Sale of—Registration in zamindar's ariyat—Rights of zamindar—Beng. Reg. VIII of 1819, ss 5, 7—Bengal Tenancy Act (VIII of 1855), s 13.*—A patni taluk was sold in execution of a decree, but the auction purchaser, although he obtained possession did not get himself registered in the zamindar's ariyat. In a suit by the zamindar against the former holder of the patni for rent due for a period previous to the sale, Held that the suit lay against him, and that the rights of the zamindar were not affected by the existence of the remedy provided by s 7 of Bengal Regulation VIII of 1819. LAKH-NARAIN MITTAL v. KESTLER PAT SINGH ROY, 13 B. L. R. 166, referred to. SREEDHARAN PAL CHOWDHURY v. TISCOCK DART. I. L. R., 20 Calc., 247

110 — *Liability of auction purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1855), ss. 65*

## SALE FOR ARREARS OF RENT

-continued-

7. RIGHTS AND LIABILITIES OF PUR-  
CHASERS—continued.

and 162, cl (c)—Rent, Suit for.—The plaintiff sued the first five defendants for arrears of rent due in respect of a certain tenure and obtained a decree on the 10th of April 1893. In execution of that decree, the tenure was sold on the 8th April 1901, the defendants 6, 7, and 8 being the auction-purchasers. On the 15th of April 1901 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 10th April 1893 and the 8th April 1901. Held that the auction-purchasers (defendants 6, 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase. HAZEL HANMAN v. RAMCHEN BAPPAI. [I. L. R., 21 Calc., 160]

111. — *Sale on basis of decree on compromise—Auction-purchaser, Title of—Liability of purchaser for rent accruing due after his purchase, but before confirmation of sale—Effect of compromise as against purchaser—Rent Accrual of—Bengal Tenancy Act, s 53.*—A tenant when sued for arrears of rent of a jote, compromised the case by executing a solihnama agreeing to pay rent at 13 annas per bigha on 4500 bighas. Subsequently the jote was sold, in execution of a decree passed on the basis of the solihnama, and was purchased by the defendant on the 23rd March 1889 the sale being confirmed on the 7th August 1890. In a suit instituted by the landlord against the auction purchaser for arrears of rent for the whole year 1296 (11th April 1889 to 11th April 1890), Held that the purchaser was liable for the whole instalment of rent accrued due after the date of his purchase, but before the confirmation of the sale, notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or in the absence of any contract according to the general law laid down in s 53 of the Bengal Tenancy Act. Held also that he was liable for rent under the terms of the solihnama irrespective of any question as to whether the quantity of land there mentioned was correct or not. SATYDEB LATH THAKUR v. NILEKANTA SINGH. I. L. R., 21 Calc., 383

112. — *Bengal Tenancy Act (VIII of 1855), ss 11, 12, and 13—Sale of a tenure in execution of a decree not for arrears of rent—Effect of non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.*—Under s 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by s 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid. RAMAN LAL v. KRISHNANANDINI DASGUPTA. [I. L. R., 23 Calc., 603]

113 — *Right of purchaser—Sale of tenant's interest by creditor—Subsequent sale by*



## SALE FOR ARREARS OF RENT

—continued.

### 7. RIGHTS AND LIABILITIES OF PURCHASERS—continued.

*landlord for arrears of rent—Right of purchaser.*—The right, title, and interest of a tenant in certain land having been attached, sold, and purchased in execution of a decree upon a mortgage by his creditor in 1874, the landlord, in pursuance of a notice under s. 39 of the Rent Recovery Act (Madras Act VIII of 1865), issued prior to the Civil Court's sale, sold the land at auction for arrears of rent due by the tenant. *Held* that, the tenant's rights having passed to the purchaser at the Civil Court's sale, there was no interest of the tenant available for sale by the landlord under the provisions of s. 39 of the Rent Recovery Act. *VIRAPPA NAYAK v. KATHANA TALAVACHU*. I. L. R., 6 Mad., 428

114. *Sale of occupancy holding at the instance of landlord in execution of money-decree—Subsequent sale of the same for arrears of rent—Bengal Tenancy Act (VIII of 1885), s. 22—Damages—Refund of purchase-money.*—Defendant No. 10, the landlord, in execution of a decree for money, put to sale the occupancy holding of an occupancy raiyat, the defendant No. 1, and, having purchased it himself, made a settlement of the same with defendants Nos. 2, 3, and 4; the landlord subsequently brought a suit against defendant No. 1 for recovery of rent due from him for the past years and brought to sale the same holding, which was thereupon purchased by the plaintiff. In a suit by the latter for recovery of any title, inasmuch as the landlord by his own act had brought the raiyati right of the defendant No. 1 to a termination, and there was no subsisting right in that defendant such as the plaintiff could acquire by sale. *Held* further that the plaintiff was entitled to get a refund of the purchase-money from the landlord, and that a separate suit for that purpose was not necessary. *RAM SARAN PONDAR v. MAHOMED LATIF*. 3 C. W. N., 62

115. *Mortgage of dar-talukh—Its subsequent transformation into a patni talukh—Purchaser in execution of a decree for arrears of patni rent—Right of the purchaser in execution of the mortgage-debt.*—After the mortgage of a dar-talukh, the mortgagor, with the consent of the landlord, got the dar-talukh transformed into a patni talukh, which was, however, sold in execution of a decree for its own arrears, and purchased by the principal defendants. In a suit for possession of the dar-talukh by the plaintiffs, who represented the purchaser at a sale in execution of the mortgage decree, *Held* that the old dar-talukh having been transformed into a patni, which passed to the principal defendants by the sale in execution of a decree for its own arrears, there was nothing of which the plaintiffs could recover khas possession. *Held* also (*per* BANERJEE, J.) that the creation of a mortgage gives certain rights to the mortgagor over the mortgaged property; but it does not necessarily prevent third parties from dealing with the mortgagor still as the owner of the

## SALE FOR ARREARS OF RENT

—continued.

### 7. RIGHTS AND LIABILITIES OF PURCHASERS—concluded.

property, nor is the mortgagee entitled in every case to ignore the rights arising out of such dealings in favour of third parties, but this rule is subject to one qualification, namely, that the transactions between the mortgagor and third parties, if free from fraud and collusion, are binding on the mortgagee and persons deriving title from him. *Bujnath Lall v. Ramoodem Chowdhry*, L. R., 1 I. A., 106; 21 W. R., 233; *Hem Chunder Ghose v. Thakomoni Debti*, I. L. R., 20 Cal., 533; and *Lala Initlal v. Raj Chunder Roy*, 15 W. R., 448, followed in principle. *JOTINDRA MOHUN PAI v. GODADHUR MADAK*. 2 C. W. N., 29

### S. SECOND SALE.

116. *Sale for prior arrears after sale for arrears of rent.*—Where a tenure has once been sold for its own arrears, it cannot be again put up to sale for the arrears due on account of a previous period. *Lutifun v. Meah Jan*, 6 W. R., 112, followed. *PHANGOUR MOZOOMDAR v. HIMANTA KUNARI DEBIA*. [I. L. R., 12 Cal., 597]

### 9. SURPLUS PROCEEDS OF SALE.

117. *Right to surplus proceeds—Attachment in hands of Collector.*—The surplus proceeds of a sale made for default of payment of patni rent, though under attachment by a Civil Court in the hands of the Collector, continues to be the property of the patnidar until ordered to be paid away by an order from such Court. *SADFOOL-LAH KHAN v. LUCHMEPURT SINGH DOOGRA*. [13 W. R., 58]

118. *Priority—Surplus proceeds of sale under s. 59, Beng. Act VIII of 1869—Decree against dar-patnidar after sale of his tenure.*—A patnidar caused to be sold the tenure of his dar-patnidar, under s. 59 of Bengal Act VIII of 1869, for the arrears of rent due up to 12th April 1876. This sale took place on the 7th November 1876, and after satisfaction of the decree the surplus proceeds remained in the Collectorate to the credit of the dar-patnidar. Afterwards in December 1876 the patnidar brought another suit for the dar-patni rent due in respect of the period between April and October 1876, and having obtained a decree, attached the surplus proceeds in the Collectorate, which were at the same time attached by two other holders of ordinary decrees. *Held* that the decree of the patnidar, although for rents of the current year, had no priority over the other decrees; and that the surplus proceeds of the sale of the dar-patni tenure formed part of the assets of the late dar-patnidar, and were not hypothecated to the patnidar for the rent of the year current. *GRISH CHUNDER MUNDUL v. DOORGA DOSS*. I. L. R., 5 Cal., 494

## SALE FOR ARREARS OF RENT

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## 9 SURPLUS PROCEEDS OF SALE—continued

**119** — *Beng Reg VIII of 1819 s 17 cl (5)—Patni talukh—Attachment—Priority*—The patnidar of a talukh granted a dar patni to the defendants on the 10th of February 1859. The same patnidar afterwards mortgaged the patni talukh to the plaintiffs who obtained a decree on their mortgage on the 25th September 1874. The patni was sold for its own arrears on the 17th November 1876 and after payment of rent and all expenses there remained a surplus in the hands of the Collector which was attached by the plaintiffs in execution of their decree on the 11th of November 1876. On the 12th January 1877 the defendants instituted a suit against the plaintiff under Cl 6 s 17 Regulation VIII of 1819 for compensation for the loss of the dar patni and obtained a decree which the Court directed should be satisfied out of the surplus sale proceeds and the Collector notwithstanding the plaintiff's attachment, allowed the defendants to obtain the amount decreed out of the surplus sale proceeds. In a suit by the plaintiffs to recover the amount paid for compensation on the ground that the plaintiff's attachment was prior to the defendant's suit—*Held* that the defendant's decree must notwithstanding the plaintiff's attachment be satisfied out of the surplus sale proceeds in priority to the plaintiff's decree. **SERVOYER DAS SVA s LAND MORTGAGE BANK OF INDIA** (I. L. R., 7 Calc., 173 S. C. L. R., 341)

**120** — *Sale of patni—Mortgage security, Conversion of—Surplus sale proceeds Charge of mortgages upon—Transfer of Property Act (IV of 1882) s 73*—A patni talukh having been sold for arrears of rent under Regulation VIII of 1819 the surplus sale proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees against the patnidars. The plaintiff who held a mortgage of the talukh sued to recover from the defendant the amount of his unsatisfied claim. Two of the defendants pleaded that over and above the amount taken by them there remained in deposit sufficient money to satisfy the plaintiff and that at the other unsecured creditors who had drawn out the balance should also be held liable. *Held* that the surplus sale-proceeds were to be regarded as the share into which the plaintiff's security was converted and as before such conversion the security could not be split up into parts the plaintiff was entitled to real to the balance due to him out of the whole of the surplus as otherwise his security would be diminished. **GOVAT REHARY PYN s SIVA NATH DUTT** (I. L. R., 20 Calc., 341)

**121** — *Transfer of Property Act (IV of 1882) s 73—Rights of purchasers—Mortgage*—s 73 of the Transfer of Property Act only gives a right to the mortgagee over the residue of the sale proceeds and refers to cases where the law otherwise provides that the effect of the sale is to nullify a mortgage; it is not intended in any way to enlarge the interest of the purchaser at a sale for arrears of revenue or rent.

## SALE FOR ARREARS OF RENT

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## 9 SURPLUS PROCEEDS OF SALE—concluded.

**Prem Chand Pal v Jurnma Datt, I. L. R., 15 Calc., 646** referred to **BANK PRASAD SINGH s REWAT LALL** (I. L. R., 24 Calc., 746)

**122** — *Beng Reg VIII of 1819 s 17—Distribution of surplus sale proceeds—Claim by copatnidar*—A copatnidar is not entitled to a share of the proceeds of a sale of the patni for arrears of rent held under Regulation VIII of 1819. **MOTI LAL GHOSH s BISSASSER HAZRA** (3 C. W. N., 60)

## 10 DEPOSIT TO STAY SALE

**123** — *Right to sue—Voluntary payment to stay sale—Act X of 1859, ss 102 103*—A person making voluntary payments in his own name to stay a sale in execution of a decree against others could not sue under s 103 or 103 of Act X of 1859 for the recovery of the money so paid by him. **ABDOOL WAHAB s DREMHOND** (3 W. R., Act X, 48)

**124** — *Party with recognized interest—Beng Reg VIII of 1819 s 14 cl 1—Cl 1 s 14 Regulation VIII of 1819*, does not contemplate that any party may, by depositing the amount due stay a sale of a patni but only a party having a recognized interest in such patni. According to s 6 even application for registration is not sufficient that section provides what can legally be done if registration is refused. **HARISO JENKIN BICKNER s MACKINTOSH** (W. R., 1864, 53)

**125** — *Sufficiency of interest—Suit to recover money deposited*—The plaintiff's mother brought a suit to recover a portion of a talukh which she claimed under a will and which she would be entitled to upon the death of the widow of the deceased owner. While the suit was pending the talukh was put up for sale under Regulation VIII of 1819 and to prevent its being sold she paid the rent. The above suit abated by the death of the plaintiff's mother and the plaintiff now sued the shareholders to recover the amount paid to save the talukh from sale. *Held* that the plaintiff's mother's interest in the talukh was such as entitled the plaintiff to recover the money she paid. **HABODA KOOMAR DAS s MORRIS MORUN GHOSH** (20 W. R., 273)

**126** — *Voluntary payment—Right of mortgagee to prevent sale of mortgaged property—Voluntary payment*—The mortgagee of a patni talukh paid certain moneys to prevent the sale of such talukh for arrears of zamindari rent. *Held* that this was not a voluntary payment and could not be so considered even in the case where the mortgagee by a covenant in his mortgage deed had insured himself against loss by such sale. **Fogender Chatter Ghose v Kam nes Doss, 11 Moore's I. A., 241** followed. **MOHES CHUNDER BANERJEE s PAM PURSOMO CHOWDHURY** (I. L. R., 4 Calc., 536 S. C. L. R., 280)

## SALE FOR ARREARS OF RENT

—continued.

## 10. DEPOSIT TO STAY SALE—continued.

See *DULICHAND v. RAMKISHIN SINGH*

[I. L. R., 7 Cal., 648]

127. — *Sale of transferable tenures under s. 105, Act X of 1859—Right of suit.*—The right to make payments to preserve an interest, and to recover the sums paid, was not given in the case of gasti jummas and other transferable tenures sold for arrears of rent under s. 105, Act X of 1859; when such payments are neither expressly nor impliedly authorized; they must be regarded as voluntary payments, for the recovery of which no action will lie. *SREENATH HODAR v. RAM SOONDUR CHUCKERBUTTY*. 4 W. R., S. C. C. Ref., 4

128. — *Right of suit.*—

An under-tenant who has saved the superior tenure from sale by depositing the amount of rent due, not only has the security of the tenure which he preserves, and of which he can obtain possession on application to the Collector, but he also has a right to recover the amount deposited by him as a loan in an ordinary suit. *AMBIKA DEBI v. PRANJARI DAS*

[4 B. L. R., F. B., 77]

S. C. *AMBIKA DEBI v. PRANJARI DAS*

[13 W. R., F. B., 1]

129. — *Right of suit.*—

*Beng. Reg. VIII of 1819—Non-registration of transfer.*—*L* and *R*, the holders of a patni estate, granted in 1856 a dar-patni lease to *S* at an annual rent, the lease stipulating that *S* should have full power of sale and gift, but should not sub-let without the patnidars' consent. The lease contained no stipulation for the registration of any vendee or donee. In 1860 *S* sold the dar-patni lease to *K*, the deed of sale which was duly registered providing for mutation of names in the patnidars' books. No such mutation was ever effected by *K*, who was never recognized as their tenant by *L* and *R*, the rent of the dar-patni being paid in the name of *S*. In 1864, the rent due from the patnidars being in arrear, the zamindar proceeded to sell the patni under Regulation VIII of 1819. Thereupon *K*, in order to protect his under-tenure, deposited in the Collectorate, on 17th November 1864, a sum of money, on which the sale was stayed. *K*, being then in arrear in the payment of his dar-patni rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L* and *R*. This *L* and *R* refused to allow, and they brought a suit in the Collector's Court against *S* and his sureties to recover the arrears of rent. In that suit *K* intervened, claiming the benefit of the set-off, to which, however, the High Court, on 26th June 1866, on appeal, held that he was not entitled, the deposit being merely a voluntary payment by *K*. On 30th October 1867 *K* brought a regular suit against *S* and *L* and *R* to recover the amount of the deposit, and obtained a decree, but the decision was reversed on appeal, and the suit dismissed for want of jurisdiction. On 6th June 1869 *K* filed his plaint in the proper Court. Held that he was entitled to recover the amount deposited by him

## SALE FOR ARREARS OF RENT

—continued.

## 10. DEPOSIT TO STAY SALE—continued.

in the Collectorate. *LUCKHINARAIN MITTER v. KHETTRO PAL SINGH ROY*

[13 B. L. R., P. C., 146; 20 W. R., 380]

Affirming the decision of the High Court in S. C. *KHETTER PAUL SINGH v. LUCKHEE NARAIN MITTER* [15 W. R., 125]

*OKHOY COOMAR CHATTERJEE v. DHIRAJ MAHTAB CHUND*. 22 W. R., 299

## 130.

*Payment made by vendee of dar-patnidar—Voluntary payment.*—A payment made by the vendee of the dar-patnidar (who has not obtained registration) to save the patni from sale is a voluntary payment, and the registered dar-patnidar cannot seek to deduct the amount from the rent due by him. *LUCKHENARAIN MITTER v. SEETANATH GHOSH*

[1 Ind. Jur., N. S., 317; 6 W. R., Act X, 8]

## 131.

*Payment of patni rent by dar-patnidar—Beng. Reg. VIII of 1819, s. 13.*—In a suit by the purchaser of a patni against a dar-patnidar for arrears of rent of the year 1285 (1878), it appeared that, before the plaintiff's purchase, the dar-patnidar had paid the amount of arrears of patni rent for the year 1284 (1877), in order to save the patni from being sold under Regulation VIII of 1819, and that the amount so paid considerably exceeded the dar-patni rent due at the date of suit. Held that the defendant was entitled to deduct from the rent claimed the amount paid under the Regulation in excess of the dar-patni rent due up to the end of 1284. *NORO GOPAL SIRCAR v. SRINATH BUNDOPADHYA*

[I. L. R., 8 Cal., 877; 11 C. L. R., 37]

## 132.

*Payment by dar-patnidar—Beng. Reg. VIII of 1819—Beng. Act VIII of 1869, s. 62.*—The zamindar of an estate, in which the plaintiff and defendant respectively had purchased patni and dar-patni tenures, obtained decrees for arrears of rent accruing before their purchases, though one of the decrees was obtained subsequently to defendant's purchase; and in execution of these decrees he advertised the patni for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the patnidar against the dar-patnidar for arrears of rent accruing due subsequently to the defendant's purchase, Held that the defendant was, on the construction of s. 13 of Regulation VIII of 1819 and s. 62, Bengal Act VIII of 1869, entitled to set off such payments against the plaintiff's claim. *Nobogopal Sircar v. Sreenath Bundopadhyay, I. L. R., 8 Cal., 877*, followed. *LALIT MOHUN SHAHA v. SRINIBAS SEN*. I. L. R., 13 Cal., 331

## 133.

*Payment by dar-patnidar—Notice of title to tenants—Beng. Reg. VIII of 1819, s. 13.*—A dar-patnidar who has paid a deposit in order to stay the sale of the superior tenure under cl. 4, s. 13, Regulation VIII of 1819, and has come into possession of the tenure, and is entitled to the profits of it, is bound to give notice

## SALE FOR ARREARS OF RENT

—continued—

## 10 DEPOSIT TO STAY SALE—continued

of his title to the raysals. In the absence of such notice, he cannot recover from them rents already paid by them to the patnidar. *MILKOVET ROR v. HINDIA* 4 W. R., Act X, 38

134

— *Payment to a third party*—Money paid to preserve estate from sale. A defendant is not entitled to recover money voluntarily paid by him to preserve an estate from sale. *PONNO CHUNDER DOSA CHOWHERRY v. SURENATH (10000)* 6 W. R., 173

135

— *Right to sue*—A shareholder who pays up arrears of rent due from the whole of the tenure in order to save it from sale in execution is entitled to recover contributions from other shareholders who were in possession during the period within which the arrears accrued, even though the tenure should be in the name of another and the decree be technically against such other alone. *ASIT KUMAR v. MUKHOPADHYAY* 22 W. R., 631

136

— *Compulsory payment*—A plaintiff who has paid the arrears of rent of a former year which had been assigned to an assignee, is entitled to recover the arrears of the year in which the money was paid. *Held* that the plaintiff is entitled to recover back the money from the defendant. *ASIT KUMAR v. MUKHOPADHYAY* 22 W. R., 631

137

— *Suit to recover money paid*—*Beng. Reg. VIII of 1819 s. 14 of 3*—*Beng. Act VIII of 1865 s. 6*—A patnidar in execution of a decree for rent against his muradard attached certain property of his including a parcel of land belonging to the plaintiff who to save that portion paid the whole amount due and sued the muradard to recover the portion he ought to have paid. The suit was dismissed on objection of the plaintiff to pay having been shown. She appealed, alleging that her portion was within and subordinate to the liability of the muradard, and to sell would have prejudiced her holden. *Held* that the case was rightly remanded by the lower Appellate Court, but that the issue to be tried was whether the plaintiff was a party who came under the provisions of a G. Regulation VIII of 1819, read with s. 13, Regulation VIII of 1819 more particularly with cl. 3. *LUCKHURST PRINCE v. HENDRICKS* 12 W. R., 313

138

— *Suit to recover money paid*—The plaintiff purchased an estate at an auction-sale in execution of a decree against the defendant who was in possession, and after his purchase obtained possession on 6th April 1860. While he was in possession, one R., the patnidar, asked the defendant to recover arrears of rent which had become due. During the defendant's possession and before the plaintiff's purchase and in execution of the decree he obtained in this suit the estate in possession of the plaintiff was attached and ordered by the Collector to be sold, whereupon the

## SALE FOR ARREARS OF RENT

—continued—

## 10 DEPOSIT TO STAY SALE—continued.

plaintiff paid the amount of the decree to save the tenure from sale. In a suit brought to recover the amount, *Held* that the payment by the plaintiff was, as far as the defendant was concerned, a voluntary payment. Mere inconvenience without risk of actual damage is not sufficient to take away the voluntary character of the payment. *LAM BAKSH CHITLAGI v. HINDOT MANI DEVI*

[8 B. L. R., 10 note, 10 W. R., 448]

139

— *Suit to recover money paid*—A patnidar which had been attached by G in execution of a decree against D was claimed by S, whose claim was allowed. Upon this G instituted a suit against S and others to have the patni declared to be the property of G, and, being unsuccessful, had the patni sold in execution of his decree against D to the purchaser, and got possession. After this, he saved the estate from being sold for arrears of rent which had accrued prior to his purchase, by paying up the amount due. He subsequently sued D and S to recover the amount so paid. S, who had meant to appeal to the Privy Council, succeeded in obtaining a reversal of the decree under which G had sold the patni, but this reversal did not take place before G had instituted the suit for recovering the arrears he had liquidated. *Held* that G was entitled to recover from S the amount which had been paid by him to save the patni from being sold. *GOPAL CHUNDER CHUCKRABORTY v. LODDOP LALL DEB*

[10 W. R., 115]

140

— *Suit to recover money paid*—The plaintiff purchased at an auction sale a share of A's tenure which had been attached on account of a money-decree. Subsequently the whole tenure was advertised for sale in execution of a decree for arrears of rent. On applying to the Munsif he was told that, if he deposited the whole amount due, the sale would be stayed. He did so and prevented the sale. He now sued A to recover the amount deposited. *Held* that the payment was neither officious nor voluntary and that A, who had enjoyed the profits of the land, was equitably liable for the sum paid to save it from sale. *ANANT MONTU BANSJEE v. HARADUT CHATTERJEE*

[19 W. R., 287]

141

— *Conditional tender*—*Beng. Reg. VIII of 1819*—*Reg. J—A* tender to stay a sale under Regulation VIII, 1819 must be of the whole of the muradard's demand and without any condition as to its being kept in deposit by the Collector. *LAM CHURU THOMPAS v. DROO MOTEE DOSSEE* 17 W. R., 122

142

— *Payment to a muradard*—*Beng. Reg. VIII of 1819, s. 13*—*Payment to stay final sale*—The direction in s. 13 of the Regulation VIII of 1819 that money paid into Court by a talukdar in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or month.

## SALE FOR ARREARS OF RENT —continued.

### 10. DEPOSIT TO STAY SALE—concluded.

for which the notice of sale may have been published, is satisfied by payment, not into Court, but to the zamindar. If a strictly literal construction were put upon the words "into Court," no payment effectual to stay the sale could be made, for "the Court" has nothing to do with these sales, which are managed by the Collector. *TARINI DEBER v. SHAMA CHURN MITTER*. I. L. R., 8 Calc., 954

143. ———— *Nature of payment—Loan to proprietor—Beng. Act VIII of 1865, s. 6.*—Money deposited to protect from sale a tenure advertised under the provisions of Act VIII of 1865 must, under s. 6, be considered as a loan made to the proprietor of the tenure, which becomes security to the depositor, who is entitled, on applying, to obtain immediate possession in order to recover the amount from any profits belonging to the tenure. *KARTICK SURMAH v. BYDONATH SAFFRNE*

[10 W. R., 205]

144. ———— *Position of person making payment—Beng. Reg. VIII of 1819—Suit for share of ptnr estate—Mortgagee.*—Plaintiff claimed an eight annas share of a ptnr as purchased by the official assignee of an insolvent, D, whom the Principal Sudder Ameen found to have been owner in his own right by inheritance of the share of the ptnr of which defendant's ancestor, G, having deposited arrears of rent, was in possession as giurdar under the provisions of Regulation VIII of 1819. Held that G was substantially in the same position as a mortgagee in possession under an usufructuary mortgage; and that plaintiff, as a purchaser from such a mortgagor, would have no cause of action until the debt was paid off. Held that, as defendant's plea of purchase from the alleged shareholders of the ptnr, in satisfaction of their ancestor G's lien, had proved unfounded, if they were permitted to fall back on their title as giurdars, the plaintiff must be allowed to show that the debt "was realised from the usufruct of the tenure," even though this had not been "established in a suit instituted for the purpose." *BOISTUB CHURN BHADRO v. TARA CHAND BANERJEE*

11 W. R., 357

## 11. SETTING ASIDE SALE.

### (a) GENERAL CASES.

145. ———— *Civil Procedure Code (1882), s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Bengal Tenancy Act (VIII of 1855), s. 174.*—S. 310A of the Code of Civil Procedure applies to the sale of a tenure in execution of a decree for its own arrears. *JANANDHAN GANGULI v. KALI KRISHNA THAKUR*. I. L. R., 23 Calc., 393

*KRISHNADHAN NATH v. DAMAYANTI DEVI*

[I. L. R., 23 Calc., 393 note]

*BEHARY LAL SEAL v. RUSSICK CHUNDER PAL*

[I. L. R., 23 Calc., 393 note]

*BUNGSHIDHAR HALDAR v. KEDARNATH MONDAL*

[1 C. W. N., 114]

## SALE FOR ARREARS OF RENT —continued.

### 11. SETTING ASIDE SALE—continued.

146. ———— *Order under s. 310, Civil Procedure Code, 1852—Notice to purchaser.*—An auction purchaser is entitled to a notice before an order is made under s. 310A. *BUNGSHIDHAR HALDAR v. KEDARNATH MONDAL*

[1 C. W. N., 114]

147. ———— *S. 310A of the Civil Procedure Code does not apply to sale under Act X of 1859, as the Code of Civil Procedure applies only up to the sale, and not after it.* *HARISH CHANDRA GHOSE v. ANANTA CHARAN PATRA*

[2 C. W. N., 127]

### (b) IRREGULARITY.

148. ———— *Beng. Reg. VIII of 1819, s. 8, Application of—Jungleburi tenures.*—S. 8, Regulation VIII of 1819, refers to jungleburi tenures that existed at that time, and its provisions do not apply to any tenure created since the passing of that Regulation. *MONMORUN SINGH v. WATSON & Co.*

[2 Hay, 398]

149. ———— *Beng. Reg. VIII of 1819, s. 8, Construction of—Residing in neighbourhood—Attesting witnesses.*—By the words "residing in the neighbourhood" in Reg. VIII of 1819, s. 8, the Regulation does not make it imperative that the attesting witnesses shall be residents of the village, but may be taken to include men living within a short distance of the entchery. *MOHNEE DOSSEE v. JUGGODUMBA DOSSEE*

W. R., 1864, 382

150. ———— *Substantial persons—Attesting witnesses.*—With reference to the provision in cl. 2, s. 8, Reg. VIII of 1819, that the service of notice of sale of a patni taluk shall be attested by three substantial persons,—Held that the word "substantial" must be understood in its ordinary sense,—i.e., men who have some stake in the community, men of local influence or importance and respectability,—and not be taken to mean simply men who can readily be found. *GOPAL KISHORE SHOOR v. NUDUN MOHUN HOLIDAR*

[2 W. R., 188]

*MOHNEE DOSSEE v. JUGGODUMBA DOSSEE*

[W. R., 1864, 382]

151. ———— *"Substantial persons"—Service of notice.*—The provisions of cl. 2, s. 8, Reg. VIII of 1819, with regard to the notification of the sale of a patni taluk for the arrears of rent under the Regulation that the serving person shall "bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served, the sale will not be vitiated by non-compliance with any of these provisions,—e.g., as where one of the witnesses attesting the service of the notice turns out not to be "substantial." A respectable man, of good character,

## SALE FOR ARREARS OF RENT

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## 11 SETTING ASIDE SALE—continued

living and well known in the neighbourhood may properly be considered a substantial person" within the meaning of cl 2 s 8 of the Regulation. It is too limited a construction of that clause to hold that the word substantial must be taken to mean a wealthy man from whom damages could be recovered by the landlord supposing the attestation to be false.

PAMBAICK BOSE & KAMISER ACOMAREZ DOSSER  
[14 B L. R., 394]

S C I AM SANKU BOSE & MONMORVIEZ DOSSER  
[L. R., 2 L. A., 71 23 W. R., 113]

## 152.

*Substantial person—Suit to set aside sale for irregularity—Non service of notices—Omission to tender rent*—In a suit to set aside the sale of a patti for arrears of rent under Regulation VIII of 1819 on the ground that proper notices were not sent served, and published under s 8 cl 2 the objection in order to succeed must be one of substance and not merely of form. The requirements of the Regulation as to the service of the notice and the giving of the receipt by substantial persons, may be held to have been substantially performed where the persons giving are such as are usually expected to attend such a document persons who are treated with consideration e.g., ameer, moolkars, chowkdaras. PITAMBER LAL & DANCORER DOSSER & PITAMBER PANDA . 24 W. R., 129

## 153

*Service of notice of sale—Beng Reg VIII of 1819 s 8 cl 2 Non service of notice Effect of on sale*—Where a Court finds that the notice prescribed in cl 2 s 8 Regulation VIII of 1819 has been duly served, it need not find whether the person who served the notice complied with all the directions of the Regulation as to what should be done in relation to such service. Omission to comply with those directions does not vitiate a sale under the Regulation, provided notice is duly served. SONA PEEZER & LALL CHAND CHOWDHRY . 9 W. R., 242

## 154

*Proof of service—Onus probandi—Evidence Act s 106*—In a suit against a kaminar to reverse the sale of a patti tenure held under Regulation VIII of 1819 on the ground of non-service of notice the onus of proving service lies on the defendant, according to the spirit of a 106 of the Evidence Act. DOORDA CHURN VERMA CHOWDHRY & NARAYENDREN 21 W. R., 397

## 155

*Proof of service—Beng Reg VIII of 1819 s 8 cl 2 Publication of s 8 cl 2*—The manner in which the notice of service of notice of sale is served is not essential to the validity of the sale, but it is essential to the validity of the sale, that the notice of sale should be served in strict compliance with the same clause and section of the Regulation. BANG WAT CHANDER DASS & SUDER [1 L. R., 4 Cal.,

C L. R., 357

## SALE FOR ARREARS OF RENT

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## 11 SETTING ASIDE SALE—continued

150 *Beng Reg VIII of 1819 s 8 cl 2—Proof of publication of notice before sale of patti taluk for arrears of rent*—The due publication of the notices prescribed by Regulation VIII of 1819, s 8, cl 2 forms an essential part of the foundation on which the summary power to sell a patti taluk for non payment of rent is exercised by the zamindar, who when instituting this proceeding, is exclusively responsible for such publication being regularly conducted. Although objection to the form of the receipt and the absence of the receipt itself need not be regarded if the fact of the due publication of the notices having been made is not matter of controversy (as held in *Soma Bhee v Lalchand Chowdhry 9 W. R., 242*) yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zamindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming was maintained by the Judicial Committee, MAHARAJAH OF BURDWAN & TARASUTDARI DEB [1 L. R., 9 Cal., 619 13 C L. R., 34 L. R., 10 I. A., 19]

## 157

*Proof of publication of notice—Beng Reg VIII of 1819 s 8—Irregularity in sale—Suit to set aside sale*—It is essential to the validity of a sale held under Regulation VIII of 1819 of a patti estate for arrears of rent, that the notices of sale prescribed by cl 2, s 8 of the Regulation should have been all duly and regularly published as therein directed. BAIKANTHA NATH SINGH & DEVIJAY MAHATAR CHAND [9 B L. R., 87. 17 W. R., 447]

MAHARATH OUPPA & JAGANNATH ROY CHOWDHRY 9 B. L. R., 89 note. 11 W. R., 87

And as to what amounts to publication of notice PABHAR CHANDRA DAVERNER & BRAJNATH CHOWDHRY

[9 B L. R., 91 note 14 W. R., 489]

## 158.

*Beng Reg VIII of 1819 s 8, cl 2—Formalities prescribed in that section for due publication of the notice of sale*—In cases where the due publication of the sale notice is in controversy it is incumbent upon the landlord to show that the formalities prescribed by s 8 of Regulation VIII of 1819 have been complied with. *Maharajah of Burdwan v Tarasutdars Deb.* 1 L. R., 9 Cal., 619 L. R., 10 I. A., 19 and *Maharajah of Burdwan v Krishna Kamesh Deb.* 1 L. R., 14 Cal., 365. 1 L. R., 14 I. A., 20 referred to. *Soma Bhee v Lalchand Chowdhry 9 W. R. 242* explained. BHOJO CHAND MAHATAR & AMRITA LAL MUKERJEE 1 L. R., 27 Cal., 308

## 159

*Ground for setting aside sale—Non service of notice*—The fact of no notice having been served in the manner is sufficient ground for setting aside a sale for arrears of

# SALE FOR ARREARS OF RENT

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## 11. SETTING ASIDE SALE—continued.

rent. NUGENDRO CHUNDER GHOSH v. MUSRUFF  
BIBEE . . . . . 15 W. R., 17

TARA CHAND BISWAS v. RAM JEEBUN MOOSTAFEE  
[22 W. R., 202]

180. ————— *Beng. Reg. VIII*  
of 1819, s. 8.—*Notice of sale, Publication of.*—  
In a case of a sale under Regulation VIII of 1819,  
where the patni was a small piece of land, upon which  
there was no town or village or cutchery of any  
kind, and the peon stuck up the notice in the  
Collector's office and also at the sudder cutchery of  
the zamindar, and obtained the receipt of the de-  
faulters in the latter place, he was held to have  
carried out substantially, as far as he could, the  
provisions of the law regarding notice. HURRI  
KRISTO ROY v. MOTEE LALL NUNDFE

[14 W. R., 36]

181. ————— *Beng. Reg.*  
*VIII of 1819.*—It was held to be a far more exact  
compliance with the spirit of Regulation VIII of  
1819 to serve the notice which it enjoins at the place  
in which the defendant's gomashtha was transacting  
and did habitually transact business, than at the  
cutchery, which had not been in use. HUNOOMAN  
DOSS *alias* NONNAH BABOO v. BIREO CHURN ROY

[20 W. R., 132]

182. ————— *Beng. Reg.*  
*VIII of 1819, s. 8.*—In the case of a sale of a patni  
talukh for arrears of rent, so long as the cutchery at  
which notice on the defaulter, as required by Regu-  
lation VIII of 1819, s. 8, cl. 2, is served, is an ad-  
jacent one in which all the business of the defaulting  
patni is carried on, and is on land belonging to the  
defaulter, publication at that cutchery is a sufficient  
publication. MUNGAREE CHAPRASSEE v. SHINO SOON-  
DUREE . . . . . 21 W. R., 369

183. ————— *Beng. Reg.*  
*VIII of 1819, s. 8.*—*Due publication of notice of*  
*sale.*—Where there is a cutchery upon the land of a  
defaulting patnidar, the notice required by s. 8 of  
Regulation VIII of 1819 must be served there; but  
where there is no such cutchery, the notice should  
be published, in the manner required by the section,  
at the principal town or village within the talukh.  
MAHARAJAH OF BURDWAN v. KRISTO KAMINI DAS

[I. L. R., 9 Calc., 931; 13 C. L. R., 427]

S. C. on appeal to the Privy Council. Publication of  
the notice of sale of a tenure under Regulation VIII  
of 1819 is required to be in the manner prescribed in  
s. 8, cl. 2; and personal service on the defaulter is not  
sufficient. The object of directing local publication  
of the notice, viz., to warn the under-lessees of the  
sale proceedings and also to advertise the sale to  
those who might bid, would be frustrated if it were  
sufficient to publish the notice at a distant cutchery or  
to serve it personally. If there is a cutchery on the  
land of the defaulting patnidar, meaning the land  
which is to be sold for arrears of rent, the copy or  
extract of such part of the notice of sale as may  
apply to the tenure in question must be published at

# SALE FOR ARREARS OF RENT

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## 11. SETTING ASIDE SALE—continued.

that cutchery, and if there is no such cutchery on the  
land held by the defaulter, the copy or extract must  
be published at the principal town or village on the  
land. In the description of this in cl. 2, as "the  
notice required to be sent into the mofussil," the word  
"mofussil" is opposed to the sudder cutchery of the  
zamindar, and refers to the subordinate estate, which  
is the subject of the sale-proceedings. Where a  
zamindar, selling the tenure of a defaulting patni-  
dar under the Regulation, had caused to be stuck up  
the requisite petition and notice at the Collector's  
cutchery, and the notice at the zamindar's cutchery,  
but not the copy or extract which is directed by the  
Regulation to be similarly published at the cutchery  
nor had published it at any other place upon the land  
of the defaulter,—*Held* that the zamindar had not  
observed a substantial part of the prescribed process,  
and that this was for the defaulting patnidar "a  
sufficient plea" within the meaning of the Regula-  
tion. MAHARANI OF BURDWAN v. KRISHNA KAMINI  
DASI . . . . . I. L. R., 14 Calc., 365

MAHARANI OF BURDWAN v. MINTUNJOX SINGH

[I. R., 14 I. A., 13]

See AHSANULLA KHAN BAHADOOR v. HURRI  
CHURN MOZOOMDAR . . . I. L. R., 17 Calc., 474

184. ————— *Insufficient*  
*publication of notice—Suit for reversal of sale.*—  
Where, in a suit to set aside a patni sale under  
Regulation VIII of 1819, it was proved that the  
notice of sale was first stuck up in the cutchery of  
the ijaradar (the mehal having been let out in ijarā  
by the patnidar), and, on the refusal of the ijaradar's  
gomashtha to give a receipt of service, it was taken  
down, and subsequently personally served on the  
defaulting patnidar at his house, which was at some  
distance from the patni mehal,—*Held* that the ob-  
ject of the provisions in Regulation VIII of 1819 as  
to service of notice of sale is not only to give notice  
of sale to the defaulter, but also to the under-tenants,  
and to advertise the sale on the spot for the infor-  
mation of intending purchasers; but though those pro-  
visions had not been strictly complied with, yet as  
the plaintiff (the patnidar) did not allege that in  
consequence of the defective publication there was  
not a sufficient gathering of intending purchasers,  
nor that the under-tenants were ignorant of the sale,  
and were prejudiced by such ignorance, nor that the  
mehal was sold below its value,—*Held* that the de-  
fect did not amount to a "sufficient plea" under  
s. 14 for setting aside the sale. *Bylanika Nath*  
*Sing v. Dhiraaj Mahatab Chand Bahadur*, 9 B. L.  
R., 87, commented on and distinguished. GOVEREE  
LALL SINGH v. JOODNISTEER HAJRAH

[I. L. R., 1 Calc., 359; 25 W. R., 141]

185. ————— *Publication of*  
*notice of sale—Material irregularity—Beng. Reg.*  
*VIII of 1819, s. 8, cl. 2.*—Cl. 2, s. 8 of Regulation  
VIII of 1819, which provides that a notice of sale  
under the Regulation shall be stuck up in the  
cutchery of the zamindar, is not complied with by  
serving the notice upon the zamindar himself or his

## SALE FOR ARREARS OF RENT

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## 11 SETTING ASIDE SALE—continued

agent. The object of the Regulation is to make known to the holders of undaktenures and rayats and the rest of the place that the patta will be sold if the arrears are not paid off within the time specified and if the notice is not stuck up in the catchery as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale. **GOBIND LALL SEAL v CHAND HERRY MAITY** I L R., 9 Cal., 173

168

Beng Reg VIII

of 1819, s. 8—Publication of proof of service—*Suit to set aside sale*—Compliance with the directions in Regulation VIII of 1819 as to service of notice is essential to the validity of a sale under that Regulation. Where there was evidence of service upon the defaulter personally, but not of service at his catchery—*Held* that this was not sufficient, and that the sale must be set aside. **Maharajah of Burdwan v Tarasuntari Dahi**, 1 I 10 I A., 19 I L R. 9 Cal. 619 and **Lala royah of Burdwan v Krishna Kama Das** I L R. 9 Cal., 931, followed. **MAHOMED ZAMIR v ABDOL HAKIM** I L R., 12 C. 67

167

Patta tenure—

*Beng Reg VIII of 1819 s. 8 cl. 2 and s. 14—Date of publication of notice*—The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time previous to that day, so as to satisfy the provisions of s. 8 cl. 2 of Regulation VIII of 1819 was held not to be sufficient ground for setting aside the sale of a patta tenure for arrears of rent. There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place the Court refused to set aside the sale. It would not be a "sufficient plea" within the meaning of s. 14 that the receipt had been obtained or the notice published on, instead of previous to, the 15th of Bysack. **MATTHEW CHURCH MITTER v MOOHARAY MOHUN CHOW**

[I L R., 1 Cal., 175 24 W. R., 453]

166.

Beng Reg VIII

of 1819 s. 8—*Benami purchase—Validity of sale*—A and B were co-sharers of a patta which was sold for arrears of rent by the zamindar and purchased by C. In a suit by A against B, C, and the zamindar, the plaintiff alleged (1) that no sufficient notice had been given, and (2) that C purchased benami for B. *Held*, on the question of notice that once it was found that the notice had been posted up in the catchery of the defaulter in accordance with cl. 2, s. 8 Regulation VIII of 1819 it was not essential to the validity of the sale that any other notice should have been given to the defaulter themselves or that the service should have been verified in the manner directed by the section. *Held* also the benami purchase having been proved, that the sale must be considered

## SALE FOR ARREARS OF RENT

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## 11. SETTING ASIDE SALE—continued

good as far as the zamindar was concerned, and therefore that it as against him must be dismissed with costs; and that as against B the parties were in exactly the same position as before the sale, B being a constructive trustee for A. **Doss Beesee v Lall Chandra Chowdhry**, 1 W. R., 212, and **Kogalak Chaudhri Bawerjee v Ka's Prasanna Chowdhry**, 18 W. R. 60, cited and followed. **JOTENDRO MOHUN TAGOOR v DEBENDRO MOHUN** 2 C L R., 419

169

—Beng Reg

VIII of 1819, cl. 3 ss. 8, 14—*Patta sale—Notice Publication of—Ostent sale*—It is imperative that the notices referred to in cl. 3, s. 8 of Regulation VIII of 1819, be published previously to the 15th Kartick. Non-compliance with such direction is a sufficient plea within the meaning of s. 14 of the Regulation for reversal of a sale held thereunder. **Matungee Chura Mitter v Moohary Chura Ghose** 1 L R., 1 Cal., 175 24 W. R. 403 disented from. **BYNOMORI DEBIA v GHOSH CHUNDER MOHUN** I L R., 18 Cal., 383

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Beng Reg.

VIII of 1819, s. 8—*Service and publication of notice of sale—Irregularities in preliminaries to sale*—*Petition for sale—Certificate of Munsif when service is sworn to before him—Form of notice of sale in mid year sales for six months' arrears*—All the requirements in cl. 2, s. 8 of Regulation VIII of 1819 must be imported into cl. 3 of that section *mutatis mutandis*. Where therefore the zamindar is proceeding under cl. 3 to obtain a mid year sale for six months' arrears of rent, the service of notice of sale is a condition precedent to the sale being held. Such notice must show, as provided by that clause, that the sale may be prevented by payment of the whole of the balance due, or of three fourths of such balance. In such a case a notice which stated that the sale would take place unless the whole of the balance was paid as if the zamindar was proceeding under cl. 2 for the whole year's arrears was held to be a bad notice, and a non-compliance with a substantial requirement of the Regulation such as to justify the reversal of the sale. The publication of the petition to the Collector containing a specification of the balance of rent due, by attaching it up in some conspicuous part of the catchery as required by cl. 2, s. 8 of the Regulation, is a substantial portion of the process to be observed by the zamindar previous to a sale for arrears of rent, non-compliance with that provision therefore is not a ground for setting aside the sale. For the same reason, the non presentation of the petition on the precise day (1st Kartick) specified in cl. 3 s. 8 affords no ground for setting aside the sale. The presentation of the petition on the 2nd Kartick when the 1st was a Sunday was held to be a sufficient compliance with the section. The words "certificate to which effect" in the provision of cl. 2, s. 8, relating to the procedure in case of refusal by the village people to attest the publication of the notice of sale, mean a certificate to the effect



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### 11. SETTING ASIDE SALE—continued.

that the peon did come before the Munsif or police-officer, as the case may be, and did make voluntary oath as to the service of the notice. Where the peon, after serving the notice, made an affidavit as to the mode of service, and took the affidavit before the Munsif, to whom it was read and who then signed it, there was held to be a sufficient certificate to satisfy the requirements of the section. **AHSANULLA KHAN BAHADOOR v. HURRI CHURN MOZOOMDAR** I. L. R., 17 Calc., 474

*Held* by the Privy Council affirming this decision:—The power of sale given to the zamindar by Regulation VIII of 1819, upon default in payment of the rent by a patnidar is only exercisable subject to a condition as to notice to the defaulter. To bring into operation the provisions of cl. 3 of s. 8, relating to a mid-year sale, the serving a notice, according to that section, intimating to the patnidar that payment of three fourths of the balance due will prevent a sale, is a condition precedent to the sale. A notice relating to a mid-year sale was *held*, to be essentially defective, as it followed cl. 2 instead of cl. 3 of s. 8, and intimated that payment of the whole arrears would be the only way to stay the sale. This objection was taken for the first time in the Appellate Court. *Held* that, as a defect fatal to the whole proceedings appeared in the notice, the objection was competently taken in that Court. *Macnaghten v. Mahabir Pershad Singh*, I. L. R., 9 Calc., 656; I. R., 10 I. A., 25, distinguished. **AHSANULLA KHAN BAHADOOR v. HARICHARAN MOZUMDAR**

[I. L. R., 20 Calc., 86  
I. R., 19 I. A., 191]

171. — *Beng. Reg. VIII of 1819, s. 8—Notice, Publication of—Reasonable time—Construction of the section—Setting aside sale, Ground of.*—The provision in s. 8 of Regulation VIII of 1819 requiring the notice of sale to be published before the 15th Bysack applies to the notice, to be published in the mufassal and not to the notice to be affixed at the Collectorate. The words in the section "the same shall then be stuck up in some conspicuous part of the cutchery" do not mean that it must be stuck up either immediately or before the service of the other notices referred in the section or at least before the 15th of Bysack. It will be a sufficient compliance with the provision of the section if the same be stuck up in a conspicuous part of the cutchery within a reasonable time before the sale. **NIAMAT ULLAH v. FORBES**

[2 C. W. N., 461]

172. — *Beng. Reg. VIII of 1819, s. 8, cl. 2—Onus of proof of publication of notice before sale of patni talukh for arrears of rent.*—In a suit to set aside a sale of a patni talukh, held under the provisions of s. 8 of Regulation VIII of 1819, on the ground that the notice required by sub-s. 2 of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notice required by

## SALE FOR ARREARS OF RENT —continued.

### 11. SETTING ASIDE SALE—continued.

that sub-section, the service of which notice is an essential preliminary to the validity of the sale. In such a suit, where there was no evidence one way or the other to show that the notice required by that sub-section to be stuck up in some conspicuous part of the Collector's cutchery had been published,—*Held* that the plaintiff was entitled to a decree setting aside the sale. **HURRO DORAL ROY CHOWDHRY v. MAHOMED GAZI CHOWDHRY**

[I. L. R., 19 Calc., 699]

173.

— *Beng. Reg. VIII of 1819, ss. 8, 14, cl. 2—Publication of notice in the Collector's cutchery—Non-publication of notice in manner prescribed, Effect of, on the validity of a sale of a patni tenure—"Sufficient plea."*—The sticking up or publication in a conspicuous part of the Collector's cutchery of a notice in accordance with the provisions of cl. 2 of s. 8 of Regulation VIII of 1819 is essential to the validity of a sale of a patni tenure under that Regulation. Where a notice of sale, instead of being stuck up and published in some conspicuous part of the Collector's cutchery as required by law, was in accordance with the practice which prevailed during the incumbency of the Nazir of the Collector's cutchery at Birbhum and of his predecessors in office, kept by the Nazir with other petitions for sale and notices relating to them in a bundle, which was at night locked up for safe custody, and in the day time kept in a conspicuous place near his seat at the entrance to the cutchery, any person who chose to ask for it or wished to see it being at liberty to inspect the whole bundle,—*Held* by PETHERAM, C. J., and GHOSE, J. (TORTENHAM, J., dissenting)] that this was not a publication of the notice within the meaning of cl. 2 of s. 8 of the Regulation and that it was a 'sufficient plea' for the defaulting patnidars within the meaning of s. 14 to have the sale set aside. **Maharaja of Burdwan v. Tarasundari Debi**, I. L. R., 9 Calc., 619; I. R., 10 I. A., 19, relied on. **Ahsanulla Khan Bahadur v. Hurri Churn Mozoomdur**, I. L. R., 17 Calc., 474, distinguished. **RAJNARAIN MITRA v. ANANTA LAL MONDUL**, **KRISTO LAL CHOWDHURI v. ANANTA LAL MONDUL** I. L. R., 19 Calc., 703

174. —

— *Act X of 1859—Non-attachment and non-publication of sale proclamation—Civil Procedure Code (Act XIV of 1852), s. 311.*—There is no provision in Act X of 1859 under which the sale of a jote in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation. **PATIL SHAHU v. HARI MAHANT**

[I. L. R., 27 Calc., 789]

175.

— *Sale after due and proper notice set aside as irregularly conducted—Second sale without fresh notice—Suit to set aside second sale—Madras Rent Recovery Act (Mad. Act VIII of 1865), ss. 18, 39, and 40.*—A land'ord attached his tenant's holding for arrears

## SALE FOR ARREARS OF RENT

—continued

## 11 SETTING ASIDE SALE—continued

of rent in 1890 and within the time prescribed by the Madras Rent Recovery Act a 19 put in an application for sale to the Collector and otherwise complied with the procedure prescribed by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale (which was granted); a fresh sale took place without a fresh notice being given to the tenant under a 39 of the intent on to sell. The tenant now sued to have this sale set aside. *Held* that a fresh notice was not necessary and that the plaintiff was not entitled to have the sale set aside. **OLIVER v. ANANTHAKA MATTAR** I. L. R., 20 Mad., 498

## (c) OTHER GROUNDS

176 ——— Unregistered proprietor's right to sue to set aside sale—*Patni taluk*—*Transfer of patni*—*Registered transferee*—*Beng. Reg. VIII of 1819 s. 14*—Where a patni taluk has been sold under the provisions of Regulation VIII of 1819 an unregistered shareholder therein is entitled to sue for a reversal of the sale under the provisions of s. 14 of the same regulation. **CHUNDER PERSHAD ROY v. BRUVADRA KUMARI SHARMA**

[I. L. R., 12 Cal., 622]

177 ——— *Beng. Reg. VIII of 1819 ss. 3, 5, 6, 14*—*Sale of patni tenure*—*Registered patnidars*—*Suit by unregistered patnidars*—An unregistered proprietor of a patni tenure is entitled to sue to set aside a sale held under Regulation VIII of 1819. **CHUNDER PERISHAD ROY v. SHANDRA KUMARI SHARMA** I. L. R., 12 Cal., 622 followed. **JAYAKRISHNA MUKHOPADHYA v. SANYASIN** I. L. R., 15 Cal., 345

178 ——— *Fraud* *Suit to set aside sale*—*Beng. Act VIII of 1885*—*Right of purchaser*—A purchaser at a sale in execution of a decree held under Bengal Act VIII of 1885 could not be ousted from the property purchased by him without proof that the decree and sale were fraudulent and that he (the purchaser) was a party to or had no knowledge of the fraud. **DAMUDAR ROY v. NIMATUDDIN CHUCKERBUTTY** [I. L. R., 15 W. R., 385]

179 ——— *Collusion*—*Suit by tenant against purchaser to set aside sale*—Where a tenure had been sold under s. 10a, Act X of 1859 in execution of a decree for the rent of land held under a *miras pottal* a tenant in possession was at liberty to show that the decree had been obtained by fraud and collusion against a person who had then no interest in the premises. **BOONADAZ v. GEORGE** 2 W. R., Act X, 63

180 ——— *Beng. Reg. VIII of 1819*—*Invalid sale*—A patni taluk being about to be brought to sale under Regulation VIII of 1819 the agent of the sharers were in attendance at the Collectorate on the day of sale prepared to pay the rent due. Two of the agents (T and B) happening to be out of the way at the time, the lot was

## SALE FOR ARREARS OF RENT

—continued.

## 11 SETTING ASIDE SALE—continued

about to be called up. The third K, without informing the Collector or zamindar's agent of their intention to pay or giving notice to the others, purchased the pottal. *Held* that K's act was one of bad faith, and that the 4 annas shareholders whom he represented could not in equity be allowed to benefit by adopting the fraud. *Held* also that as between the Collector and zamindar and the defaulting patnidars the sale was valid; but that it was void so far as it created a title in favour of the 4 annas share holders to the 12 annas share, and K must be treated as having made the purchase on account of and as a trustee for the 12 annas shareholders. **KOTLAH CHUNDER HANERJEE v. KALAN PANDIT CROWDNEY** 10 W. R., 80

181 ——— *Collusion*—*Invalid sale*—*Reconveyance of share sold*—Where the sale of a tenure for arrears of rent was brought about by collusion between the party in whose name it stood and the purchaser with a view to get rid of a co-sharer, who had neglected to have his share transferred to his name—*Held* that the transaction was a private one and not really an auction sale for the purpose of realizing the zamindar's rent and that on payment of his share of the rent the above sharer was entitled to have his share reconveyed to him. **KISHORE CHUNDER SEIN v. KALLY KISHOR PAUL CROWDNEY** 20 W. R., 333

**See SHRIDH SUNDERR DASS v. PASCORWARE CHUNDERA** 14 W. R., 158

**SIDDER NIGER ALLI KHAN v. OMOODHYAM KHAN** 10 Moore's I. A., 640  
[5 W. R., P. C., 83]

182 ——— *Collusion*—*Beng. Reg. VIII of 1819*—*Sale where no arrears are due*—*Per AIRLIE J.*—It can only be on the ground that a sale is carried out in respect of arrears not really due that fraud and collusion can be imputed. **KAM CHEN BUNDOADHYA v. DRAGO MOTER DASS** 17 W. R., 122

183 ——— *Beng. Reg. VIII of 1819*—*Invalidity of sale*—*Sale where no arrears are due*—A patni sale under Regulation VIII of 1819 is invalid if there was no arrear of rent at the date of sale whether notice of the fact had been given to the Collector or not at the time of the sale. **ENTHOOR CHUNDER BROODICK v. PENTAR CHUNDER PRIN** [7 W. R., 219]

184 ——— *Sale after arrears have been paid*—*Suit to set aside sale*—*Deposit of rent in Collector's treasury*—An estate was sold under cl. 2 s. 8 Regulation VIII of 1819 for arrears of rent due by a patnidar to the zamindar. Prior to the date of sale, the amount due was paid by the patnidar to an accountant in the Collector's Office as in satisfaction of arrears, but no notice was given to the zamindar or Collector. A suit was afterwards brought to set aside the sale on the ground that, in consequence of such payment there were no arrears due at the time of sale. *Held per NORMAN and MACHERSON*

## SALE FOR ARREARS OF RENT

—continued.

## 11. SETTING ASIDE SALE—continued.

*JJ.*, that the suit could not be maintained. *Per MITTER, J.*—If the custom of the Collectorate was, as alleged by the plaintiff, for payments in satisfaction so to be made to the Collector's accountant, the sale ought to be set aside. KRISHNA MOHAN SHAHA v. AFTABUDDIN MAHOMED

[8 B. L. R., 134: 15 W. R., 560]

185. ———— *Sale by zamindar with notice (though irregularly served) that arrears of rent have been deposited.*—Where a zamindar puts up a patni for sale, under Regulation VIII of 1819, knowing that the rent due to him has been paid into Court by the patnidar, the sale is invalid, even if the notice served on the zamindar was illegally served. TARA SOONDUREE DEBIA v. RADHA SOONDUR ROY . . . . . 24 W. R., 63

186. ———— *Sale under decree alleged to be against wrong person—Beng. Act VIII of 1865—Registered tenant.*—The plaintiff purchased, on 28th of September 1866, the right, title, and interest of one H in a certain tenure of which G was the registered tenant. Previously the zamindar had brought a suit against G for arrears of rent of the tenure and obtained a decree, in execution of which the tenure in question was, on 29th April 1867, sold to the defendant under Bengal Act VIII of 1865. In a suit by the plaintiff for a declaration of his right in the tenure, and for reversal of the sale to the defendant,—*Held* that the suit by the defendant was rightly brought against G, who was the registered tenant; and the arrears being actually due and the sale a *bona fide* one, such sale was valid and binding as against the plaintiff. FATIMA KHATUN v. COLLECTOR OF TIPPERAH

[8 B. L. R., 4 note: 13 W. R., 433]

187. ———— *Sale of an under-tenure in execution of decree for arrears of rent—Act VIII of 1865—Sale under three separate decrees each against one of three joint brothers—Execution issued only against one—Joint interest of three brothers in joint possession sold.*—A zamindar brought to a judicial sale an under-tenure in execution of three *ex-parte* decrees obtained by him for arrears of rent thereof for different periods. The property was held by three Hindu brothers in joint possession. The zamindar purchased it at the sale. At the instance of the zamindar, execution had been issued against only one of the brothers. Another of them, referring to this, afterwards disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was, that the decrees had not, each and all of them, been against each and all of the three brothers, and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with proper notices under Act VIII of 1865, and separate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made. *Held* that the sale was a valid one, and

## SALE FOR ARREARS OF RENT

—continued.

## 11. SETTING ASIDE SALE—continued.

operated to transfer the tenure to the purchaser. TARA LAL SINGH v. SAROBAR SINGH

[I. L. R., 27 Calc., 407]

L. R., 27 I. A., 33

4 C. W. N., 533

188. ———— *Decree for sale set aside on review—Bona fide purchaser—Suit to set aside sale.*—A purchased a share of B's talukh at an auction-sale in execution of an *ex-parte* decree obtained against B under s. 105 of Act X of 1859. B obtained leave under s. 58 of Act X of 1859 to revive the suit, and succeeded in getting it dismissed. He now sued to set aside the sale to A. *Held* that the sale to A was binding against B, notwithstanding that the decree in execution of which it had taken place had been set aside in review, provided the sale was *bona fide*. JAN ALI v. JAN ALI CHOWDHRY

[I. B. L. R., A. C., 56: 10 W. R., 154]

189. ———— *Decree for sale set aside for fraud—Suit to set aside sale.*—In a suit to annul the sale of an under-tenure in execution of a decree under Act X of 1859, which was subsequently set aside on the allegation that it had been obtained collusively and by fraud, it was found that neither the decree holder nor the purchaser was guilty of any fraud. *Held* that the mere circumstance of the decree under which the sale had taken place having itself been set aside did not invalidate the sale, the plaintiff having failed to show that the purchaser was a party to the fraud which led to the decree and sale. JUGUN KISHORE BANERJEE v. ABHAYA CHARAN SARMA

[I. B. L. R., A. C., 84]

MOHESH CHUNDER BAGCHEE v. DWARKANATH MOITRO . . . . . 24 W. R., 260

190. ———— *Sale while warrant is in force against moveable property—Beng. Act VIII of 1869, s. 61—Irregularity in sale—Suit to set aside sale for irregularity.*—Under s. 61 of Bengal Act VIII of 1869, a sale for arrears of rent, while a warrant against the moveable property of the debtor is still in force, is not merely irregular, but void. A suit will lie to set aside an auction sale for arrears of rent where the decree-holder himself becomes the purchaser, on the ground of irregularity in conducting or publishing it, unless it be shown that the judgment-debtor has failed to set the sale aside in a proceeding under the Civil Procedure Code, or having full opportunity of so doing, has neglected to do so. UJOLA DAS v. DHIRAJ MAHATAB CHAND

[7 C. L. R., 215]

191. ———— *Want of material injury—Beng. Reg. VIII of 1919.*—A purchaser under a sale for arrears of rent is not entitled to have the purchase set aside on the ground merely of an irregularity in sticking up the preliminary advertisement, unless he can show that he has been prejudiced thereby. JOYRUB BEBE v. AHMED JAM

[Marsh., 31: 1 Hay, 63]

192. ———— *Want of notice of suit for arrears—Suit to set aside sale.*—No suit will lie

## SALE FOR ARREARS OF RENT

—continued—

## 11 SETTING ASIDE SALE—continued

to set aside the sale of an estate in execution of a decree for arrears of rent at enhanced rates accorded to a purchaser for placement subsequently returned on appeal, was on the ground of want of notice of the sale of arrears of rent. **DOORNA PERSHAD PILL (GOWDARY) v. JOORSH PERSHAD GOWDARY** 4 W. R., Act X, 38

## 193 Want of notice of sale

*Possessory purchaser*—If a purchaser is sold for arrears of rent without the notice required by Regulation VIII of 1919 the sale is informal and can be set aside notwithstanding the bona fides of the purchaser. **MODARACK ALI v. AMER ALI** 21 W. R., 253

194. — *Unregistered*

*tenant—Purchaser—Not to set aside sale*—The purchaser of a tenure which is liable to be sold under Regulation VIII of 1919 who has registered his name as tenant is not entitled on a sale of the tenure to no effect of sale and a writ brought by him for reversal of the sale on that ground was dismissed. **DHURPATY SINGH RAY v. VILLAVATI ALI**

[19 B. L. R., 183 note 15 W. R., 211]

**Also BHONSO TARIKAR DOSSIE v. PHOONNY MOH DOSSIE** 13 B. L. R., 180 note

**GOSWAMI MCKHILL DOSS v. JOTI HENRY SINGH** 25 W. R., 162

195. — *Prag Ety III of 1919 s. 14—Potala sale—No potala interest—Overs of proof of requirements of Reg. VIII of 1919*

Certain potala lands had been taken under Reg. VIII of 1919 and purchased by the defendants. The plaintiffs being co-potdars of a portion of the lands taken, notices were after the sale dispensed by the defendants. The co-potdars then brought suit against the defendants asking for possession of the grounds forming their copotdary alleging that the notices of sale had not been duly served and that the proceedings taken by the defendants were void as they were taken in the name of the last deceased holder of the potala. The remainder was made a party to the suit, but no relief was asked against him. Held that notwithstanding that the parties questioned the validity of the sale, the suit was not one under s. 14 of the Regulation, no relief being claimed against the remainder and that the plaintiffs' only remedy was a suit under s. 14 of the Regulation to set aside the sale of the entire potala. **SURESH CHANDRA MEKHODARYA v. AKKOR 4350** I. L. R., 20 Cal., 746

196 Vagueness of specification and notice of sale. *Act X of 1909, s. 101*—Want of clarity in the specification of the arrears and costs for which a sale takes place or in the mode in which the notice is published is not an irregularity vitiating a sale for arrears of rent if fraud is absent. **MAHOMED AHMEDODDIN ALI v. LOSS CHITTO** [15 W. R., 279]

197. — *Absence of one shareholder's name from proceedings—Irregularity affecting*

## SALE FOR ARREARS OF RENT

—continued—

## 11 SETTING ASIDE SALE—continued.

*validity of sale*—Where a tenure was duly sold for arrears of rent under Act X of 1909 and a Potala Act VIII of 1905, the absence of a shareholder's name from the proceedings did not as a matter of law invalidate the sale as against him. **DOORNA PERSHAD PILL (GOWDARY) v. JOORSH PERSHAD GOWDARY**

[14 W. R., 30]

198 Fixing date of sale—*Prag Ety III of 1919*—*Custom—Uniformity of practice*—As regards the date fixed for sale and the era to be followed the intention of the Regulation was to lay down a uniform practice in each local court. Uniformity being the essential requirement, and the particular date only the form of enforcing regularity, a practice which has been established for a course of years and which is reasonable and convenient in itself is not liable to objection on a mere point of form. **PITAM SINGH PANDA v. LAKSHMI DEVI PANDA** 24 W. R., 129

199. — *Law—Prag Ety III of 1919*—According to Regulation VIII of 1919, the sale of a potala tenure for arrears of rent must take place on a day in the Beggal month of Jyest. When a sale was advertised to take place on the 15th Jyest 1909, which date was erroneously stated in the sale notice to correspond with Saturday, May 15th, 1909, whereas the 15th Jyest was in fact Sunday, May 16th, and the sale took place on Saturday, the 14th Jyest the sale was held to be illegal in consequence of its not having taken place on the 15th Jyest or any subsequent date to which it might have been adjourned after due notice. **BACHAM MOOKHERJEE v. ISSER CHATTERJEE MOOKHERJEE** W. R., 1834, 4

200. — *Change of date of sale—Sale not for sale arrears—Prag Ety III of 1919*—In a suit to set aside a sale for arrears of rent due up to Anshun 1901 the plaintiff, who claimed under a deed of conditional sale, was held not entitled to a decree on the following grounds. The change of date of sale from a holiday to the next advertised public sale day was not in this case such a postponement of the sale as to require any new distinct notice. A sale is not invalid because it is not for the full amount of arrears due at the end of the year; it may take place at the end of the year for such arrears as may then be due. No fraud or collusion was proved to justify the sale being set aside. **FORNES v. PRATAP SINGH DOSSA**

[7 W. R., 409]

201. — *Postponement of sale—Discretion of Court*—A sale in execution of a decree under Pota Act X of 1909 can be postponed at the discretion of the Court only when the postponement is shown to promise benefit to the judgment-debtor so that it will put him in a position to satisfy the demand, or when an immediate sale would be likely to entail injury to him, while a postponement would cause no serious prejudice to the decree-holder. **JANAKESATH MOOKHERJEE v. PANDA MONTY CHATTERJEE** 20 W. R., 130

## SALE FOR ARREARS OF RENT —continued.

### 11. SETTING ASIDE SALE—concluded.

202. ————— *Mad. Act VIII of 1865 (Rent Recovery Act), s. 53—Adjournment for want of bidders to next day—Duty of officer conducting sale.*—A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empowered to sell. *Held* that the sale was invalid. *PALANI v. SIVALINGA* . . . I. L. R., 8 Mad., 6

203. ————— *Inadequacy of price—Ground for setting aside sale.*—Inadequacy of price is no ground for setting aside a sale regularly held for arrears of rent under the patni law. *MUNGAZEE CHATRASSEE v. SHIMO SOONDUREE* 21 W. R., 369

204. ————— *Irregularity not caused by act or omission of decree holder—Act X of 1859, s. 104—Damages.*—S. 104, Act X of 1859, does not enact that the decree-holder is to pay damages whenever it may be found that there has been an irregularity in publishing the sale processes, wholly irrespective of the question whether such irregularity was caused by his acts or omissions. *RAMCHUNDER SURMAN CHUCKERBUTTY v. KATTE CHUNDER SINGH* [7 W. R., 307

205. ————— *Omission to tender before sale—Inclusion of irrecoverable charges.*—Where there is no tender before sale of the amount of rent due, a sale under Regulation VIII of 1819 cannot be set aside merely because some charges were included which might not strictly be recoverable under the Regulation, where the zamindar in his petition clearly distinguished the amount due for rent from such charges. *PITAMBER PANDA v. DAMOODER DOSS. DASSIE v. PITAMBER PANDA* . . . 24 W. R., 129

### 12. EFFECT OF SETTING ASIDE SALE.

206. ————— *Recovery of purchase-money—Decree for purchase-money—Execution—Fresh suit—Interest on deposit.*—In a suit to set aside the sale of a patni tenure, where a purchaser is made a co-defendant under s. 14, Regulation VIII of 1819, and it is decreed that the purchaser may recover the purchase-money from the zamindar defendant, *—Held* that the purchaser may proceed in execution without a fresh suit. If the purchase-money of a patni is in deposit in the Collectorate, and the zamindar, judgment-debtor, fails to assist the judgment-creditor in recovering his dues, he is liable for interest on the entire sum. *PREOLALL GOSSAIN v. GIAN TURUNGINEL DOSSIA* . . . 13 W. R., 161

207. ————— *Sale where no patni tenure exists.*—*Held* by JACKSON, J. (MOORE, J., *dissentante*), that a zamindar who puts up for sale a patni under Regulation VIII of 1819, guarantees to the purchaser that there are some lands appertaining to the patni, and if it turns out that there are no such lands (that there is in fact no such patni), the purchaser will be entitled to recover his

## SALE FOR ARREARS OF RENT —continued.

### 12. EFFECT OF SETTING ASIDE SALE —continued.

purchase-money. *KHELUT CHUNDER GHOSE v. KISHEN GOBIND DEB* . . . 16 W. R., 128

208. ————— *Refund of bonus paid to purchaser on his purchase—Lease, Construction of—Landlord and tenant—Failure of consideration—Sale subsequently set aside.*—The defendants, after purchasing a patni talukhi at an auction sale for arrears of rent under Regulation VIII of 1819, granted a dar-patni lease to the plaintiffs (the former dar-patnidars) and received a bonus of Rs. 199. The auction-sale being five years afterwards set aside, *—Held* that the plaintiffs were entitled to a refund of the bonus, although they had not been dispossessed, but had simply reverted to their former position as darpatnidars under the former patnidar. *TARACHAND BISWAS v. RAM GOBIND CROWDHRY*

[I. L. R., 4 Calc., 778; 4 C. L. R., 20

209. ————— *Indemnification for payments of rent while sale existed—Beng. Reg. VIII of 1819, s. 14, cl. 1.*—Where a zamindar sells a patni tenure for arrears of rent and the sale is afterwards set aside, the purchaser can, under Regulation VIII of 1819, s. 14, cl. 1, require the Court to compel the zamindar to indemnify him on account of all payments of rent which he may have made, and if he does not do so, he cannot set up his loss in answer to a liability which he has incurred. *TARACHAND BISWAS v. NAFAR ALI BISWAS*

[I. C. L. R., 236

210. ————— *Position of holder of chahar patni—Sale—Under-tenure—Purchaser, Liability of.*—The holder of a chahar-patni, or other subordinate tenure, whose tenure has been brought to an end by the sale for arrears of rent of a superior tenure on which his own was dependent, is, upon such sale being set aside, remitted to his previous position, and is entitled to recover possession of the land comprised in his chahar-patni from the purchaser or any assignee of the purchaser at such sale, and he can do so notwithstanding that he himself took a dar-patni, including the land he had held as chahar-patnidar, from the purchaser at such sale, and that this dar patni was afterwards sold in execution of a decree against himself, and purchased at such last-mentioned sale by the person whom he seeks to evict on the strength of his original title. *SREENARAY BAGCHFI v. SMITH*

[I. L. R., 4 Calc., 807; 4 C. L. R., 146

211. ————— *Order for refund of purchase-money—Beng. Reg. VIII of 1819—Notice of sale—Setting aside sale—Refund of purchase-money.*—If a patni is sold for arrears of rent without the notice required by Regulation VIII of 1819, the sale is informal and can be set aside, notwithstanding the *bona fides* of the purchaser. Where such a sale was set aside and the lower Appellate Court refused to make an order for refund of the purchase-money, the High Court in special appeal, and with reference to s. 14, cl. 1, of the

# SALE FOR ARREARS OF RENT

—concluded

## 12. EFFECT OF SETTING ASIDE SALE

—concluded.

Registration declared the purchaser entitled to a refund with interest. **MORARJEE ALI v. ANNE ALI** 21 W R, 353

212. — Rights of a auction purchaser on sale being set aside—Interest on purchase money—*Benoy Pag VIII of 1912* s. 14—Under s. 14 of Regulation VIII of 1912 when a sale is set aside the auction purchaser is entitled to get back the purchase-money with interest. **BNOR CHAND MAHARAJ v. ANITA LIL MEHRA** I. L. R., 27 Cal., 303

# SALE FOR ARREARS OF REVENUE

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See CHANDRASEKHAR SINGHAR DEVIKAR DECOIT ACT

11. RIGHT OF SET—REVENUE, SALE FOR ARREARS OF

Sale to set aside—

s. Co-Sale—BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—POSSESSION I. L. R., Ap., 42

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# SALE FOR ARREARS OF REVENUE

—cont. used

## 1. RIGHT TO SELL

1. — Right of Government.—Whenever the land revenue is in arrear Government is entitled to sell the land and to realize its due whoever is the defaulter. **HALAKISHNA VASDEV v. MADHARAJ NARAYAN** [I. L. R., 5 Bom., 73

2. — — — — — Arrears—Benoy Regs. XII of 1798 and III of 1799—Benoy Reg. V of 1812—By Regulations XIV of 1793 and VII of 1799 the Governor General in Council may order a sale for arrears of a monthly instalment of revenue before the close of the year but in order to warrant that Act there must be an arrear of a previous year or of a monthly instalment. The existence of a writ of enforcement or distraint is no a condition precedent to the right to enforce the payment of the revenue by monthly instalments, provided the monthly instalments be fixed and determined. By Regulation V of 1812, if there be an arrear of the annual assessment, or of a fixed monthly instalment of that assessment, unpaid on the first day of the following month, the Governor General in Council may order a sale, and the Board of Revenue may direct the whole or any of the defaulting zamindari to be sold. When the monthly instalments are fixed and determined, the Government does not forego the right of selling the zamindari on default being made in payment of those instalments, by taking a bond from sureties by which the estates of the sureties also were rendered liable for the payment. **KIRI CHANDRA BOY v. GOVERNMENT** [5 W R, P C., 41 1 Moore's L. A., 393

## 2. PROTECTED TENURES

3. — — — — — Act XI of 1809 s. 37—Power of purchaser to avoid an occupancy—Right of occupancy.—The title of a purchaser at a sale for arrears of Government revenue to void an under-tenure and eject the tenant will depend upon whether the tenure is protected under any of the clauses of s. 37 of Act XI of 1809 and whether the tenant has a right of occupancy. If the tenant can prove such a right he cannot be evicted under s. 37. **SHYAM PRASAD SINGH v. HARKHOND KIRI BOSE SINGH** 12 W R, 123

4. — — — — — Right of transferee of purchaser at sale for arrears of revenue.—The rights which are conferred upon a purchaser at a sale for arrears of revenue under Act XI of 1809 s. 37 are capable of being transferred to another person, if the transfer follows immediately upon the sale or with a reasonable time thereafter. **HARKHOND CHANDRA DUTT v. JODAI ALI** 23 W R, 29

5. — — — — — Right of purchaser to avoid under-tenure.—When a sale is granted by a Hindu widow though in appearance a duly registered tenure falling within the 3rd exception of s. 37 Act XI of 1809 was in reality a fraud which the owner or reversioner might have avoided,

## SALE FOR ARREARS OF REVENUE

—continued.

### 2. PROTECTED TENURES—continued.

—Held that a revenue sale passes the right of avoiding it to the auction-purchaser. **RAM CHUNDER CHUCKERBUTTY v. KASHINATH MOITRA** [W. R., 1884, 66]

*Suit by purchaser*

6. —to avoid under-tenure—Beng. Act VIII of 1865, s. 16—Resident and hereditary cultivator.—A certain chur having been converted into two estates paying Government revenue, the plaintiffs became the purchasers of one of these estates at a sale for arrears of revenue and of a howla lease of the other at an auction-sale for arrears of rent, and brought a suit, in virtue of s. 37 of Act XI of 1859 and s. 16 of Bengal Act VIII of 1865, to avoid the tenures of the defendants, who held, in shikmi talukhdari and howladari tenure, lands appertaining to both estates. The defendants admitted the alleged nature of their holdings, but claimed exemption from eviction on the ground that their ancestor, more than twelve years before, had cleared and cultivated the land and built a house thereon, and that since his death they themselves had continued to cultivate the land and reside upon it. The lower Courts having found that the defendants were hereditary and resident cultivators, it was held that the defendants were entitled to the benefit of the proviso in s. 16 of Bengal Act VIII of 1865, the words of that proviso being wide enough to embrace every resident and hereditary cultivator irrespective of his denomination. **MAHOMED ASSANOULLAH CHOWDHRY v. SHANSHIR ALI** 4 C. L. R., 165

7. —Garden and homestead land with tanks.—Where a party had occupied land for about forty years under a howla lease, and had made tanks, gardens, and homesteads, he was held to be protected under Act XI of 1859, s. 37. **GRISH CHUNDER BANERJEE v. GUNGA DOORGA** [25 W. R., 60]

8. —Protection from effect of sale—Land planted as garden.—A landlord cannot, by planting a garden in any portion of his estate, become, *quoad* such plantation, his own raiyot, so as to bring the land so planted under the protection of Act XI of 1859, s. 37, in the event of his estate being sold for arrears of revenue. **BOOL CHAND JHA v. LUTHOO MOODEE** 23 W. R., 387

9. —Garden land—Under-tenure—Avoidance of tenure.—Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser. **GOBIND CHUNDRA SEN v. JOY CHUNDRA CHASER** I. L. R., 12 Calc., 327

10. —Permanent structures and improvements—Suit to avoid incumbrances.—In a suit to avoid an under-tenure by the purchasers at an auction sale for arrears of Government revenue, the defendants contended that the

## SALE FOR ARREARS OF REVENUE

—continued.

### 2. PROTECTED TENURES—continued.

tenure was created prior to the permanent settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that accordingly it was protected under exceptions 1 and 4 to s. 37 of Act XI of 1859; but the lower Court gave a decree to the plaintiffs and annulled the under tenure. Held by **WHITE, J.**, that, notwithstanding a party may fail to show that his tenure was created prior to the permanent settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding. **BHAGO BIBEE v. RAM KANT ROY CHOWDRY** [I. L. R., 3 Calc., 293]

11. —Under-tenure holders—Raiyats, Rights of—Improvements on land.—A person holding land which is not protected from the operation of s. 37 of Act XI of 1859 by any of the first three exceptions is yet entitled to the benefit of the 4th exception in respect of any of the items mentioned therein which may have been established on the land; and there is nothing in the words of the exception confining the benefit of it to tenure or under-tenure-holders, and excluding the raiyats from it. **Bhago Bibee v. Ramkant Roy Chowdhry, I. L. R., 3 Calc., 293**, followed. The benefit of the 4th exception to s. 37, Act XI of 1859 must be limited to improvements effected *bona fide* and to permanent buildings erected before the revenue sales, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous occupier. **AJGUR ALI v. ASMUT ALI** [I. L. R., 8 Calc., 110; 10 C. L. R., 8]

12. —Lease of tank without surrounding land.—A lease of tank without any portion of the surrounding land is not protected under cl. 4, s. 37 of Act XI of 1859, as it is not, within the meaning of that clause, a lease of land whereon a tank has been excavated. **Ajgur Ali v. Asmut Ali, I. L. R., 8 Calc., 110**, referred to. **ASMAT ALI v. HASMAT KHAN** 2 C. W. N., 412

13. —Ejectment—Dwelling-house, tanks, and trees.—The plaintiffs, purchasers at a revenue sale, sought to eject the defendant from a piece of land measuring a little over one bigha. The defendant pleaded that he had his dwelling-houses, tank, and trees on the holding. It was found that the dwelling-houses consisted of certain huts, and that the so-called tank was some two or three cubits in extent. As to the trees, there was no finding that there was anything in the shape of a plantation or garden. Held that a dwelling-house, to be exempted under s. 37 of Act XI of 1859, must be a dwelling-house of a permanent character, and mere huts would not come within that description. That upon the findings no cause had been made out for exemption of any portion of the land. **SHYAMA CHAMAN DAS** 3 C. W. N., 222

# SALE FOR ARREARS OF REVENUE : SALE FOR ARREARS OF REVENUE

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## 2 PROTECTED TENURE.—continued

14. — — — — — s 52.—*Plantations*—The plaintiff was the purchaser at a sale under Act XI of 1859 of the 24 Pergunnahs for arrears of revenue of an estate in the Sunderbunds in which the defendant was holder of a mukdama was the jagalabam tenure, and which he was to clear away the jungle and then to cultivate the land with paddy. In a suit after notice to him to eject the defendant and obtain possession of the land, or to have the defendant's tenure annulled,—*Held* that the defendant's tenure was not protected as being one of lands whereon plantations have been made within the meaning of s. 52 of Act XI of 1859. **BHOLANATH BANDYOPADHYA v. UMACHTEN BANDYOPADHYA** (I.L.R. 14 Cal., 440)

## 3 SALE OF SHARE OF ESTATE.

15. — — — — — Separation of estate—*Act XI of 1859 ss 10, 11 and 37*—“*Shares*” of an estate—The portion of an estate for which a separate account is opened under ss 10 and 11 of Act XI of 1859 and the portion from which it is separated, are equally shares within the meaning of s. 10. The latter although it may for convenience's sake be termed the parent estate, cannot be considered as entire estate within the meaning of s. 37, but is still a share and liable to all the incidents of a share. **MOSOMTS MOOKERJEE v. HIROMOMTS MOOKERJEE** (1 W.R., 37)

16. — — — — — *Act XI of 1859, s. 13*—*Application for separate account without order of Collector*—s 13 Act XI of 1859 does not say that when an application has been made for a separate account, that he is to put up to sale only the share in respect of which an arrear of revenue may be due. An order setting aside the sale as to the plaintiff's share therefore reversed on appeal. **RAJENDRO KISHORE NARAIN SINGH v. DOORBA KOOXWAR** (7 W.R., 154)

17. — — — — — *Act XI of 1859, s. 11*—*Share of estate*—A sharer of a joint taluk, whose share consists of a specific portion of land, can claim protection from a sale for arrears of revenue only under s. 11, Act XI of 1859, non-registry of the taluk as a shikma taluk under that Act will not preclude any person claiming him self wronged by such registry from suing for the cancellation of the same. **GORE CHUNDER GOOWD v. TARA MOHON** (8 W.R., 217)

18. — — — — — *Act XI of 1859, s. 11*—*Separation of shares*—The proprietors of a certain lot having obtained a separation of their shares under s. 11 of Act XI of 1859, were remained one share (comprising one village and one-third of three other villages) which was sold for arrears of revenue, and purchased by W. Of this share W. sold one village to P, who agreed to pay a certain

## 3 SALE OF SHARE OF ESTATE.—continued

sum as his share of the Government jumma, and then applied to the Collector to open a separate account at the rate which had been agreed upon. The shareholders having objected the Collector referred the parties to the Civil Court under s. 12. P then brought a suit in the Civil Court for a separate account. *Held* that there was no legal objection to plaintiff having his separate share opened at the rate he mentioned even if the jumma on the share which remained in W's possession was excessive, for if the whole estate were put up to sale for arrears on account of that remaining share, the other shareholders could always protect themselves by paying the sum due. **POORNO CHUNDER BANERJEE v. HAN KAVATE GHOSH** (13 W.R., 213)

19. — — — — — *Act XI of 1859, ss 10, 11, and 13*—*Separation of shares*—*Sold by purchase at private sale for possession of specific share*—The proprietors of a joint mahal the jumma of which had been partitioned under s. 10, Act XI of 1859 were in possession of specific shares under a private arrangement among themselves, but had not obtained separation of shares under s. 11. One of the proprietors sold his share to the plaintiff, and the shares of two other proprietors who made default to payment of the revenue were sold under s. 13, Act XI of 1859, and purchased by the defendants. It is a suit for exclusive possession of the share purchased by the plaintiff,—*Held* that the defendants acquired by their purchase an interest in the property as an undivided estate, and the plaintiff was not entitled as against them to have exclusive possession of any specific share. **GRANADEN MISHR v. KHEEROO MITTAL** (14 B.L.R., 170; 23 W.R., 449)

## 4 INCUMBRANCES

### (a) GENERALLY

20. — — — — — Limit of power to avoid incumbrances—*Act XI of 1859, s. 11*—*Purchaser of entire estate*—The power of a purchaser at a revenue sale to annul all incumbrances is limited to purchasers of entire estates. **KALIDASS GHOSH v. CHANDRA MOHON DAS** (8 W.R., 63)

**MADHUS CHANDRA CHOWDHRY v. PRAMODHONATH BOY** (20 W.R., 284)

### (b) ACT I OF 1845.

21. — — — — — Object of act—*Fraudulent purchaser—Sale by mortgagee*—Act I of 1845 was not designed to protect a fraudulent purchaser as to the question whether a plaintiff could in point of law insist, notwithstanding an auction sale for arrears of revenue, that as against him the sale ought to be viewed as a private sale. *Held* that under the circumstances, a fraudulent device to bring about the same being alleged,—the sale must be considered a private sale. The exception that a fraudulent purchaser at an auction sale by a mortgagee will not



## SALE FOR ARREARS OF REVENUE —continued.

### 4. INCUMBRANCES—continued.

defeat the equity of redemption, is an exception to the rule that a sale for arrears of revenue gives a title against all the world. *SIDHEE NUZUR ALLY KHAN v. OJODHYARAM KHAN*

[10 Moore's L. A., 540: 5 W. R., P. C., 83

22. ——— Right to avoid incumbrances—*Right of purchaser*.—*Quare*—Whether the auction-purchaser under Act I of 1845, at a sale for arrears of revenue, was entitled to take free of all incumbrances created by the defaulting proprietor. *JUGGODESHURY DOSSIA v. UMACHURN ROY*

[7 W. R., 237

23. ——— *Right of auction-purchaser—Act I of 1845, s. 26*—An auction-purchaser of a zamindari at a sale for arrears of revenue is not entitled, under s. 26, Act I of 1845, to eject a holder of a lakhiraj tenure though held under an invalid title. *DOORGA PRESHAD CHOWDHURY v. RAJENDUR NARAIN ROY*

2 May, 121

24. ——— *Agreement by former owner as to division of chur—Act I of 1845, s. 26*.—A purchaser at a sale for arrears of Government revenue, suing to establish his right to chur lands which had accreted to the purchased estate, is not bound by an agreement entered into by the prior owner with the owners of the adjoining estate to divide the chur equally; such an agreement is an alienation of, or incumbrance on, the purchased estate, and therefore, under s. 26 of Act I of 1845, void as against the purchaser (*disentente CAMPBELL, J.*). But *per NORMAN, J.*, and *CAMPBELL, J.*, it would seem that purchasers under any of the sale laws since Act XII of 1841 may be bound by a decree in a boundary suit against the prior owner. *BOYKUNTATH CHATTERJEE v. AMEERONISSA KHATOON*

2 W. R., 191

25. ——— *Act I of 1845, s. 26—Mokurari tenant in Benares, Right of*—S. 26 of Act I of 1845, which enables auction-purchasers at sales for arrears of revenue to eject tenants in the province of Benares, was by s. 1 of Act X of 1859 made subject to the modifications contained in the latter Act. Therefore, notwithstanding a sale by auction for arrears of revenue, a mokurari tenant in the province of Benares is entitled to receive a pottah at the fixed rent theretofore paid by him. *MUNRO v. BALUCK SINGH*

[1 N. W., 153: Ed. 1873, 235

26. ——— *Act I of 1845, s. 26, cl. 3—Purchaser's right to eject—Khodkast kadimee raiyat*.—Possession as a khodkast kadimee raiyat having a right of occupancy (but not merely as a khodkast raiyat for twelve years) barred an auction-purchaser's right of eviction under cl. 3, s. 26, Act I of 1845. *LOTF ALI KHAN v. KASHER DEAL*

[1 W. R., 6

27. ——— *Act I of 1845, s. 26—Embankments*.—Embankments are not incumbrances liable to be extinguished under s. 26, Act

## SALE FOR ARREARS OF REVENUE —continued.

### 4. INCUMBRANCES—continued

I of 1845, which refers only to tenures and leases. *COLLECTOR OF 24-PERGUNNAHS v. JOYNARAIN BOSE*  
[W. R., F. B., 17: 1 Ind. Jur., O. S., 101

(c) BENGAL REGULATION XI OF 1822.

28. ——— *Right to alter arrangements as to rent—Purchase by Government—Position of old proprietors*.—An estate having been sold for arrears of revenue under Regulation XI of 1822, it was purchased by Government, and the Government as landlord raised the rents throughout the property. Held that the revenue sale cancelled all former arrangements entered into immediately by the former proprietors, and that the fresh settlement made by Government with the present proprietors would not restore former arrangements and rates because they happen to be the heirs of the former proprietors. *GANGAMONEE v. LUTEEFOONISSA CHOWDHRAIN*

[7 W. R., 196

29. ——— *Right to cancel talukhdari tenure—Settlement—Right to eject*.—The Government purchased the zamindari rights in a pergunnah, under Regulation XI of 1822 at a sale for arrears of Government revenue, and re-settled one of the talukhs in the pergunnah (which talukh had been created subsequently to the decennial settlement) with the plaintiffs as talukhdars. Subsequently and after the terms for which they had re-settled with the plaintiffs had expired, the Government sold their zamindari rights to the defendant, who ejected the plaintiffs. In a suit to recover possession, Held that it was the intention of Government to retain talukhdars in possession of their lands during the subsistence of their tenures subject to the condition of having their rents enhanced according to the pergunnah rates; and as in this case the proceedings which were taken by the Government showed that they did not cancel the plaintiffs' tenure, the defendant who purchased from the Government could not eject the plaintiffs, who were entitled to retain possession, subject to a liability to enhancement. Under the sale law as it existed before 1822, a talukhdar could not be dispossessed at the will of the purchaser, he was at most liable to pay the full pergunnah rate, and could only be ejected after refusal to pay the enhanced rate, but under Regulation XI of 1822, dependent talukhs created subsequent to the decennial settlement were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of Government revenue, unless they fell within the class contemplated by the 32nd section of that Regulation. Where an auction-purchaser, under Regulation XI of 1822, intends to cancel a talukhdari tenure (a power which he might or might not exercise), he must take some clear step to declare the avoidance or cancellation of the tenure. *ASSANOULLAH v. OBHOY CHURN ROY*

[13 W. R., P. C., 24: 13 Moore's L. A., 317

30. ——— *Right of cancellation by Government as auction-purchaser—Exercise of power of cancellation*.—Where the Privy

## SALE FOR ARREARS OF REVENUE

—continued—

## 4. INCUMBRANCES—continued

Council in the case of *Arennolla v. Ollay Chura Roy, 13 Moore's L.A. 317* recognizing that the Government had, as the auction-purchaser, a sale for arrears of revenue, the option of cancelling and avoiding the sale, but in that case ruled that it was incumbent on Government to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure and finding that the Government had not exercised that power, declared the tenant entitled to retain possession of his land during the subsistence of his tenure. Held that the decision did not apply to a case in which the proceedings of Government showed that it had exercised the power of cancellation. It was also that the inducement in that case referred mainly to tenures purchased between 1917 and 1922 but not to tenures created after Regulation XI of 1922 had informed persons that their rights were liable to be cancelled by a purchaser at an auction sale for arrears of revenue. *ATTALOODDEY MAHOMED v. SANIOULLAH SANIOULLAH v. ATTAODDEY MAHOMED* [23 W.R. 245]

[23 W.R. 245]

31. — Right of Government to annul tenures—*Precedence of cancellation—Precedence*—Where on the sale of a zamindari for arrears of revenue the Government has the right to annul all under tenures not specially protected, yet it cannot be taken for granted that the Government has enforced its extrinsic rights and even where the right of Government to do so is asserted in the course of the proceedings, it is a matter which has been decided upon evidence, whether, having asserted its right, the Government afterwards actually enforced it. *TARLOCHEN CHUCKERBORTY v. KOWLA KANT CHUCKERBORTY KOWLA KANT CHUCKERBORTY v. NARRO SINGHO SINGH* 25 W.R. 638

32. — *Precedence of cancellation—Settlement—Right to eject incumbrancers*—Where at an auction-sale for arrears of revenue the Government becomes the purchaser of the property and afterwards makes a settlement with the former proprietors of the under-tenures, the question whether or not the Government cancelled the under-tenures existing at the time of the sale is one to be decided solely according to the effect of the proceedings taken by the Collector in each case. It is a mistake to suppose that their Lordships of the Privy Council in the case of *Arennolla v. Ollay Chura Roy, 13 Moore's L.A. 317; 13 W.R. 245* intended to lay down a general rule according to which all questions of this nature are necessarily to be decided. *SROOK DES SHANA v. ALLADI* [3 C.L.R. 13]

[3 C.L.R. 13]

*See COOROO PERSHAD CHUCKERBORTY v. BIKI NATH CHUCKERBORTY* 2 C.L.R. 218

33. — Right of purchaser—*Tender of Government revenue by defaulters mortgage—Liability of Collector*—The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without either as depriving the defaulter

## SALE FOR ARREARS OF REVENUE

—continued—

## 4. INCUMBRANCES—continued

of his right of occupation, under a 35 of the Bombay Survey Act, I of 1884, have only sold his right, title and interest. *Adul Gani v. Arshad Ali Bakshi, 10 Bom. 415, and Gudo Shiddique v. Mardan Sahib 10 Bom. 419* followed. The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent but if he does refuse it, and the land is so the title of the purchaser is unimpaired. *GHEELABAI BHAIKARIDAS v. PRAKASHI- VAN ICHHANAM* 11 Bom. 218

34. — Right of ejectment—*Reg. XI of 1884—Under-tenures—Right to impeach sale*—The right to impeach a sale of lands for arrears of Government revenue extends not only to the defaulter proprietor but to derivative holders under him. By Regulation XI of 1882, s. 20, all under-tenures are extinguished by a Government sale of the proprietor's lands for arrears of revenue and an auction-purchaser takes the lands clear of all under-tenures. At a sale by Government for arrears of revenue the Government became purchaser, and afterwards granted a lease of the lands for a term of years, and put their leases into possession. At the time of the sale the lands were subject to an intermediate lease. No suit was brought to reverse the sale, but the Government some time afterwards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors subject to the recognition of the claims of their lessees. This offer resulted in an arrangement between the Government, the original proprietors, and the Government lessees, and eventually the original proprietors upheld the lease to the Government lessees to a part of the lands called the Jungle Mehal for a term of years at a reduced rent. In a suit by the intermediate lease for possession, *He d. (revenue)* the decree of the Sudder Court that by Regulation XI of 1882, s. 20, the intermediate lease was determined by the sale for Government arrears, and that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise and not such an unconditional restoration as an ouster to a reversal of the sale, and the consequent revival of the intermediate lease. *Aliter*—If a suit had been brought and a decree made for reversal of the sale. *WATSON v. SREEMOY LAL KHAN* 6 Moore's L.A., 447

(4) ACT XI OF 1939

35. — *Lakshadwars—Bombay Reg. VII of 1922, s. 10, cl. 7 and 8—Arrangement by Commissioner for payment of revenue—Payment by all through principal proprietor*—In a suit for ejectment and khas possession by an auction purchaser under Act XI of 1939 the defendants' case was that after resumption of their lakshadwars tenure a settlement had been made under Regulation VII of 1922 with the principal proprietor, and by that settlement it was arranged that the Government revenue payable

## SALE FOR ARREARS OF REVENUE

—continued.

## 4. INCUMBRANCES—continued.

by all the proprietors, the defendants among them, was to be paid through the principal proprietor, and that the defendants were to hold perpetual possession as shikmidars, and that their rights should be reserved intact. *Held* that the possession of the defendants as lakhirajdars could not be disturbed as long as they paid the revenue assessed upon them under the settlement. *Held* also (MAREBY, J., dissentiente) that cl. 8, s. 10, Regulation VII of 1822, applied only to cases referred to in cl. 7,—that is, of cultivating proprietors on pattidari or bhyachari tenure, or the like, and not to a case of this kind. **RAM GOBIND ROY v. KUSHUPUDOA**. 14 W. R., 1

Affirmed on review, where it was held that a Commissioner's amulnam cannot destroy legal rights, even if no protest or objection be made. The order of a Commissioner requiring proprietors having separate jummas, to pay, for the convenience of the Collector, their shares of revenue through one of their number, cannot override their legal right of separate proprietorship allowed under the settlement law and preserved by express record, or transform such right into a joint tenancy. Where therefore such order had been made, and the defendants paid the revenue through one of their number and he made default,—*Held* the whole estate was not liable to be sold for his default. **RAM GOBIND ROY v. KUSHUPUDOA**.

[15 W. R., 141]

36. — Right to annul incumbrances—*Encroachments by neighbouring estates*.—The principle under which purchasers of estates at revenue sales acquire such estates in the condition they were in at the permanent settlement, is equally recognized by the sale law (Act XI of 1859) as by the laws previous to it, and applies as much to actual encroachments on the talukh or estates by neighbours as to incumbrances or under-tenures created on it by the old proprietor or by his laches. **GOLUCK MONER DOSSEE v. HURO CHUNDER GHOSE**.

[8 W. R., 62]

37. — *Permanently settled estate*.—An auction purchaser at a revenue sale of a permanently-settled estate is remitted to all the rights possessed by the original settler at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders, the presumption in favour of a purchaser resting upon the principle that every bigha of land sold must contribute to the public revenue unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession. **FORBES v. MAHOMED HOSSEIN**. 12 B. L. R., F. C., 210: 20 W. R., 44

38. — *Suit to annul under-tenures—Right to eject*.—When an auction-purchaser at a sale for arrears of revenue creates a patni, he cannot sue to annul an under-tenure within that patni, as his whole power under Act XI of 1859

## SALE FOR ARREARS OF REVENUE

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## 4. INCUMBRANCES—continued.

passes to the patnidar, who alone can institute such a suit. In such a case the patnidar's competency to sue is not affected by the fact of his being a tenant of only a portion of the estate, provided that portion contains the tenure which is sought to be resumed. A patnidar, under such circumstances, though he may recover rent, is not entitled to eject an under-tenant who had been allowed to dig a tank and remain in possession undisturbed by the former proprietor for a long period (say upwards of thirty years), and who must therefore be assumed to have held with the acquiescence of the former proprietor, such acquiescence being equivalent to a lease. **SREEMUNT RAM DEX v. KOOROO CHAND**. 15 W. R., 481

39. — *Land subject to mortgage*.—Where land in the possession of a mortgagee is sold by the mamlatdars for arrears of Government land revenue,—*Held* that, as the land revenue is the paramount charge on the land, whoever derives title from the occupant takes it subject to that charge; and that therefore the purchaser at the sale was entitled to the land free from any mortgage lien. **ABDUL GANI v. KRISHNAJI BHAKAJI**.

[10 Bom., 416]

40. — Right acquired by purchaser—*Act XI of 1859, ss. 11, 13, 54 Sale of share of zamindari*.—A, in exchange for his lakhiraj land, obtained in 1791 from his zamindar 441 bighas of mal land, which zamindar thereupon created rent-free. The zamindar fell into arrears, and the zamindari was sold. Subsequently, three persons, who had become owners of the zamindari, applied to the Collector under s. 11, Act XI of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares. The revenue due from one of them fell into arrears, and his share, which included the 441 bighas, was sold under s. 13, and purchased by the plaintiff, who now sued the descendants of A to recover possession. *Held* that a sale of a share of a zamindari under s. 13, Act XI of 1859, does not convey to the purchaser the share free from all incumbrances created by the former zamindar, but he acquires the share, as laid down in s. 54, subject to all incumbrances. **KASINATH KOOWAR v. BAKUDEHARI CHOWDHRY**.

[3 B. L. R., A. C., 448]

**S. C. KASHEENATH KOONWAR v. BUNGO BEHARR CHOWDHRY**. 12 W. R., 440

41. — *Act XI of 1859, s. 32—Right of purchaser to eject holders of howla and nim howla tenures*.—Where certain howla and nim-howla tenures were never set aside by the Revenue Settlement or Revenue Commissioner's orders from the time they were recorded as existing rightful hereditary tenures of those classes at the first settlement,—*Held* that the purchaser of the outset talukh could not eject the holders of those tenures under s. 32, Act XI of 1859, so long as they paid their jumma according to the settlement jumma-bandi. **BURODA KANTH LAHA v. GOBIND CHUNDER**.

## SALE FOR ARREARS OF REVENUE

—continued—

## 4 INCUMBRANCES—continued

GOCHO KALEE KISHORE ROY v. GOBIND CHUNDER  
GOCHO 7 W. R., 50

42.

Act XI of 1859,

s. 37—*Incumbrances—Right of purchaser*—A purchaser at a sale for arrears of revenue with a paramount title under s. 37, Act XI of 1859 acquires the estate free from any incumbrance which accrued thereupon from the laches of former proprietors, in the same way as he would have acquired it free from any incumbrance created by sale lease or mortgage. In the absence of any proof to the contrary such purchaser must be assumed to be the owner. THAKOOR DASS ROY CHOWDHURY v. NAREEN KISHORE GEORGE 15 W. R., 652

43.

Act XI of 1859,

s. 37—*Suit to cancel under-tenures—Right of purchaser*—On the 13th January 1871 A and B purchased an estate sold for arrears of Government revenue. The original proprietors asserted their right to collect the rents of a portion of the property by virtue of holding two shikim talukhs and a howla tenure. This right was affirmed by the High Court in April 1875. B had previously sold his interest to C. On the 29th May 1876 A created a patta of his 8 annas in favour of D and F and on the 4th July 1876 C purchased all the rights of the original proprietor. On the 18th January 1877 A sued under Act XI of 1859, s. 37, to cancel or vary the tenures making the original proprietors, C and various tenants, defendants. C objected that C had no right of suit or cause of action, as he had parted with all his rights to D and E and that, as his entire interest in the estate was only 8 annas, he could not sue to cancel a part only of the sub-tenures D and F then applied to be made parties. Held they could not sue, as they were not purchasers of an entire estate within s. 37, Act XI of 1859. Even on the assumption that D and F were properly made plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of the under tenure, both before and after the Government sale. *Sreemant Ram Roy v. Kookoor Chami*, 15 W. R., 431 followed. DWARAKA-NATH PAL v. GRISHCHUNDER BUNDOPADHYA

(I. L. R., 8 Cal., 627)

44.

Act XI of 1859,

s. 37, 52—*Sunderbund estate—District of which portion only is permanently settled—District, Meaning of—Beng. Reg. IX of 1816 and III of 1829—Estate—Beng. Act VII of 1868*—The plaintiff was the auction-purchaser at the sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of the estate in the Sunderbunds on which the defendant was the holder of a mokurari mautrai junglebari tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-P and therefore within that Collectorate with to the provisions of Bengal Act VII of 1868, s. The district of the

## SALE FOR ARREARS OF REVENUE

—continued—

## 4 INCUMBRANCES—continued.

24-Pergunnahs is a permanently-settled district, but the portion of it forming the Sunderbunds was declared by Regulation III of 1828, s. 13, not to be included in the permanent settlement. The Sunderbunds tract was, moreover, under Reg. IX of 1816 formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs. In a suit after notice to quit to eject the defendant and obtain possession of the land, or to have the defendant's tenure annulled—Held that, whether the term "district" was used with reference to the jurisdiction of the Civil Courts or the Revenue Collector, the plaintiff was the purchaser of an estate in a "permanently-settled district" within the meaning of s. 37 of Act XI of 1859, and not in a district "not permanently settled" within s. 52 of that Act, and he was therefore entitled to eject the defendant. The position of the estate within the district of the 24-Pergunnahs was not affected by the appointment of the Commissioner of the Sunderbunds as an officer specially invested with the powers of the Collector within a certain portion of that district. Held also that the defendant's tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859. Held further that, though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Bengal Act VIII of 1868. BHOLANATH BANDO-PADHYA v. UMACHARN BANDO-PADHYA UMACHARN BANDO-PADHYA v. BHOLANATH BANDO-PADHYA

(I. L. R., 14 Cal., 440)

45.

Ejectment, Right

of—*Benami lease obtained by defaulting proprietor from purchaser at revenue sale, Effect of, on under-tenures—Act XI of 1859, s. 37, 53*—A mahal belonging to defendants Nos. 1 and 2 was brought to sale for arrears of Government revenue and purchased by defendant No. 3, from whom the plaintiff obtained a talukdari potah of a portion of the land comprised in the mahal. The plaintiff thereupon sued to eject defendant No. 4 who was in possession of the land under a lease which was found to have been granted previous to the revenue sale. In the suit it was found that the plaintiff obtained the talukdari potah as mere benamiar for defendant No. 1. Held that the provisions of s. 53 of Act XI of 1859 applied to the case, and that the plaintiff was not entitled to interfere with the tenancy of defendant No. 4 or eject him, and that the suit had been rightly dismissed. RASH BEHARI BOSS v. PURNA CHUNDER MOCHKADAE

(I. L. R., 15 Cal., 350)

46.

Act XI of 1859,

s. 37 and 53—*Adverse possession—Limitation*—The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and repurchased from the then purchaser by the plaintiff

## SALE FOR ARREARS OF REVENUE

—continued.

## 4. INCUMBRANCES—continued.

in 1886. He applied under Ch. X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record-of-rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was māl land, though it was held as lakhiraj under certain sanads, and as he also found that no rent had ever been paid for it, it was entered on the record-of-rights as māl land held under those sanads as lakhiraj. The Special Judge on appeal by the plaintiff held that the land having been found to be māl should have been entered as māl land unassessed with rent. In a suit to have the land assessed with rent, it was found that the sanads, under which the defendant claimed to hold, were granted not by any predecessor in title of the plaintiff, and were of a date anterior to the Permanent Settlement. Held that the adverse possession set up by the defendant was within the meaning of s 53 of Act XI of 1859, an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on repurchase. If such adverse possession therefore were sufficiently long, the suit would be barred by limitation. The plaintiff could not be regarded as a person who had acquired the estate "free from all incumbrances which may have been imposed upon it after settlement" as provided by s. 37 of Act XI of 1859, and could not therefore claim (as held by the lower Appellate Court) that his suit was not barred, having been brought within twelve years from the date of the sale for arrears of revenue. The case was remanded for findings whether the land was māl or lakhiraj, and whether the defendant's adverse possession was long enough to bar the suit. KARM KHAN v. BROJO NATH DAS

[I. L. R., 22 Calc., 244]

47. — *Right of auction-purchasers to annul incumbrances—Act XI of 1859, s. 37—Suit to cancel under tenures—Parties.*—The right that is given by s. 37 of Act XI of 1859 to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold for arrears of revenue, to avoid and annul an under-tenure, is a right that must be exercised by all the purchasers jointly where there are more purchasers than one. JATRA MOHUN SEN v. AUKHIL CHANDRA CHOWDHRY. I. L. R., 24 Calc., 334

AKHIL CHANDRA CHOWDHRY v. JATRA MOHAN SEN. . . . . 1 C. W. N., 314

48. — *Purchaser at a revenue sale—Act XI of 1859, s. 37—"Entire estates"—Partition by Collector, Effect of—Estates Partition Act (Beng. Act VIII of 1876), s. 123—"Time of settlement."*—A new estate created upon a partition by the Collector comes within the meaning of "entire estate" in s. 37 of Act XI of 1859. The words "time of settlement" in that section mean the time when the contract was made with Government, and in the case of a permanently-settled estate mean the time of permanent settlement. A partition by the Collector merely apportions the amount of revenue; there is no settlement of the

## SALE FOR ARREARS OF REVENUE

—continued.

## 1. INCUMBRANCES—continued.

revenue in any sense at the time of such partition. KOOWAR SINGH v. GOUR SUNDER PERSHAD SINGH [I. L. R., 24 Calc., 887]

49. — *Act XI of 1859, s. 37—"Eject," Meaning of—"Entire estate," Meaning of Notice.*—When an estate sold for arrears of revenue is recorded in a separate number in the Collector's rent-roll with a separate revenue assessed upon it, and the specification in the sale certificate granted under s. 28 of Act XI of 1859 in the form prescribed by the Act shows that the estate sold was an entire estate, the mere fact of a portion of the lands of that estate being joint with those of certain other estates cannot stand in the way of its being an entire estate within the meaning of s. 37 of the Act. Held also that the signification of the word "eject" in s. 37 of Act XI of 1859 includes such partial ejectment as would result from a decree authorizing realization by the plaintiffs of rent in proportion to their share from the cultivating miyats on the land. KALI PROSAD WASTI v. GURU CHOWDHURI v. BULGARI (unreported) distinguished. Held also that a decree for partial ejectment and joint possession can be made in favour of a co-owner of property. HALODHUR SEN v. GOOROO DAS ROY, 20 W. R., 126, RADHA PROSAD WASTI v. ESUF, I. L. R., 7 Calc., 414, approved of. Held further that the law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, although the tenure is not *ipso facto* avoided by a sale of the estate for arrears of revenue and is only liable to be avoided at the option of the purchaser at such sale, but such option may be exercised by the institution of a suit within the time allowed by law. TITU BIBEY v. MOHESH CHANDRA BAGCHI, I. L. R., 9 Calc., 653, referred to. KAMAL KUMARI CHOWDHURANI v. KIRAN CHANDRA ROY. . . . . 2 C. W. N., 229

50. — *Unrecorded co-partner, Purchase by—Incumbrances—Act XI of 1859, ss. 37, 53—A, in November 1862, purchased a portion of an estate sold in execution of a decree against the then proprietor. This sale was not confirmed till the 9th February 1863. Default occurred in the payment of the Government revenue in January 1863, and the entire estate was put up for sale by the Collector, and purchased by A on the 29th March 1863. Held that A, at the time of his second purchase, was an unrecorded co-partner of an estate within the meaning of s 53 of Act XI of 1859, and therefore took the entire estate subject to all the incumbrances existing at the time of the Government sale for arrears of revenue. ABDUL BARI v. RAMDASS COONDOO*

[I. L. R., 4 Calc., 607]

51. — *Re-purchase by co-proprietor—Rights of under-tenants—Incumbrances—Act XI of 1859, s. 53.*—Under s. 53 of Act XI of 1859, a co-proprietor who purchases an estate at a sale for arrears of Government revenue takes it subject to the incumbrances created by the

## SALE FOR ARREARS OF REVENUE

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## 4 INCUMBRANCES—continued

defaulting proprietor MANOWEN GART CROWDERY  
v LEITCHER 7 B L R., AP, 52

S. C. MANOWEN GART CROWDERY v FRANK  
MORSE MOOREHEAD 18 W R, 138

And this is so whether the purchaser be a tenant or from  
the benamiar after his purchase. See same case,  
and case of ALUM MANJEE v AGRAH ALI

[18 W R, 138]

52. — Act XI of 1859, s 54—*Good fide incumbrances*—The object of s 54 Act XI of 1859 is to protect, not every incumbrance which may be set up, but only *good fide* incumbrances created in contemplation of an impending sale or in fraud of a possible purchaser. Where surrounding circumstances suggest such creation it is for the party setting up the incumbrance to establish its *good fide* character. *MORSE MOOREHEAD v JORDAN MOOREHEAD* 6 W R, 1

53. — Lease of a share — *Lease of a share*—A lease of a share is protected under s 74 Act XI of 1859. *KALIE PRUDHO GHOSH v MORSE MOOREHEAD* 7 W R, 235

54. — and s 13—*Liability to incumbrances*—*Mokurari lease*—*Equity as to title of alleged owners of share sold*—*Benami transfers*—*Limitation Act (XV of 1877) s 41*—After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a *mokurari* lease as an incumbrance under s 54 upon the share in the hands of the purchaser. The share having been held by several successive *tenami* holders, the main question was whether those who had granted the *mokurari* were entitled to all or to any and what part of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877 s 41, art. 144 the twelve years' bar commencing from the date of possession first held adversely. *IMAMRAT DUTTA v KAMLESWARI PRASAD*

[I. L. R., 14 Cal., 109]

L. R., 13 I. A., 160

55. — and s 10, 11, 28, 53 and Sch. A—*Rights of purchaser of share of estate admitted to special regulation under s 10 II of Act*—*Rights of mortgagee of share against purchaser*—There is a clear distinction between the rights acquired under s 53 and 54 of Act XI of 1859. Under the former provision the transferee of the certificate given under Sch. A are limited, and a purchaser under that Act acquires the estate subject to all incumbrances existing at the time of sale, whether created before or after the default and even up to the date of the sale; but there is no such limitation to the transferee of a certificate given to a purchaser under s 54 and all incumbrances created after the date of a purchase under that section takes effect, after the date on

## SALE FOR ARREARS OF REVENUE

—continued

## 4 INCUMBRANCES—continued

which the default was committed, are void. A share of a taluk admitted to special regulation under ss 10 and 11 of Act XI of 1859 was alienated for sale under that Act in default of payment of the June 1st of Government revenue. On the 21st July the recorded share mortgagee's interest in that share to the plaintiff. The sale took place on the 29th September, and the share was purchased by the defendant who obtained a sale certificate in due form under the Act of clearing, in accordance with s 23, that his title accrued from the 29th June, the day after the latest date allowed for payment of the June 1st. Held that the mortgage was of no effect as an incumbrance under s 14 of the Act. *CHOWDHRY JOGESH CHATTERJEE v KHAYR MOHAMMAD PAL* [I. L. R., 14 Cal., 148]

## (c) MADRAS ACT II OF 1854.

56. — *Mad Act II of 1854—Sale of land mortgaged—Purchase by mortgagee—Right of redemption*—Where land has been mortgaged and while in the possession of the mortgagee all for a years of revenue under Madras Act II of 1854 and purchased by the mortgagee at the revenue sale, such sale does not necessarily deprive the mortgagee of his right to redeem. *JAYANTI LAKSHMI v YENDURAI PEDRA APPADU*

[I. L. R., 7 Mad., 111]

## (d) BENGAL ACT VII OF 1863.

57. — *Beng Act VII of 1863—Beng Act VII of 1863, s 12—Auction purchaser's right of redemption*—*Onus probandi*—A person seeking to obtain the benefit of s 12 Bengal Act VII of 1863, must give some *prima facie* evidence to show that the incumbrance which he seeks to void is an incumbrance falling within the terms of the section; that is, an incumbrance imposed on the tenure by some one who previously held it. The law must be, to let the grant be reviewed and explained. *KULASHEKHAR DASS v GOCHOLMOY DASS*

[I. L. R., 8 Cal., 230; 10 C. L. R., 41]

## (g) N-W P LAND REVENUE ACT

58. — *N W P Land Revenue Act (XIX of 1873), ss 166, 167, 168—Agriculturists' Loans Act (XII of 1884), s 5—Subventive sale of shares in a fund of revenue of loan—Effect of such sale*—The provisions of ss 166, 167, and 168 of the N. W. P. Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a loan upon which there existed a prior incumbrance was sold on account of the non-payment of certain tax advances, it was held that such sale did not avoid the prior incumbrance. *SHRI SAMPAT PANDY v BANDU PRASAD MISHRA* [I. L. R., 22 All., 321]

# SALE FOR ARREARS OF REVENUE

—continued.

## 5. PURCHASERS, RIGHTS AND LIABILITIES OF.

59. — Purchaser of rights of Government—*Limitation*.—An auction purchaser of the rights of Government in a taluk sold for arrears of revenue is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his liabilities. The purchaser, moreover, is bound by no limitation which would not bind or affect the Government. The taluk in this case having come into the possession of Government at by resumption in 1841, — *Held* that the auction-purchaser could have no better title, and could be in no better position than the Government at the time of resumption. *BUZLOO RAHMAN v. PRANDHUN DUTT*. . . . . 8 W. R., 222

60. — Purchaser at sale on default of purchaser of rights of Government—*Government proclamation—Act XI of 1859*.—The Government having sold its zamindari rights in certain talukhs after a proclamation that the purchaser would be bound to abide by the settlements entered into by it with the defaulting talukhdars, one of the talukhs, a mahal, J C B, was purchased with this reservation by M, who then sued without success to eject the proprietor of the said talukh. After this, M having defaulted in the payment of the Government revenue, the mahal was sold for arrears under Act XI of 1859, and purchased by G. *Held* that G was in a very different position from M (who had purchased the zamindari rights of the Government), and was not bound by the terms of the Government proclamation, but was, as his title certificate showed, the purchaser of an entire estate separately recorded on the Collector's rent-roll. *GHOZAI MUKHDOOM v. ASHUCK JAN BIREE*. . . . . 25 W. R., 86

61. — Right to resume and assess lakhiraj land—*Act XI of 1859, s. 54*.—When the former proprietor had a right to bring a suit to resume and assess lakhiraj land, the auction-purchaser of his rights and interests acquired the same right under s. 54, Act XI of 1859. *DABIE MUNNER CHOWDHRAIN v. FAQUEER CHUNDER SHAHA*. . . . . [W. R., 1864, 293]

62. — Period from which title of purchaser dates—*Act I of 1845, s. 20*.—The title of an auction-purchaser at a sale for arrears of revenue accrues, not from the date of sale, but from the date on which the sale was confirmed, and certificate granted under s. 20, Act I of 1845. *DHIREET SINGH v. MOTHORANATH JAI*. . . . . W. R., 1864, 278

63. — Liability for Government revenue—*Right to recover money paid for arrears of revenue—Act XI of 1859, s. 21*.—The purchaser of an estate sold for arrears of revenue on the 25th Pous, the latest date of payment of the revenue due for the three months previous to Pous, is not entitled to recover from the defaulter the amount of revenue which he was subsequently obliged to pay for the month of Pous. *KREME SOONDABEE DOSSIA v. NURDOOMAB GOPIO*. . . . . 4 W. R., 75

# SALE FOR ARREARS OF REVENUE

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## 5. PURCHASERS, RIGHTS AND LIABILITIES OF—continued.

64. — *Suit for money paid for arrears of revenue—Character of Government revenue—Apportionment of revenue—Purchaser's liability*.—Government revenue does not become due from day to day, but at certain specified times, according to the contract of the puttees, or the custom of the district in which the lands liable to pay such revenue are situate. It is not therefore liable to apportionment; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due is the only person liable for its payment. The purchaser of an estate which pays Government revenue takes it subject to all revenue and cesses, whether in arrear or accruing. *Held* therefore, in a suit by a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to, his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase that he was not entitled to recover. *CHATRAPAT SINGH v. GRINDRA CHUNDER ROY*. . . . . I L. R., 6 Calc., 389; 7 C. L. R., 456

See *WOZEER BEGUM v. PUZLOONISSA*

[W. R., 1864, 373]

65. — *Bombay Survey Act, I of 1865—Registered occupant*.—Bombay Survey Act, I of 1865.—Government revenue being a permanent charge on the land, it adheres to the land and to every portion of it independently of the hands into which it passes, or the subordinate rights that may have been created by the occupant out of his own qualified proprietorship; so that, even after a valid sale of the land by the occupant to a purchaser who neglects to get his name registered in his books the Collector may, after giving notice of the failure to pay the revenue to the registered occupant, in whom alone, according to the Bombay Survey Act, I of 1865, vests the right of conditional occupancy, put up the land for sale, and the purchaser gets occupancy rights free from all claims on the part of the first purchaser. *GUNDO SHIDDHESHVAR v. MARDAN SAHEB*. . . . . 10 Bom., 419

66. — *Beng Reg. XLIV of 1793, ss. 5 and 7—Enhancement of rent*.—The object of s. 5, Regulation XLIV of 1793, taken together with s. 7, was not the destruction of the under-tenures upon the soil of the parent estate for arrears of Government revenue. It only empowered the purchaser at such sale to avoid the subsisting engagements as to rent, and to enhance the rent to that amount at which, according to the established uses and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. *Quere*—Whether such a power was given only to the purchaser or to him and his heirs, or whether it was a power attaching to the zamindari and passing to subsequent purchasers. *SHURNOMAYER v. SUTIES CHUNDER ROY*

[2 W. R., P. C., 14]

S. C. SHURNOMAYER v. SUTIES CHUNDER ROY

[10 Moore's I. A., 123]

## SALE FOR ARREARS OF REVENUE

—continued—

5 PURCHASER'S RIGHTS AND LIABILITIES  
OF—*see, ante*

67. — *Bray Reg XI of 1822* *Bray Reg XLIV of 1793*, s. 5—*Bray I. F. II of 1793*, s. 51—A zamindar was sold for arrears of Government revenue under the Act of 1822. The purchaser's right was tried to enhance the rate of the sale. *Held* that they had no right to enhance. The rights of the purchaser were defined by ss. 50 and 51 of Regulation XI of 1822, which were repealed by Act VII of 1841, and that Act, with the exception of the 1st and 2nd sections, was again repealed by Act I of 1845. Neither of the two last-mentioned statutes contains any saving of rights acquired under the statute which it repealed, but expressly limited the enhanced powers which it gave to purchasers at sales for arrears of revenue to purchasers at future sales. A sale for arrears of revenue cannot of itself modify and without any act proceeding to determination of will on the part of the purchaser alter the character of an under-tenure. See also s. 5 of Regulation XLIV of 1793 is now of no force for any purpose by the Act of 1845. The general principle upon which the subsequent legislation has proceeded, viz. that of treating a purchaser at a sale for arrears of revenue as a party with whom the perpetual assignment of the estate was made. Where an under-tenure existed at the time of the deemed alienation, the only right which the zamindar could exercise over it was that conferred by a 51 of Regulation VIII of 1793. The decision in the case of *Saravangam v. Nattar* (under Reg. 59 Moore's L. A., 123), commented on, explained, and reversed. *NATTAR v. GHOSAL v. MAHESWARI CHAUDHARI MITTAR*. 2 H. L. R., P. C., 23.

68. — *C. v. GHOSAL v. GHOSAL v. MOHSEN CHANDER MITTAR*.

[12 Moore's L. A., 263. 11 W. R., P. C., 10.]

69. — *C. in High Court, GHOSAL v. GHOSAL v. MOHSEN CHANDER MITTAR, GHOSAL v. GHOSAL v. MOHSEN CHANDER MITTAR*. 3 W. R., 178.

69. — Certified purchaser—*Act XI of 1853*, s. 36—*Sent by certified purchaser—Breadwinner*—A certified purchaser at a sale for arrears of revenue, suing to recover possession of land from which he has been ousted, is not deemed from the benefit of a 36, Act XI of 1853, unless he has acknowledged himself to be a breadwinner. *JAYATI RAN DEN v. RANLOCHEN MEDDECK*. [5 W. R., 58.]

*Revenue rejected*. 13 W. R., 183.

69. — *Act XI of 1853*, s. 35 and 36—*Purchase by former proprietor*—One of the co-shares in an estate which had been sold under Act XI of 1853 sued to recover her share from the certified purchaser (M.), himself one of the original owners. Her case was that she provided a portion of the purchase-money, but that her name was not registered on account of M.'s having no written authority to act on her behalf. M. however,

## SALE FOR ARREARS OF REVENUE

—continued—

5 PURCHASER'S RIGHTS AND LIABILITIES  
OF—*see, ante*

executed as *likarnamah* in which he admitted receipt of the purchase-money of plaintiff's 2 acres share and committed to give her possession. Plaintiff denied having received any contribution or consideration from the plaintiff though admitting execution of the *likarnamah*. *Held* that on separate title was given to the plaintiff by the *likarnamah*, and that the suit was maintainable as to one's certified purchaser on the ground that part of the purchase was made on behalf of another person, and the suit was therefore barred by a 36 of Act XI of 1853. *Held* also that there is nothing in Act XI of 1853 which makes it illegal for a former proprietor or co-sharer to be a purchaser of his estate at a sale for arrears due on that estate. *GHOSAL v. MOHSEN CHANDER MITTAR*. 11 W. R., 263.

70. — *License setting aside sale, Effect of not executing will, and sale of land*—*Validity of—Right of action—Purchaser to bring suit for the sale of land and possession—Revenue Sale Law (Act XI of 1853)*, s. 34—Certain property having been sold for arrears of Government revenue, the defendant tenant brought a suit in the Civil Court to have the sale set aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held* in a suit brought by the auction-purchaser to recover possession of the land he had bought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defendant, and that the plaintiff was entitled to proceed. *ANITA LOOIS v. YOUNG*. 11 L. L. R., 21 Cal., 235.

71. — *Liability of purchaser of a sale, who enters into possession of the purchased property to account for net profits to the person in whose favour the decree is subsequently reversed*—A purchaser of property at a sale under the Madras Revenue Recovery Act, who enters into possession thereof, is a rightful possessor until the decree is set aside. He is not therefore a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession; but he is bound to account for means profits, the calculation of which is to be based on a proper exchange of the stewardship of the property. *Dattin Mohan Roy Chowdhry v. Sarad Mohan Roy Chowdhry*. 1 L. R., 21 Cal., 112; 1 L. R., 21 Cal., 160 cited and followed. *PERUMAL SIVAR v. KIRISHANNA CHETTIAR*. 1 L. R., 17 Mad., 251.

72. — *Act XI of 1853*, s. 34—*Sale of share of Hindu widow—Effect of sale on reversionary interest*—Where a share of an estate held by a Hindu widow was sold for arrears of revenue, it was contended that under a 31 of Act XI of 1853, the estate acquired by the purchaser lasted only during the lifetime of the widow. *Held* that the purchaser did not take any interest limited to the life of the widow, but that the



## SALE FOR ARREARS OF REVENUE —continued.

### 5. PURCHASERS, RIGHTS AND LIABILITIES OF—continued.

entire share passed by the sale. **DEBI DAS CHOWDHURI v. BIPRO CHARAN GHOSAL**

[I. L. R., 22 Calc., 641

73. ———— *Act XI of 1859, s. 14—An ijmali portion of an estate in arrear—Arrear separately deposited by co-sharers of other portions—Certificate of sale issued jointly to all the co-sharers—Share of each co-sharer in the purchased portion—Transfer of Property Act (II of 1882), s. 45—Presumption.*—Where an estate was divided into several shares and one of them was left as the ijmali kalam and for others separate accounts had been opened with the Collector, and the owners of the ijmali kalam having failed to pay their share of the revenue it was put up to sale, but could not fetch a price sufficient to cover the sum in arrears and each of the co-sharers paid the entire amount of arrear separately, and the Collector issued a certificate of sale jointly to them,—*Held* that the different sharers should be entitled to equal shares in the purchased estate irrespective of their shares in the parent estate. That there being no evidence to show how the Collector made up the arrear from the funds which the parties respectively advanced, the presumption was that the Collector took from each of the funds an equal share. **DEBI PERSHAD v. ABHO KOER** . . . . . 4 C. W. N., 465

74. ———— *Purchaser at a revenue sale—Act XI of 1859, ss. 29, 35, and 37—“Entire estate,” Meaning of—Effect of estate being recorded under a distinct number on the rent roll, with a separate revenue assessed upon it—Protected interest.*—When an estate is recorded under a distinct number on the touzi or rent-roll of the Collector with a separate revenue assessed upon it and the sale certificate granted to the auction-purchaser under s. 28 of Act XI of 1859 shows that the estate sold was an entire estate, the mere fact of it comprising undivided shares in certain villages does not prevent its being an entire estate. **Kamal Kumari Choudhram v. Kisan Chunder Roy**, 2 C. W. N., 229, referred to. **PBONATH MITTER v. KIRAN CHANDRA ROY** . . . . . I. L. R., 27 Calc., 280

75. ———— *Mad. Reg. XXV of 1802, s. 12—Madras Revenue Recovery Act II of 1864, ss. 32, 41*—The purchaser at a revenue-sale is *prima facie* entitled to claim the faisal rate of rent. **PALANI v. PARAMASIVA**

[I. L. R., 13 Mad., 479

76. ———— *Madras Revenue Recovery Act (Mad. Act II of 1864), ss. 1, 39, 42—Rights of jenni in Malabar—Grant by Government of waste land on a cowle.*—The Collector of Malabar in 1869 let defendant 2 into possession of certain waste land under a cowle, and in 1872 granted to him a pottah for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Madras Revenue

## SALE FOR ARREARS OF REVENUE —continued.

### 5. PURCHASERS, RIGHTS AND LIABILITIES OF—concluded.

Recovery Act, 1864, and sold to defendant 3. The plaintiff, who was the jenni of the land, had no notice of the grant of either the cowle or the pottah; he asserted his right to jennibhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his claim. The present suit was brought to set aside the sale. *Held* the interest of the jenni did not pass by the sale. **SECRETARY OF STATE v. ASHTAMURTHI**

[I. L. R., 13 Mad., 89

77. ———— *Madras Revenue Recovery Act (II of 1864), ss. 42, 44—Sale of part of a holding for arrears of revenue due on another part.*—The plaintiff sued, as the purchaser under a Court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Madras Revenue Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor. *Held* that, under the sale for arrears of revenue, the land had passed to the defendant's vendor, and that the suit should be dismissed. **SAMA v. SRINIVASA**

[I. L. R., 13 Mad., 477

78. ———— *Madras Revenue Recovery Act (Mad. Act II of 1864), s. 42—Incumbrance—Permanent lease at a low rent.*—One of the villages in a mitta was demised by the mittadar to A on a permanent lease, at a rate below both the faisal assessment and the proportion of revenue payable upon it. The lessee's interest was brought to sale in execution of a decree and purchased by B, and ultimately was sold in 1884 to the plaintiff, who now sued the tenant in possession to enforce an exchange of pottah and muchalka. In the interval, viz., in 1883, the village was sold for arrears of revenue under Madras Act II of 1864 to C, and the defendant claimed to hold the land from C. *Held* that the permanent lease was an incumbrance under the Madras Revenue Recovery Act, 1864, s. 42, and was voidable by the purchaser at the revenue-sale, although it had not been declared to be invalid by the Collector. **NARASIMMA v. SURIANARAYANA** . . . . . I. L. R., 16 Mad., 144

### 6. DEPOSIT TO STAY SALE.

79. ———— *Tender of full amount of arrears of revenue—Madras Revenue Recovery Act, s. 37—Sale for arrears accrued since attachment.*—When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account of which the land was attached, together with interest and charges under Revenue Recovery Act, 1864, s. 37, the Collector is bound to stay the sale. When therefore a Collector, notwithstanding such tender, proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tender,—*Held* that the sale was invalid. **SECRETARY OF STATE FOR INDIA v. GOONDAR**

[I. L. R., 22 Mad., 5

## SALE FOR ARREARS OF REVENUE

—continued—

## C. DEPOSIT TO STAY SALE—continued.

80. — Right of person making deposit—*Act I of 1853 s. 9*—*v. Act I of 1853.* A person made a deposit with reference to sale for arrears of revenue, that Collector shall at any time before sunset of the 15th day of payment receive as a deposit from any party not being a proprietor of the estate the amount of the arrears of revenue due from him to be carried to the credit of the said estate; and if the party depositing a whole year shall have been so credited as aforesaid, shall prior to the sale of the estate by the Collector be entitled to protect an interest of the said party which would have been endangered or damaged by the sale of the estate; he shall be entitled to recover the amount of the deposit with interest from the proprietors of the estate. *Held* that the person so depositing money for arrears does not thereby acquire any lien on the estate. *JAGAN CHANDRAN DOSSER*

(Marsh, 221)

S C SREEMATH DOSSER &amp; FAGAN 2 May, 75

81. — Right of one proprietor against co-proprietors. *Act I of 1853 s. 9*—*v. Act I of 1853.* A person who has paid his own and his co-proprietors share of the Government revenue to save the estate from sale can recover from him the co-proprietors share of the revenue but he cannot recover it from the latter's paternal uncle who only undertakes to pay his part to the Government. *BRACHMATH ACHARYA & GOVIND CHANDRAN* 7 W. R. 247

82. — Right of person both proprietor and mortgagee—*Payment made as mortgagee to save estate from sale*—A person who is both proprietor and mortgagee is not entitled as mortgagee to file a declaration on account of Government revenue paid by him to save the estate from sale for arrears of revenue when after redemption it ceased to be a mortgaged estate, which payment it was his duty to have made in his capacity of proprietor. *LOOLAN CHANDRAN & DANOOTIA NARAYAN*

[3 W. R. 182]

83. — Voluntary payment—*Right of mortgagee to recover arrears paid*—Said Government revenue paid by mortgagee in payment of property mortgaged for a debt secured by an instalment bond executed in his favour by the mortgagee through a notary. Although the plaintiff could not prove the execution by the defendant of the power of attorney in the name of the person alleged to have signed the bond for the defendant, yet as the plaintiff had paid the arrears of revenue due from the mortgaged property in the bond file bill that he had a rightful interest in it and would thereby save the property from sale and be entitled to recover the money so paid, such payment was held to be not officious, and the suit was decreed. *INDRAN KOWDER & LALIA DEVI PRASAD* 5 W. R. 128

84. — *Act XI of 1853, s. 9*—*Suit by mortgagee to recover deposit of arrears of revenue*—A mortgagee who obtained a

## SALE FOR ARREARS OF REVENUE

—continued—

## D. DEPOSIT TO STAY SALE—continued.

decree for possession with mortgage profits on 11th May 1861 and the mortgagee under s. 9, Act XI of 1853 to recover a sum alleged to have been paid by plaintiff on account of Government revenue for the quarter's instalment due on the 15th June following. *Held* that as at the time the decree was made the plaintiff was the proprietor of the estate in arrears he was not a party to the sale under s. 9 and the suit could not be. *JESODRA DOSSER & MATHY CHINRA DOSSER* 12 W. R. 246

85. — *Sale after sale set aside*—*Payment by purchaser made pending proceedings to set aside sale to save estate from further sale*—Plaintiff the absolute owner of an estate purchased by him at a sale in execution of a decree, that it was held in favour of the plaintiff, in proceedings to set aside the sale, that the plaintiff was not a party to the sale, and when the sale to him was set aside and restored to him, he was not entitled to be repaid any amount but filed paid by him for the preservation of the estate. If it made any arrangement with the mortgagee by which the latter's position as to the Government revenue for him, plaintiff could not recover from the mortgagee, there being no privity between him and them. His remedy was against the mortgagee. *HINDU KANAR & PUT CHANDRAN* 18 W. R. 289

86. — Liability of estate held by Hindu widow for debt incurred to person making payment to protect revenue—*Act I of 1853, s. 9*—An estate mortgaged was about to be sold for arrears of Government revenue, when it was saved from sale by the mortgagee depositing a sum sufficient to discharge the revenue. The mortgagee brought a suit against the person in possession of the estate, the Hindu widow of the original mortgagee, asking under s. 9, Act I of 1853, to obtain repayment from her personally of the money paid to save the sale of the estate, not making the revenue officers defendants, and not praying that the talukhmichan might be sued to pay the amount due. A decree was given in that suit to the mortgagee, and on execution of that decree the revenue officers intervened. *Held* that the mortgagee and those claiming under him had no charge on the estate, and were not entitled to have it sold in its entirety to pay the amount which was paid in to stop the sale of the estate. The revenue officers, under s. 9, Act I of 1853, was only a personal action, and the decree gave no remedy against the land, the sale of which for arrears of revenue had been stayed by the deposit. In such a suit the question is not whether the person who pays the arrears acquires thereby a charge on the taluk which he saves from sale, but whether he seeks to enforce that right; he must do so in a suit properly framed for that purpose and not merely in a suit which is confined to a personal remedy against the person in possession of the taluk.

## SALE FOR ARREARS OF REVENUE

—continued.

## 6. DEPOSIT TO STAY SALE—continued.

If the person who so pays the arrears of rent seeks repayment only, under the section and law cited, as against the person in possession of the talukh who has only a limited interest therein, and confines his suit to that object, the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as he had in the talukh. This ruling does not affect the general doctrine that, in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. **NOGENDER CHUNDER GHOSE v. DOSSES** . . . . . 8 W. R., P. C., 17

**S. C. NOGENDER CHUNDER GHOSE v. KAMINI DOSSES** . . . . . 11 Moore's I. A., 241

87. ——— Payment by patnidar to save tenure from sale—*Mistake in Collectorate in crediting payment as deposit.*—The payment of revenue into the Collectorate by a patnidar to save the estate from sale is equivalent to payment of the ptni rents to the zamindar. The fact that the zamindar had himself paid money into the Collectorate which he intended as revenue, but which by mistake was credited to a deposit account, and for which he took a receipt showing that the money was received as a deposit, and not as a payment of revenue, does not render the patnidar liable. **JOTENDER MOHUN TAGORE v. KISHEN MONFF DABEE**

[W. R., 1864, Act X, 11

88. ——— Payment by shareholder —*Voluntary payment of arrear of revenue—Right to reimbursement—Act XI of 1859, s. 13*—A shareholder voluntarily coming forward and paying an arrear of revenue due by a defaulting co-shareholder who has a separate account, before the share of such defaulter has been put up for sale under the provisions of s. 13, Act XI of 1859, cannot claim to be reimbursed by such defaulter, nor is the defaulter under any legal obligation to repay the amount advanced. **KISHEN CHUNDER GHOSE v. MUNDIN MOHUN MOZOOMDAR** . . . . . 7 W. R., 365

89. ——— Right of suit to recover amount of deposit—*Act XI of 1859, s. 9—Suit to recover amount paid as deposit to save estate from sale.*—Where a party pays into the Collectorate, under the provisions of s. 9, Act XI of 1859, arrears of revenue due by a defaulting proprietor of an estate, his suit to recover the amount paid is not inadmissible, merely because there exists no privity between plaintiff and defendant. **WOOMAMOTEE BERNONIA v. HILLS** . . . . . 11 W. R., 377

90. ——— Right of suit to recover amount deposited—*Payment made by mokuraidar for predecessor—Payments of revenue in excess of lease—Voluntary payment.*—Installments of Government revenue paid by a mokuraidar on account of his predecessor, being necessary payments made to save the estate from sale, are recoverable, but

## SALE FOR ARREARS OF REVENUE

—continued.

## 6. DEPOSIT TO STAY SALE—continued.

not under Act X of 1859. Payments on account of Government revenue in excess of lease are not recoverable. **BUNWARRE KISHORE v. JOY CHUNDER GOSSAIN** . . . . . 2 W. R., 262

91. ——— Obligation of lender of money to stay sale—*Necessity*—A lender is not bound to inquire into the exact amount necessary to be borrowed to save an estate from a sale for arrears of Government revenue. It is sufficient if he satisfy himself of the existence of a necessity to justify him in loaning to the estate for repayment. **NETTER CHUNDER BANERJEE v. GUDDADHUR MUNDLE** 3 W. R., 122

92. ——— Right to contribution where part owner pays revenue due on whole estate to save his own interests—*Madras Revenue Recovery Act, s. 35—Contract Act, ss. 64, 70.*—In 1881, while the pottah of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable. The claim was decreed, but on appeal by defendants 3 and 4 the suit was dismissed as against them. Plaintiff appealed, making defendant No. 4 alone respondent. Held that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession. **SESHAGIRI v. PICHU**

[I. L. R., 11 Mad., 452

93. ——— Payment of arrears of village revenue by the assignee of a mortgage of portion of the village property in order to stay the sale—*Madras Revenue Recovery Act (Mad. Act II of 1864), s. 30—Defaulter—Registered and real owners*—The plaintiff was assignee of a mortgage of 38½th pangus in a village consisting of 51½th pangus. Having sued the executors of the mortgage and obtained a decree in 1885, he, in 1887 and 1888, paid certain arrears of revenue due, from the village, in order to prevent its sale. In 1888 the plaintiff's 38½th pangus were sold in execution of the decree of 1885 to the 85th defendant, subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears. Held that the 85th defendant, as also the 38½th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under s. 35 of the Revenue Recovery Act; that not only registered proprietors, but real owners and their holdings, may be treated as defaulters within the

## SALE FOR ARREARS OF REVENUE

—continued

## 6 DEPOSIT TO STAY SALE—concluded

memorandum of a 30 of that Act. *Seshagiri v Pichu*  
*I L R 11 Mad 457* followed. *Srinivasa Tha-*  
*thachar v IAMA Ayyan I L R, 17 Mad., 247*

## 7 SALE PROCEEDS

84. — Right to surplus proceeds  
 —*Estate subject to mortgage*—When mortgagee's  
 lands are sold for arrears of Government revenue not  
 secured through default of the mortgagee any pro-  
 ceeds which may arise from the sale in excess of the  
 arrears belong to the mortgagee and he has a right  
 of action for their recovery. *HEERA LALL CHOW-*  
*DHRY v JANAKRISHNATH MOOKERJEE*

[16 W. R., 223]

85. — Right to payment out of  
 surplus proceeds—*Liability of purchaser to*  
*reimburse judgment debtor*—Act XIX of 1873 (N. W. P.  
 Land Revenue Act) s. 14f—Act V of 1877  
 s. 316—A share of a mehal arrears of Government  
 revenue being due in respect of the whole mehal was  
 sold in execution of a decree. The existence of the  
 arrears was not fixed at the time of sale. The title of  
 the purchaser to the share vested from the date of the  
 sale. Act X of 1873 s. 316 being in force at that  
 date. The Collector attached and realized the amount  
 of the arrears out of the surplus sale proceeds. Held  
 that inasmuch as at the date of the realization of the  
 arrears out of the surplus sale-proceeds the purchaser  
 was the proprietor of the share and it and he were  
 responsible under s. 14f of Act XIX of 1873 (N. W. P.  
 Land Revenue Act) for the arrears the payment of  
 the arrears out of the surplus sale-proceeds must be  
 regarded as a payment made in satisfaction by the  
 judgment-debtor for the purchaser and the judg-  
 ment-debtor was entitled to be reimbursed by the  
 purchaser. *RAM CHAND v PATEL SINGH*

[I. L. R., 6 All., 112]

86. — Suit for sale-proceeds by  
 mortgagee—*Omission to give notice of charge on*  
*estate sold*—A purchased certain villages in the  
 name of his son B. A being indebted to C exe-  
 cuted a mortgage-bond and deposited the title deeds  
 of those villages with C as security for the debt. C  
 afterwards sued A for recovery of the mortgage-debt,  
 and ultimately obtained a decree in his favour.  
 Pending this suit A died and was succeeded by B, his  
 heir, against whom the suit was revived. B became a  
 defaulter to Government when the Government  
 authorities seized the villages and took steps for bring-  
 ing them to sale to satisfy the Government demands.  
 C informed the Government officer of his claim,  
 and petitioned to have the sale stayed, but the  
 Collector sold the villages as the property of B sup-  
 pressing the notice of the equitable charge of C upon  
 the villages. C then sued B, the Collector, and the  
 auction purchasers, claiming to be entitled to the  
 sale-proceeds of the villages in the hands of the  
 Government in satisfaction of his mortgage-debt.  
 The Sudder Dewany Court dismissed the plaintiff's  
 claim, on the ground that the decree made in the suit  
 against A was against the effects of A and only

## SALE FOR ARREARS OF REVENUE

—continued

## 7 SALE PROCEEDS—concluded

applied to such property as B was in possession of at  
 that time, and that as it had been sold to realize the  
 demands of Government the decree did not apply to  
 the villages. This decision was reversed on appeal,  
 the Judicial Committee holding, first that the suit  
 was properly instituted for recovery of the sale-pro-  
 ceeds in possession of Government, as the decree  
 obtained by C against B operated as a conveyance of  
 the estate of A, making it assets in B's hands, which  
 C had a right to follow, secondly, that as the Govern-  
 ment had notice of C's equitable charge upon the  
 villages and suppressed that fact at the auction-sale  
 to the purchasers there was a clear equity in C to  
 call upon the Government for payment out of the  
 auction proceeds received by them and an account  
 was directed of the amount received by the Collector  
 from the sale of the villages with interest so far as  
 the amount received would extend to the payment of  
 C's mortgage-debt. *See also*—Where property is  
 sold by Government for general debts and not for  
 arrears of revenue, they sell only the interest of the  
 debtor and do not guarantee the vendor a title.  
*DOUGLAS v COLLECTOR OF BEXARIS*

[5 Moore's L. A., 271]

## 8 SETTING ASIDE SALE

## (a) IRREGULARITY

87. — Irregularity in conduct of  
 sale—Act XI of 1859 ss. 25, 26, 27-38—*Sub-*  
*stantial injury—Form of petition—Remedy by*  
*suit*—The object of the Revenue Sale Law (XI of  
 1859) is to give a title to the purchaser which shall  
 not be open to challenge by anybody; and the only  
 ground on which a revenue sale can be set aside  
 is (s. 26) that of irregularity in conducting the sale  
 in which case the Commissioner can set it aside  
 on a petition of appeal presented to him within  
 fifteen days of the sale. The petition may disclose  
 a case of hardship or injustice where irregularity  
 does not exist, as, for instance that the sale has  
 taken place where no arrears are due, and under such  
 circumstances the Government, under s. 26 may set  
 aside the sale. If the Commissioner will not  
 interfere, the party aggrieved may, within one year  
 of the sale becoming conclusive (s. 27), bring an  
 action in the Civil Court under s. 33 and the Court  
 may set aside the sale on proof of irregularity and  
 substantial injury caused thereby. If no irre-  
 gularity producing substantial injury is proved the  
 Civil Court cannot entertain an action to set  
 aside a sale for arrears and the only course open to  
 an injured party is by a suit for damages as provided  
 for in s. 33. *WOMESH CHUNDER CHATTERJEE v*  
*COLLECTOR OF 24-PERGUNNARS WOMESH CHUN-*  
*DRE CHATTERJEE v ISHARUTOOLLAH*

[8 W. R., 439]

88. — Omission to give notice of  
 sale—Act XI of 1859, s. 33—*Material injury—*  
*Setting aside sale, Ground for*—To sell an estate  
 for arrears under Act XI of 1859, after calling the

## SALE FOR ARREARS OF REVENUE

-continued.

## 8. SETTING ASIDE SALE—continued.

proprietor into a false security by failure to give him a notice which the law prescribes as a condition precedent of a sale, is of itself a very material injury irrespective of the amount of purchase-money realized, and one amply sufficient to warrant a Court in annulling the sale under s. 33. **MOHABEER PERSHAD SINGH v. COLLECTOR OF TIRHOOT**

[15 W. R., 137

99. ——— Omission to serve notice on minor defaulter.—*Madras Revenue Recovery Act (II of 1864), ss. 25, 27—Mad. Reg. V of 1804, s. 20.*—A mitta consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Reg. V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiff's mother and affixed to the wall of the house on 17th January, and notice under s. 17 was served on 17th February. The sale took place in September, and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale,—*Held*, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole was vitiated by the irregularity. **MEKAPERUMA v. COLLECTOR OF SALEM**

[I. L. R., 12 Mad., 445

100. ——— Irregularity in issue of notice.—*Ground for setting aside sale—Damage to defaulter.*—A sale under Act XI of 1859 may not be set aside on the ground of irregularity in the issue of notices, unless such irregularity is shown to have caused loss or damage to the defaulter. **LULEETA KOOR v. COLLECTOR OF TIRHOOT**

[19 W. R., 283

101. ——— Notification of sale, Necessary contents of.—*Act XI of 1859, s. 33.*—It is unnecessary to specify in the notification of sale the names of the mouzahs included in the property sought to be sold. All that is necessary is to specify the estates or shares of estates, and the number they bear in the Collector's office. **AMRUNISSA KHATOON v. SECRETARY OF STATE FOR INDIA**

[I. L. R., 10 Calc., 63

S. C. AMRUNNESSA KHATOON v. BROWNE

[13 C. L. R., 131

ZERKALEE KOOR v. LALLA DOORGA PERSHAD

[16 W. R., 149

102. ——— Sale Notification.—*Act XI of 1859, s. 6—Description—"Residue" of an*

## SALE FOR ARREARS OF REVENUE

-continued.

## 8. SETTING ASIDE SALE—continued.

*estate.*—In a notification of sale under Act XI of 1859 the share of an estate intended to be put up for sale must be so described that there can be no mistake about it. Merely advertising that the "residue" of an estate is to be sold without giving further particulars and stating what that residue is, cannot be considered to be a sufficient description.—**ANNADA CHARAN MUKHUTI v. KISHORI MOHON RAY**

[2 C. W. N., 479

103. ——— Notification of sale, Omission in.—*Revenue-paying estate—Sale of share of an estate—Recorded proprietors—Omission of names of proprietors—Irrregularity—Act XI of 1859, ss. 6, 34.*—When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859. **SECRETARY OF STATE FOR INDIA v. RASHBEHARY MOOKERJEE**

[I. L. R., 9 Calc., 591; 12 C. L. R., 27

104. ——— Irregularity in publishing notification of sale.—*Suit to set aside sale—Act XI of 1859, ss. 6, 20, 35—Beng. Act VII of 1868, s. 8—Certificate of title.*—A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently, the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20 of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchasers. *Held*, in a suit to set aside the sale, that, inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May. *Held* further that the Court was not bound, under s. 8 of Bengal Act VII of 1868, to presume conclusively that the provisions of s. 6 of Act XI of 1859, as regards the fixing of the date of sale, had been complied with. Under s. 8 of Bengal Act VII of 1868, the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices. **BAL MOKOND LALL v. JIRJUDHUN ROY**

S. C. BAL MOKOND LALL v. JIRJUDHUN ROY

[11 C. L. R., 468

105. ——— Material irregularity.—*Substantial injury—Act XI of 1859, ss. 6, 7, 20, 23, 33—Certificate—Beng. Act VII of 1868, s. 8—Per GARTH, C.J., MITTER, PRINSEP, and FROST, J.J.*—A non-compliance with the provisions of s. 6, Act XI of 1859, is not a mere irregularity, and is not one of those errors in procedure which are



# SALE FOR ARREARS OF REVENUE

—continued.

## 8. SETTING ASIDE SALE—continued.

Court cannot cancel the sale unless such substantial injury has been established. The words "except as otherwise is hereinafter provided," which occur in cl. (1) of s. 38, refer to the action which the Collector is empowered to take *suo motu*, under cl. (3) of the same section, and have no relation to the remedy provided by s. 59. Direct evidence is not necessary to connect inadequacy of price realized with a material irregularity, where the latter has been proved: and the relation of cause and effect between the two may be inferred where such inference is reasonable. But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant, where the sale actually took place, the inadequacy of price being susceptible of other explanations.—*Held* that it was not shown that the irregularity referred to had caused substantial loss, and that there was therefore no ground for setting the sale aside. **BOMMAYYA NAIDU v. CHIDAMBATHAM CHETTIAR** [I. L. R., 22 Mad., 440]

112. — *Act XI of 1859, s. 5—Attachment by order of Civil Court—Latest day of payment, Attachment subsequent to.*—In a suit to set aside the sale of an estate for arrears of revenue, one of the grounds taken by the plaintiff was that the estate, which was under attachment by an order of the Civil Court at the time of the sale, was sold without due observance of the formalities prescribed by s. 5, Act XI of 1859. The date fixed for payment of the arrears for which the estate was sold was the 7th June 1893. The date of attachment was 2nd August following. *Held* that s. 5 of Act XI of 1859 provides for cases in which the attachment has been made at least fifteen days before the last date of payment for which it is sought to bring the estate to sale. This section would not therefore apply to a case like the present in which the attachment was after the last day of payment and after the estate had become liable to sale for arrears of Government revenue. **Bunwari Lal Sahu v. Mohabir Persad Singh**, 12 B. L. R., 297; L. R., 1 I. A., 89, referred to. **NOWNIT LAL v. RADHA KRISTO BHUTACHARJEE** [I. L. R., 22 Cal., 738]

113. — *Bombay Land Revenue Code (Bom. Act V of 1879), ss. 56, 57, 150, and 153—Confirmation of sale by Collector—Omission of Collector to make—Declaration of forfeiture before sale.*—A sale of a holding for default of payment of assessment is not invalid, although prior to the sale there has been no declaration of forfeiture by the Collector. The declaration of forfeiture is not so essentially a necessary preliminary of a sale that without it the sale is illegal and invalid. The fact that a sale has taken place is *prima facie* evidence that forfeiture had been declared. **GANPATI v. GANGARAM** . I. L. R., 21 Bom., 381

# SALE FOR ARREARS OF REVENUE

—continued.

## 8. SETTING ASIDE SALE—continued.

114. — *Irregularity in refusing fine for non-attendance, tendered by proprietors—Act XI of 1859—Procedure—Beng. Act VII of 1868—Fine for non-attendance of proprietors before Collector in partition proceedings under Beng. Reg. XIX of 1814.*—In sales held by the Collector for the realization of Government demands realizable as arrears of revenue, the procedure laid down in Bengal Act VII of 1868 is to be followed. Therefore, where a fine had been imposed for non-attendance of proprietors before a Deputy Collector for the purpose of a partition under Regulation XIX of 1814, and the amount had been ordered to be paid on a given day but was not so paid but tendered subsequently,—*Held* that the Collector ought not to have sold the property of the defaulters. He was bound to receive the amount tendered. **MOHAN RAM JHA v. SHIB DUTT SINGH** [8 B. L. R., 230; 17 W. R., 21]

115. — *Irregularity in not accepting highest bid—Obligation of Collector to sell to highest bidder.*—At a sale for default of payment of Government revenue, the Collector is bound, to sell to the highest bidder, even though (as in this case) that bidder be the husband of the person in arrear. **CORNELL v. OODOY TARA CHOWDHRAIN** [8 W. R., 372]

## (b) OTHER GROUNDS.

116. — *Fraud—Act XI of 1859, ss. 6, 7, 18—Ground for setting aside sale.*—In a suit to set aside a sale for arrears of Government revenue held on the 26th March 1879, it was alleged as grounds for setting the sale aside (1) that the arrears had been paid into the Collector's treasury on the previous day and a receipt granted for them, and that, according to the custom which had prevailed in the Collectorate of the district on payment of arrears being so made, the property had always been exempted from sale; (2) that the notices issued under ss. 6 and 7 of Act XI of 1859 were not served according to law; and (3) that the purchaser at the sale had dissuaded other persons from bidding as alleged. *Held* that the sale was valid, as no order had been made by the Collector in writing exempting the property from sale under s. 18 of Act XI of 1859, mere payment of arrears into the treasury without an order under s. 18 not having in itself the effect of exempting the property from sale. *Held* also that the object of the notification under s. 7 of Act XI of 1859 being to give notice to the raiyats not to pay rent to defaulting zamindars, non-service of such notification could not be a ground for invalidating the title of the auction-purchaser; and that, inasmuch as the irregularity in the service of notice under s. 6 of Act XI of 1859 was not taken in the grounds of an appeal which had been presented to the Commissioner, it could not be urged in a regular suit as a ground for setting aside the sale. *Held* further that it was no fraud for persons at a sale for arrears of revenue to combine not to bid against each other.

## SALE FOR ARREARS OF REVENUE

—cont. next

## 8 SETTING ASIDE SALE—continued

See *Enl Mokond Lal Jeyadun Roy I L R 9 Cal 271 11 C L 1 455* GORIED CHET  
DRA GANDOPADHYA v. NERAJUTISSA BIRI  
[13 C L R, 1]

## 117 — Act X of 1876

4—*Jurisdiction of Civil Court—Fraud of officers conducting sale*—S 4 cl (c) of Act X of 1876 excepts from the jurisdiction of the Civil Court claims to set aside on account of irregularity mistake or any other ground except fraud sales for arrears of land revenue. *Quare*—Whether the exception of fraud in the above enactment is confined to fraud on the part of officers conducting sales for arrears of land revenue. *PAIKISHAN VASDEVY v. MADHATRAY NARAYAN* I L R, 5 Bom. 73

## 118 — Act VI of 1859

s 33—S 33 of Act VI of 1859 should not be read as meaning that under no possible circumstances can a suit be brought to set aside a sale on the ground of fraud. *AMIRUNNESSA KHATOON v. SECRETARY OF STATE FOR INDIA IN COUNCIL*  
[I L R, 10 Calc. 63]

S C AMIRUNNESSA KHATOON v. BROWNE

[13 C L R, 131]

## 119 — Beng. Act VII

of 1868—*Sale improperly conducted*—In a suit by a mortgagee for possession of the mortgaged property which had been sold under Bengal Act VII of 1868 where plaintiff alleged that the sale was brought about by fraudulent withholding of the rents, and that the mortgagee had purchased it *bona fide*—*Held* that where a sale has been held under the provisions of Bengal Act VII of 1868 but improperly and irregularly it can only be questioned by a suit brought within proper time and against proper parties. *RAS TINKER DASSEE v. PEARCY BIRER* 23 W R, 82

## 120

*Bidders Disinterested*

*action of*—In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue the finding of the Court of first instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue and had thereby caused the property to be sold under Act VI of 1859 purchasing it himself at a small sum in the name of certain other persons and had also dissuaded certain intending bidders from bidding at such sale. *Held* that the evidence did not warrant such a finding but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the revenue-sale was not based upon any right of interest common to himself and his co-sharers, and that in the absence of representation or concealment the fact that he had intentionally defaulted as found did not constitute fraud; nor did the fact that he had deterred others from bidding for the property, necessarily constitute an act of fraud. *Shoolan Chauder Sen v. Ram Chauder Shamsi Mookomdar*

## SALE FOR ARREARS OF REVENUE

—continued

## 8 SETTING ASIDE SALE—continued

I L R, 3 Cal., 300 distinguished. *DOORGA SINGH v. SHEO PERSHAD TROON*  
[I L R, 16 Cal., 194]

121. — *Sale without attachment—Attachment of property sold not necessary—Sale ultra vires—Act XI of 1859 s 6 17*—The right to set aside a sale for arrears of Government revenue under Act XI of 1859 is not confined to proprietors alone but extends to all persons such as mortgagees having an interest in the property at antecedent to its sale. *Watson v. Sreemust Lal Khan & Moore's I 447*, relied on. There is no holding in s. 6 of Act XI of 1859 which indicates that property sold for arrears of Government revenue should be under a tachment at the time of sale. A sale in contravention of ss. 5 and 17 of Act XI of 1859 is *ultra vires* and therefore void. The principle laid down by the Full Bench in the case of *Lala Mohan Lal v. Secretary of State for India in Council I L R, 11 Cal. 200*, applied. *GOSWAMI LAL POT v. BIPRODAS ROY*

[I L R, 17 Cal., 398]

## 122. — Act XI of 1859

(*Bengal Revenue Sale Law*) ss 3 8 and 33—*Bengal Excise Act (Beng. Act VII of 1869), s 2*—*Unauthorized sale by Collector—Jurisdiction of Civil Court*—Act XI of 1859 the Bengal Revenue Sale law, providing for the sale of estates in arrear of payment of revenue does not sanction, and by plain implication forbids the sale of any estate which is not at the time in arrear of such payment. The whole clause in so far as they relate to sales or to the challenge, as well as the provisions of Bengal Act VII of 1868 are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. A Collector had sold an estate purporting to act under Act XI of 1859 for a supposed arrear of revenue. There was however, only an erroneous debit in the Collector's books against the estate in excess of the revenue actually assessed upon it, chargeable against it, and due from it. *Held* that the sale was without authority that the Civil Court had jurisdiction to declare the sale void and that the provisions of s. 33 of Act XI of 1859 relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction. The enactment in s. 8 had no application to such a case. This was not a question about a transfer from the account of one revenue-paying estate to that of another nor was it a claim for remission or abatement which had not been duly allowed by the Government. s. 8 has no application except there be (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellants were credited, and their alleged default was based upon erroneous debit entries to which they were not parties. *BALAKISHAN DAS v. SIMPSON*

I L R, 25 Cal., 833

I L R, 25 I A, 161

2 C W N., 513



## SALE FOR ARREARS OF REVENUE

—continued.

## 8. SETTING ASIDE SALE—continued.

123. — Sale where no arrears due — *Bond fide purchase*.—The sale of an estate for arrears of revenue where no such arrears exist is null and void, even though it is regularly conducted and the purchase is made *bond fide*. **SREEMUNT LALL GHOSE v. SHAMA SOONDURIE DASSEE**

[12 W. R., 276]

RAM GOBIND ROY v. KUSHUFFUDOZA

[15 W. R., 141]

See **BAIJNATH SAHU v. LALLA SITAL PRASAD**

[2 B. L. R., F. B., 1: 10 W. R., F. B., 66]

and **HAREHOO SINGH v. BUNSIDHUR SINGH**

[I. L. R., 25 Calc., 876]

124. — *Act XI of 1859*.—Where there has been a sale under Act XI of 1859, for arrears of revenue, but it is found that no revenue is actually due to Government, the sale must be set aside as not coming within the provisions of the Act. **MANGINA KHATUN v. COLLECTOR OF JESSORE**. 3 B. L. R., Ap., 144: 12 W. R., 311

125. — *Suit to set aside sale—Sanction of Commissioner*.—A suit to set aside a sale for arrears of revenue on the ground that no arrears were due may be brought without previous sanction of the Commissioner. **THAKOOR CHURN ROY v. COLLECTOR OF 24-PERGUNNAHS**

[13 W. R., 336]

123. — *Act XI of 1859—Suit to set aside sale—Costs of partition—Sanction of Board of Revenue—Beng. Reg. XIX of 1814*.—On 12th June 1867 some of the proprietors of an estate applied to the Collector for a partition under Regulation XIX of 1814. On the same day the Collector issued a notice to all the shareholders, including the plaintiffs in this suit, calling upon them to come in within one month and show such cause and offer such objections, etc., as they should think fit. It did not appear that the plaintiffs did come in or did anything upon this. Similar applications were made by other shareholders. On the 19th August 1867 the Collector drew out a tabular statement purporting to be in pursuance of s. 4, Regulation XIX of 1814. In it was a column giving the shares into which the expenses of the partition were to be divided. On the same day a notice was issued to the proprietors, ordering in them to pay their respective quotas of the expenses accordingly. It was said by the defendants that the apportionment was confirmed by the Commissioner on the 20th January 1868. On the 6th March 1868 it was ordered by the Collector that a proclamation should be issued in accordance with paragraph 4 of s. 5 of Act XI of 1859, directing the plaintiffs, as defaulters in two sums of R252-3-2 and R9-9-6, to pay the Government revenue. On the 28th March such proclamation was issued accordingly. Subsequently one of the plaintiffs came in, and offered to pay all that was then due and outstanding. His application was rejected, and on the same day, the 8th April, the sale proceeded, and the whole interest of the plaintiffs was sold for R16,900. The plain-

## SALE FOR ARREARS OF REVENUE

—continued.

## 8. SETTING ASIDE SALE—continued.

tiffs appealed to the Commissioner, but their appeal was dismissed. The plaintiffs therefore brought a suit against the purchasers and the Collector for the recovery of the property and for cancelment of the sale. *Held* that the sale was void. There was no arrear of Government revenue justifying a sale under Acts XI of 1838 and XI of 1859, s. 5. There could be no arrear until demand after sanction by the Board of Revenue and by the Lieutenant-Governor of the estimate of expenses prepared by the Collector and fixed by the Commissioner. The Board must give its sanction in each case, and the defendants failed to show that it had done so. But even if the Commissioner had power finally to determine the amount and date of payment, it was not shown that he had done so, or, supposing that he had, that any fresh demand had been made upon the parties liable. **HAB GOPAL DAS v. RAM GOLAM SAHI**

[5 B. L. R., 135: 13 W. R., 381]

127. — *Unauthorized sale by Collector—Want of sanction—Subsequent confirmation—Accounts—Costs*.—The sale by a Collector of a whole talukh in one lot for arrears of revenue, without specific authority previously conferred by the Board of Revenue, was held to be an act unauthorized by the general rules and principles of the regulations, and not rendered valid by the subsequent authorized confirmation of it by the Board, and by the appropriation of the surplus proceeds of the money by the defaulting proprietor. The proprietor's acquiescence in a sale made, as he believed, by the authority of the Board of Revenue did not give legal efficacy to a sale altogether void for the want of such authority, or bar his claim to annul the sale on that ground. The Courts below, without entering into any investigation of the profits made by the purchaser during his occupation of the estate, assumed that he had reimbursed himself the amount of the purchase-money and interest out of the profits of the estate. The Privy Council, however, saw no ground for such an assumption, and directed that an account should be taken of the principal and interest due to the purchaser in respect of the purchase money paid by him, and also of the net profits made by him, out of the estate during his occupation; and that on payment to him of whatever may appear due to him on taking such account, possession of the talukh should be delivered to the proprietor. The Privy Council further, acquitting the purchaser of all blame in the transaction, reversed so much of the decrees of the Courts below as condemned him in costs, and ordered each party to bear his own costs in all the Courts. **MITTERJEET SINGH v. HEIRS OF THE WIDOW OF JUSWUNT SINGH**

[6 W. R., P. C., 15: 3 Moore's I. A., 42]

128. — *Sale for arrears of revenue of mitta held by tenants-in-common during minority of some of the owners—Mad. Reg. X of 1831, ss. 1, 2, 3—Mad. Reg. V of 1804, s. 14 (4), s. 20*.—A mitta held by tenants-in-common was sold for arrears of revenue

## SALE FOR ARREARS OF REVENUE

—continued

## 8 SETTING ASIDE SALE—continued

at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale the District Court held that Regulation X of 1831 s. 2 absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned. Held on appeal that the minors not being sole proprietors their estate was not one of which the Court of Wards could assume the management and therefore s. 2 of Regulation X of 1831 did not affect the sale. KRISHNA v. MEKAMPURNA. COLLECTOR OF SALEM v. MEKAMPURNA.

[I L R., 10 Mad., 44]

129 — Payment of arrear of revenue through post office—Act XI of 1939, s. 2.—Payment by postal money order.—Where the revenue of an estate was sent through the post office by a money order in sufficient time, but it did not owing to the negligence of the post office reach the Collector in due time and the estate was sold for arrears of revenue—Held that the sale was rightly held. Payment to the post office is not equivalent to payment to the Collector, and the post office cannot be considered as the agent of the Collector. BAIKATNA NATH DUTT v. GURGA PRASAD MITTAL. 4 C W N, 103.

130 — Collector's order of exemption—Act XI of 1859, ss. 19, 33.—A Collector's order under s. 19 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption and not an order having effect as an exemption or not, according to what may happen, or be done, afterwards. It must not depend on an act which may or may not be performed. The High Court having set aside a sale, as contrary to the provisions of Act XI of 1859 upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale the Judicial Committee referring to s. 33 as prohibiting such a course, reversed the decision of the High Court. LAL GAUR SANKER LAL v. JANKI PRASAD I. L. R., 17 Cal., 608.

[I L R., 17 I. A., 57]

131 — Exemption from sale of land under attachment by Collector—Act XI of 1860, ss. 17, 25, 35.—Bengal Act VII of 1868—Suit to set aside sale.—Bengal Cess Act (Beng. Act IX of 1860)—Omission to specify ground of objection in revenue appeal.—An estate sold for arrears of revenue had been previously brought to a judicial sale by a mortgagee whose charge preceded that of a pulse incumbrance, when the present plaintiffs represented. It was not the consequence of the execution sale that pulse incumbrancers who were not parties to the prior mortgagee's suit, were displaced or left with nothing but a claim against the surplus proceeds of the sale, if any; and on the facts the present plaintiffs had a mortgagee's interest in the estate sold by the Collector,

## SALE FOR ARREARS OF REVENUE

—continued

## 8 SETTING ASIDE SALE—continued

entitling them to sue to have the sale for default in payment of revenue set aside, as contrary to Act XI of 1859. A sale for arrears of revenue, if for arrears which have accrued while the land has been subject to an order issued by the Collector under the Cess Act (Bengal Act IX of 1860), for the levy of road cess in arrear is contrary to s. 17 of Act XI of 1859, such an order being an attachment within the meaning of that section. But under s. 23 of that Act, in every case where a sale for arrears of revenue is impeached as being contrary to the provisions of Act XI of 1859 no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner under s. 25. The above provision in s. 33 applies where the sale has been irregularly conducted, and also where the sale has been illegal in consequence of an express provision for exemption of the land from sale for arrears having been contravened. LAL GAUR SANKER LAL v. JANKI PRASAD I. L. R., 17 Cal., 609; I. R., 17 I. A., 57, referred to. GOBIND LAL ROY v. BANJARAM MISHRA.

[I L R., 21 Cal., 70]

I. R., 20 I. A., 165

132 — Sunset law—Beng. Act VII of 1869, s. 11—Revenue Sale Law (Act XI of 1939), s. 6.—Act XI of Bengal Act VII of 1869 makes sunset law applicable in s. 6 of Act XI of 1939 applicable to sales of tenures under the former Act. The refusal, therefore, of the Collector to accept payment of the amount due when tendered after sunset on the latest day for payment does not make the sale under Bengal Act VII of 1869 illegal. AZIMUDDIN PATWARI v. SECRETARY OF STATE FOR INDIA. I. L. R., 21 Cal., 390.

133 — Payment of arrears before sale without obtaining exemption from sale—Act XI of 1859, ss. 6, 13, 18, and 33.—Proceedings when share of estate is not sold at auction.—Ground for annulling sale not declared and specified in appeal to Commissioner.—The plaintiffs and defendants were sharers in a certain estate, the plaintiffs being owners of a joint share, and the defendants the owners of other shares, in respect of which separate accounts had been opened in the Collector's register. The plaintiffs in March 1890 made default in the payment of Government revenue for their share, and it was advertised to be put up for sale on the 18th September 1890, under ss. 6 and 13 of Act XI of 1859 for recovery of the amount due, Rs 18-6. On the 10th September the plaintiff paid into the treasury of the Collector the amount of arrears due, and made an application that the joint share might be exempted from sale; receipts were given for the amount paid in, but no order was made on the application and the share was not exempted from sale. On the 16th September the joint share was put up for sale but there being no bids the sale was postponed, and on the same day the Collector made an order under s. 14 of Act XI of 1859 that, unless the arrears were paid by the other sharers (the defendants) within ten days, the whole estate

## SALE FOR ARREARS OF REVENUE —continued.

### 8. SETTING ASIDE SALE—continued.

would be put up for sale. Notices of this order, provided for by a rule made under the Act by the Board of Revenue, were given to the serving peon on the 2nd October for service on the defendants, and the arrears were paid in by some of the defendants on the 4th and by others on the 7th October, and eventually the Collector, acting under s. 14 of the Act, granted on the 5th December 1890 a certificate of purchase, and gave delivery of possession to the defendants. The plaintiffs appealed to the Commissioner, but their appeal was rejected on the 10th March 1891. In a suit for a declaration that the proceedings taken by the Collector under s. 14 of the Act were illegal and conveyed no title to the defendants, and for possession of the joint share with mesne profits,—*Held* by PETHERAM, C.J., and BEVERLEY, J. (AMEER ALI, J., dissenting), that the Collector not having exempted the share from sale, the payment by the plaintiff of the arrears on the 16th September was no bar to the proceedings taken under s. 14 of the Act. *Held* also that the defendants' purchase was not made invalid by the fact of their not having paid in the arrears within ten days from the 18th September, the day fixed for the sale; the ten days in s. 14 run from the time when notice of the Collector's order is given to the other sharers, and not from the date of the sale. *Held* further that it was not open to the plaintiffs to take this latter objection, as it was not declared and specified in their grounds of appeal to the Commissioner in accordance with s. 33 of the Act. *Gobind Lal Roy v. Ramjanam Misser*, I. L. R., 21 Cal., 70, followed. *Per* AMEER ALI, J., *contra*. *Per* PETHERAM, C.J.—S. 33 applies to sales under s. 14 as well as to sales by public auction under the Act. *Semble*—There is nothing in Act XI of 1859 which would have prevented the plaintiffs from purchasing the share themselves when it was put up for sale on the 18th September. *Per* BEVERLEY, J.—Under s. 6 of the Act, the sale, if it had taken place on the 18th September, would have conveyed a good title to the defendants; and under s. 14 they are expressly declared to have "the same rights as if the share had been purchased by them at the sale." *Per* AMEER ALI, J.—The proceedings provided for by s. 14 do not apply in a case where there have been no bids at the sale. S. 33 is not applicable to a transfer by the Collector of the defaulting share under s. 14; the sale contemplated by s. 33 and referred to by the Privy Council in *Gobind Lal Roy v. Ramjanam Misser*, I. L. R., 21 Cal., 70, is a public sale held at a place prescribed by the proper authorities at which there are bidders and a possibility of competition. *Gossain Chutturbroo Dutt v. Ishri Mool*. . . . I. L. R., 21 Cal., 844

134. — Benami purchase for defaulting proprietors—*Beng. Reg. XI of 1822—Void or illegal sale.*—Under Regulation XI of 1822, a benami purchase for defaulting proprietors at a sale for arrears of revenue was not *ipso facto* illegal and void. *Kalehdoss Mookerjee v. Mothooranath Banerjee*. . . . 5 W. R., 154

## SALE FOR ARREARS OF REVENUE —continued.

### 8. SETTING ASIDE SALE—concluded.

135. — Fraudulent purchase by judgment debtor—*Act XI of 1859—Right of decree-holder.*—In a suit to recover possession of a share of an estate on the ground of purchase at a sale in execution, which share was alleged to have been knocked down by the Collector to another party in an execution sale under Act XI of 1859, where it was found that the plaintiff's purchase had not been *bona fide*, the right, title, and interest of the decree-holder having been previously purchased *benami* by the judgment debtor himself,—*Held* that the real purchaser was the judgment-debtor, and that the holder of the rent-decree could properly sell either the estate of the said right, title, and interest. *Lalla Juggessur Sahoy v. Gopal Lall*. . . . 15 W. R., 54

136. — Failure of consideration—*Suit to set aside sale and recover purchase-money on the ground that subject of sale was alluvial land and practically non-existent.*—An estate does not necessarily mean land but may denote *julkur*, *phulkur* or *bunkur* rights, and even where land has been entirely washed away there still remains the right to possession of any alluvion that may subsequently reappear on the same site, which right may, in accordance with the Privy Council decision in *Lopez v. Maddun Mohun Thakoor*, 13 Moore's I. A., 467, be sold as an estate. A suit, therefore, by a purchaser of such an estate to have the sale set aside and recover his purchase-money, on the ground that the subject of his purchase was non-existent at the time of sale, and had since remained so, was held to be not maintainable. *Government v. Radhay Singh* [20 W. R., 117]

137. — Award of compensation to purchaser—*Sale set aside under Beng. Reg. I of 1821.*—A sale in 1802 of lands for arrears of Government revenue was set aside by the *mofussil* and *sudder* commissions constituted under Bengal Regulation I of 1821, although no suit was brought to annul the sale until 1821; and the decision was affirmed by the Judicial Committee. But the sale having taken place by direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under cl. 2, s. 4 of Regulation I of 1821, awarded the purchaser compensation to be paid by the Government. *Ishuree Persad Narain Singh v. Lal Chutterput Singh* [3 Moore's I. A., 100]

S. C. DEEP NARAIN SINGH v. LAL CHUTTERPUT SINGH . . . . 6 W. R., P. C., 27

### 9. MISCELLANEOUS CASES.

138. — Act XI of 1859, s. 5—*Effect of notification under Act—Attachment.*—A notification issued under s. 5, Act XI of 1859, is simply a public call on the debtor to pay his debt by a fixed date; it does not operate as an attachment by the Civil Court. *Nurekoo Ram v. Ramjorawan Singh*. . . . 9 W. R., 481

# SALE FOR ARREARS OF REVENUE

—concluded.

## 9. MISCELLANEOUS CASES—concluded.

139. ——— Transfer of tenure from one Collectorate to another—*Payment of revenue—Notice of transfer*—If a tenure is transferred from one Collectorate to another, and the holder of the tenure, after receiving notice of the transfer, continues to pay his revenue into the former Collectorate, he is not entitled to take credit for such payment. But if he pays before notice and obtains a receipt, such receipt is a quitance as against Government. **THAKOOR CHURN ROY v. COLLECTOR OF 24-PERGUNAH** . . . 13 W. R. 336

140. ——— Act XI of 1859, s 31—*Recorded proprietor, Representative of—Execution of decree—Purchaser in execution of decree—Revenue sale—Deposit—Assignee*—S 31 of Act XI of 1859 must be read strictly. An assignee of the recorded proprietors is not their representative within the meaning of that section, and the Collector is justified in refusing to pay to such assignee, claiming on his own behalf, money held in deposit on account of the recorded proprietors. **SECRETARY OF STATE FOR INDIA IN COUNCIL v. MARUTIM HOSHY KHAN** [I L. R., 11 Calc., 359]

# SALE FOR ARREARS OF ROAD CESS.

See **BENGAL CESS ACT, 1871** s 3

[I. L. R., 12 Calc., 430]

See **BENGAL CESS ACT, 1880**, s 47

[I. L. R., 24 Calc., 27]

See **BENGAL TENANCY ACT**, s 65

[I. L. R., 21 Calc., 722]

See **LIMITATION ACT 1877** ART 12

[I. L. R., 23 Calc., 775]

L. R., 23 I. A., 45

See **PUBLIC DEMANDS RECOVERY ACT**, s 2

[I. L. R., 14 Calc., 1]

I. L. R., 23 Calc., 641

See **PUBLIC DEMANDS RECOVERY ACT** s 7.

[I. L. R., 23 Calc., 775]

L. R., 23 I. A., 45

# 13th IN EXECUTION OF CERTIFICATE UNDER BENGAL ACT VII OF 1868—b

*Act (Beng. Cases UNDER PUBLIC DEMANDS specify ground)* ACT

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See CASES UNDER HINDU LAW—JOINT  
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[I. L. R., 13 Mad., 504

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See CASES UNDER ONUS OF PROOF—SALE  
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[4 B. L. R., A. C., 181

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[I. L. R., 27 Calc., 264

See TRANSFER OF PROPERTY ACT.

## 1. PLACE OF SALE.

1. ——— Place of holding the sale—  
*Sale of moveable property in execution of  
decree—Practice.*—Under the Code of Civil  
Procedure (Act XIV of 1882), it is intended that  
a sale of moveable property attached in execution of  
a decree should ordinarily be held in some place  
within the jurisdiction of the Court ordering the sale.  
Good and sufficient reasons must be shown for direct-  
ing otherwise. Where the only ground urged for  
directing a sale outside the Court's jurisdiction was  
that the property would probably fetch a better  
price, and it was found by the Court that a fair sale  
could be had on the spot,—*Held* that no sufficient  
reason was shown for departing from the usual  
practice. *LAKSHMIBAI v. SANTAPA REVAPA SHINTRE*  
[I. L. R., 13 Bom., 22

2. PERSON SELLING PROPERTY OF WHICH  
HE IS NOT, BUT AFTERWARDS  
BECOMES, OWNER.

2. ——— Obligation to make good  
the sale out of subsequently-acquired in-  
terest—*Vendor and purchaser.*—The doctrine—  
that where a person sells property of which he is not  
the owner, but of which he afterwards becomes the  
owner, he is bound to make good the sale to the pur-  
chaser out of his subsequently-acquired interest—  
does not apply to a case where the sale was made  
through the Court at the instance of an execution-  
creditor, and was therefore compulsory. *ALUK-  
MONEE DABER v. BANEER MADHUB CHUCKERBUTTY*  
[I. L. R., 4 Calc., 677 : 3 C. L. R., 473

## 3. OBJECTION TO SALE.

3. ——— Dispossession of third party in  
execution—*Resistance or obstruction by stranger  
on delivery to auction purchaser—Civil Procedure  
Code, 1859 s. 269.*—There was no provision in the  
Civil Procedure Code, 1877, similar to that contained

## SALE IN EXECUTION OF DECREE

—continued

## 3. OBJECTION TO SALE—concluded

In a 25<sup>th</sup> of Act VIII of 1859 which enabled the Court executing a decree to inquire into a complaint made by a person other than the defendant on the ground of oppression in the delivery of possession to the purchaser of immovable property sold in execution of a decree and therefore the only remedy of a person dispossessed was by regular suit. A decreed debtor purchased certain property belonging to B his judgment debtor at a sale in execution of his decree and delivery of possession to him was ordered. A stranger to the suit thereupon presented a petition to the Court executing the decree asking up a title to a moiety of the property in question and prayed for an injunction on the suit, and for recovery of possession on the ground that he had been dispossessed by A. Held that the application could not be maintained. HARISATTOOLAH v. ENGOBATH (1888).

[I. L. R., 3 Cal., 729 1 C. L. R., 517]

This court is now rectified and under the Civil Procedure Code 1908 the Court has power to make an inquiry on the application of a third party dispossessed in execution.

4. Decree, Impachment of by a stranger as fraudulent—*Civil Procedure Code (Act VIII of 1859) s. 25*—In the execution of a decree ordering the sale of immovable property it is not competent for the Court to refuse to sell it because a stranger to the suit in which such decree was obtained who is in possession of such property impeaches the decree as having been obtained by fraud; the course open to him, if he wishes stay of execution, being to file a suit and obtain an injunction for that purpose. PRASHOTTAM VITHAL v. PRASHOTTAM LEWIS. I. L. R., 8 Bom., 533.

## 4. STAY OF SALE.

5. — Stay of sale in regard to a particular property—*Order property of judgment debtor*. To save a particular property from sale, a judgment debtor must show the value and condition of other property in her possession and the Judge must consider how and by what arrangement such a disposal of different portions of such property may be made so as to avoid the sale of the property already attached. DES ARMAIS BIKER v. FAY LALL MOONJEE. 3 B. L. R., App. 107. 12 W. R., 68.

6. — Stay of sale pending administration suit—*Mortgage decree—Right of secured creditor*—In execution of a decree on a mortgage-debt created by the father of the judgment-debtor, since deceased, which decree directed that the mortgage-charge should be enforced, first, by sale of the property specifically mortgaged, and, secondly, if the debt remained unsatisfied by the sale of the other property in the possession of the judgment-debtor, the judgment-debtor proceeded to have the property sold. After issue of the sale notification, one of the judgment debtors applied for stay of the sale on the ground that an administration suit

## SALE IN EXECUTION OF DECREE

—continued

## 4. STAY OF SALE—concluded

was pending with respect to the property of his father, the mortgagor, and also asked that a receiver be appointed and arrangements made for paying off the mortgage debt and saving the property from sale. Held that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration suit. HISTOMONIST DODDER v. BAMA CHURN NAO CHOWDREY. [I. L. R., 7 Cal., 733; 9 C. L. R., 344]

7. — Tender of debt by transferee of property—*Civil Procedure Code, s. 291*—Held that the assignees of a purchaser from a judgment-debtor of property, the subject matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale. BENARI LAL v. GANPAT. [I. L. R., 10 All., 1]

8. — Civil Procedure Code, ss. 278, 305—s. 305 of the Civil Procedure Code (which enables the Court in certain cases to stay the sale of immovable property to enable the debtor to raise the amount of the decree by mortgage, lease, or private sale of the property) contemplates a mortgage or lease or private sale only where "the amount of the decree can be thus provided for." A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of certificate a mortgage by the judgment-debtor is, as between him and his mortgagee, *bona fide*, nor can it affect the lien acquired by the judgment-creditor under s. 26. GURRAMI v. VENKATRAMI. I. L. R., 14 Mad., 277.

## 5. IMMOVABLE PROPERTY.

9. — Interest in decree against mortgaged property—*Civil Procedure Code, 1859, s. 239—Sale of decree—Interest in immovable property*—A decree for the sale of mortgaged property was attached and sold in execution of a decree. Held that the interest in immovable property thereunder conveyed to the purchaser was immovable property within the meaning of s. 239 of Act VIII of 1859 and that certificate of sale ought to have been granted to the purchaser. HARI GOVIND JOSHI v. RANCHANDRA PANDURANG JOSHI. [9 Bom., 64]

10. — Decree creating charge on land—*Interest in immovable property*—The sale of a decree charging land for its satisfaction in the course of execution-proceedings against the judgment-creditor is a sale of an interest in immovable property. Held that the provisions of the Code of Civil Procedure relating to sales of immovable

## SALE IN EXECUTION OF DECREE —continued.

### 5. IMMOVEABLE PROPERTY—concluded.

property will apply to such sale. BHAWANI KUAR  
v. GHUJAB RAI . . . I. L. R., 1 All., 348  
MOBKONISSA v. DEWAN ALI MISTREE  
[4 W. R., Mis., 22]

### 6. BIDDERS.

11. ——— Withdrawal of bid—*Civil Procedure Code, s. 290.*—It is competent to a bidder at a Court auction sale to withdraw his bid. AGRA BANK v. HAMEIN . . . I. L. R., 14 Mad., 235

### 7. PURCHASERS, RIGHTS OF.

#### (a) GENERALLY.

See CASES UNDER ACCRETION—RIGHT OF PURCHASERS TO ACCRETIONS.

12. ——— What passes by sale—*Sale under money-decree—Right, title, and interest of judgment-debtor.*—Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale. AEHE RAM v. NAND KISHORE . . . I. L. R., 1 All., 238

KHUB CHAND v. KALIAN DAS

[I. L. R., 1 All., 240]

BARTON v. BRIJONATH SCHARMA . . . 3 W. R., 65

RAM ONOOGROHO SINGH v. MONTORUN  
[6 W. R., 223]

SETH OODEY KURREN v. CHAIT RAM  
[2 Agra, 125]

JYKISHOON SOOKUL v. SHUNKER SOOKUL  
[3 Agra, 168]

ZALIM v. CHOONEE LALL . . . 3 Agra, 194

BHUKAN BHAIJATA v. BHAIJI PRAG . 1 Bom., 19

13. ——— *Sale under Bom. Reg. IV of 1827—Right, title, and interest of judgment-debtor.*—All that passed under a Court's sale under Bombay Regulation IV of 1827 was the right, title, and interest of the judgment-debtor whose property was proclaimed for sale. KUSHABA BIX SANKROJI v. PITAMBARDHARI . . . 12 Bom., 15

14. ——— *Property sold with specification—Rights of judgment-debtor.*—Though there is a specification of the subject of sale at the time of sale, yet it is not the property specified, but only the right of the judgment-debtor therein, that is offered for sale and is conveyed, there appearing no provisions in the Procedure Code to contemplate the sale or transfer of anything more than the right and interest of the judgment-debtor; and the auction-purchaser at a sale in execution acquires by the express terms of the conveyance to him, not the presumed title of the person in possession, or the apparent title in the Collector's books.

## SALE IN EXECUTION OF DECREE —continued.

### 7. PURCHASERS, RIGHTS OF—continued.

but the right, title, and interest of the judgment-debtor in the property sold. MAHOMED BUKSH v. MAHOMED HOSSEIN  
[3 Agra, 171: Agra, F. B., Ed. 1874, 145]

See BALUK DOSS v. NIMAYE CHUNDER SIRCAR  
[17 W. R., 511]

15. ——— *Description of property in specification under s. 237 of Civil Procedure Code on application for attachment—Execution against joint family property.*—The specification required by s. 237 of the Civil Procedure Code of the judgment-debtor's share or interest in immoveable property sought to be attached should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only. MURHAMMAD HUSAIN v. DIP CHAND  
[I. L. R., 14 All., 190]

16. ——— *Sale of rights and interests in mouzah consisting of two mehals—Submersion of mehal at time of sale—Sale certificate not specifically mentioning submerged mehal—Passing of rights in submerged mehal to purchaser.*—The rights and interests of certain judgment-debtors in a mouzah consisting of two separate mehals, respectively known as the Uparwar mehal and the Kachar mehal, were brought to sale in execution of the decree. At the time of the sale, the Kachar mehal was submerged by the river Ganges, and in the sale-notification the revenue assessed upon the Uparwar mehal only was mentioned, and there was no specific attachment of the Kachar or submerged land, but the property was sold as that of the judgment-debtors in the mouzah. Subsequently the river having receded, the auction-purchaser attempted to obtain possession of the Kachar land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the Uparwar mehal. Held that either the whole rights of the judgment-debtors in both mehals were sold, or, if not, their rights in the Uparwar mehal with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mehal; and the mere fact of the mention in the sale-notification of the revenue of the Uparwar mehal did not affect what passed by the sale. Held also that the attachment of the judgment-debtors' entire proprietary rights in the mouzah included their interests in both mehals, and the sale-certificate clearly showed that all their rights in the village were passed to the purchaser. *Nahadeo Dubey v. Bholanath Dicheit, I. L. R., 5 All., 86, and S. A. No. 818 of 1855, referred to. Fida Husain v. Kutab*

## SALE IN EXECUTION OF DECREE

—continued

## 7 PURCHASERS, RIGHTS OF—continued

*Hussain, I L R, 7 All, 38*, dissented from *MUHAMMAD ABDEL KADIR & KUTUB HUSAIN KUMAL-UD-DIN AHMAD & KUTUB HUSAIN*

[I L R., 9 All, 136]

17 ————— *Increase of judgment debtor's interest occurring after attachment and before sale.*—Previously to a mortgage of it, a fractional interest in certain property (which interest was purchased by the plaintiff the mortgagee at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife under the conditions that, if he should have no child by her his two sons by another wife should each have an estate therein. He died without other children. *Held* that the two sons had taken definite interests capable of being attached within s. 266 of the Civil Procedure Code, not being mere expectancies. *Held* that a judicial sale of property, purporting to be of all the interest of a judgment debtor carries with it any enlargement thereof that may have occurred after the attachment and before the sale and that accordingly the above-mentioned settlor having died without a child by that wife between the date of the attachment and the sale the sons augmented interests passed thereby. *UMES CHUNDER SINGH & ZAHUR PATINA*

I L R., 18 Cal., 184

[I L R., 17 I. A., 201]

18 ————— *Civil Procedure Code (Act XIV of 1852) s. 274 cl (c).—Rights of purchaser of mortgage bond at sale in execution of decree.*—Where a person at an execution sale purchases a mortgage-bond under which certain immovable property is given as collateral security for an advance the fact that he has not attached under s. 274 of the Code will not affect his right to have the collateral security enforced by the sale of the properties mortgaged. *HASIRATH DAS & SADASIV PATNAIK*

I L R., 20 Cal., 805

19 ————— *Sale of raiyat's interest.—Want of zamindar's consent to a sale.*—An auction purchaser of a raiyat's right and interest in his house in a village could not acquire more title than could have been transferred by private sale, and therefore if by the village custom the raiyat cannot alienate the house with the zamindar's consent, and such consent has not been obtained the sale in execution conveys no rights in it to the purchaser. *SUBH LALL & LOCHUN SINGH*

3 Agri, Rev., 7

20 ————— *Sale of specified share.—Property coming to debtor before sale.*—When there was a sale of a specified share belonging to the judgment-debtor—*Held* that the auction-purchaser was not entitled to claim property which had before sale descended to the judgment-debtor. *ALADEB & AJMER KOOTWEE*

1 Agri, 282

21 ————— *Interest in purchase-money.—Civil Procedure Code 1877, s. 266.—Property not subject to attachment and sale.*—The purchaser at a sale in execution of a decree of the right or interest which the vendor of immovable

## SALE IN EXECUTION OF DECREE

—continued

## 7 PURCHASERS, RIGHTS OF—continued

property is in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, takes nothing by his purchase, such interest not being subject to attachment and sale under s. 266, Civil Procedure Code 1877. *AHMAD UDDIN KHAN & MAJLIS RAI*

I L R., 3 All., 12

22 ————— *Right to mesne profits.—Civil Procedure Code (Act VIII of 1859), s. 259.—Certificate of sale.*—The possession, with mesne profits, of land comprised in a *xur i paragi* lease of the year 1851 was decreed to the *xur i paragi* dars in 1860, and litigation as to their rights under the lease was carried on till 1874, when, after their deaths it ended in favour of their representatives. In 1869 one of the parties to that litigation obtained a decree for money against the *xur i paragi* dars, and in 1874 in execution of this decree, all the right, title and interest of the representatives of the latter in the lease of 1851 was sold to a third party. *Held* (reversing the decision of the High Court) that the right to the mesne profits awarded by the decree of 1869 did not pass by the sale, but remained in the representatives. *GANESH LALL TEWARI & SHAM SARAIN*

I L R., 6 Cal., 213

23 ————— *Life interest in property of testator.*—A life-interest in the residue of the real and personal property of a testator after all the charges upon it have been satisfied and provided for, and after a full administration has taken place of the assets for the purpose of discharging these several dispositions, cannot be sold under an execution issued in the Supreme Court against the property of the testator. The sale therefore passes nothing to the purchaser. *TOXAI SHERON & DAVID MULLICK FURKHOON POGHAR*

[4 W. R., P C., 87; 6 Moore's I. A., 510]

24 ————— *Sale of legacy under writ against executor.*—A seizure and sale by the Sheriff of the amount of a legacy under a writ against the executor, declared invalid in the absence of proof of payment extinguishing the legatee's interest. *LAZAR & COLLIA RAGAYA CHETTY*

[5 W. R., P C., 128. 2 Moore's I. A., 83]

25 ————— *Right and interest of proprietor of resumed revenue-paying estate.*—By a sale in execution of the rights and interests of a judgment-debtor as recorded proprietor of a Government resumed revenue-paying estate, released rent-free lands lying in the estate do not pass to the purchaser. *DOE GOBINDMOY DEBIA & IMPAD AII*

5 W. R., 170

26 ————— *"Right, title, and interest" of a judgment debtor in a partly-executed decree.—Possession of land attached under Beng Reg 1 of 1812 s. 26.*—A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a *talukh* which had been a *nee* 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Regulation 1 of 1812. The Court



## SALE IN EXECUTION OF DECREE —continued.

### 7. PURCHASERS, RIGHTS OF—continued.

which granted the decree, intending to execute it approved the proceedings of an Ameen purporting to put the decree-holders into constructive possession of a certain number of mouzabs of the talukh. In 1850 the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, their "right, title, and interest" in the decree of 1843. *Held* (affirming the judgment of the High Court) that possession of the mouzab having been delivered, so far as it could be delivered, considering the attachment to which the talukh containing these mouzabs was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution sale was only the unexecuted portion of the decree of 1843. *GRISHCHUNDER CHOKERBUTTY v. JIBANESWARI DABIA GRISHCHUNDER CHOKERBUTTY v. BISWARI DEDIA*

[I. L. R., 6 Cal., 243; 7 C. L. R., 420]

27. ————— *Sale of right, title, and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchaser.*—In 1873 and 1876, portions of an impartible primogenitary zamindari, which were in the possession of a lessee from the zamindar, were attached and brought to sale in execution of decrees against the zamindar. The purchase-money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale certificate was the right, title, and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1881, and the lease having run out, the purchaser now sued in 1893 for possession. *Held* that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor. *ABDUL AZIZ KHAN SAHIB v. APPAYASAMI NAICKAR* . . . I. L. R., 22 Mad., 110

28. ————— *Sale of rights of deceased debtor whose representatives hold certificate of administration.*—In cases where the right of inheritance really vests, the purchaser of the rights of a deceased judgment-debtor, whose representatives hold under a certificate under Act XXVII of 1860, does not acquire the entire estate, but acquires it subject to all legal and equitable rights of inheritance. *SHAM COOMAR ROY v. JUTTUN BIBEE*

[14 W. R., 448]

*RAJKRISTO SINGH v. BUNGSHEE MORUN*

[14 W. R., 448 note]

29. ————— *Sale of zamindari rights—Building appurtenant to zamindari rights.*—The "rights and interests" of a zamindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property *quâ* zamindar. *Held* that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interest" in the village passed such building to the auction purchaser. *ABU HASAN v. RAMZAN ALI* . . . I. L. R., 4 All., 361

## SALE IN EXECUTION OF DECREE —continued.

### 7. PURCHASERS, RIGHTS OF—continued.

30. ————— *Sale of house and lands to different purchasers—Decree-holder, Purchase of land by, and sale of house to, third person.*—Where a decree-holder who had attached certain land and a house upon it caused the land to be sold in execution and purchased it, and then caused the house to be sold to a third party,—*Held* that he had purchased the land on which the house stood, subject to the right of the person who bought the house to have it continued there. *MOOKTA SOONDUREE CHOWDHRAIN v. MUTHOORANATH GHOSE* . . . . . 22 W. R., 209

31. ————— *Sale of property with incumbrances—Right, title, and interest of debtor.*—The purchaser at a Court's sale buys only the right, title, and interest of the debtor, burdened with all valid liens such as a previous san mortgage. *Mathuradas Ranchoddas v. Kalai Khushal, 7 Bom., A. C., 24, and Chintaman Bhaskar v. Shiram Hari, 9 Bom., 304, followed.* *RANCHODAS DAYALDAS v. RANCHODAS NANABHAI*

[I. L. R., 1 Bom., 581]

32. ————— *Interest adverse to judgment-debtor—Effect of sale—Incumbrances by debtor after attachment.*—Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all the alienations and incumbrances effected by him after the attachment of the property sold. *DINENDRONATH SANNAI v. RAMKUMAR GHOSE. TARAKCHANDRA BHUTTACHARJEE v. BAIKANTNATH SANNAI* . . . I. L. R., 7 Cal., 107; 10 C. L. R., 281

[I. L. R., 8 I. A., 65]

*BHUGOBAN CHUNDER DOSS v. LALLA THAKOOR PERSHAD* . . . . . W. R., 1864, 359

33. ————— *Sale free of decree-holder's interest—Reservation of rights.*—When a judgment-debtor's property is sold at the instance of the judgment-creditor, the sale, whether directed by the decree or not, must be a sale free of the judgment-creditor's rights in the property, unless these are reserved. *DOOLEY CHUND v. OOMDA BEGUN* . . . . . 24 W. R., 263

*See DULLAB SIKKAR v. KRISHNA KUMAR BAKSH*  
[8 B. L. R., 407; 12 W. R., 303]

34. ————— *Prior right of former purchaser at unconfirmed sale—Laches.*—The purchaser at a Court's sale buys only the then existing right, title, and interest of the judgment-debtor, and therefore ordinarily takes, subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own. *Quare*—Whether the case might not be different if the delay in the confirmation of the former purchase were accompanied by great laches on the part of the first purchaser, or by other special circumstances. *KONAPA BEN MAHADAPA v. JANABDAN SUEDEV* . . . . . 11 Bom., 193

## SALE IN EXECUTION OF DECREE

—continued—

## 7 PURCHASER'S RIGHTS OF—continued

35 — Effect of sale—*Gift of purchaser as compared with purchaser by private sale—Right as against charges on estate sold*—A purchaser at a judicial sale is in a position different from that of a mere representative of the old proprietor or of one who comes in by a voluntary sale made by the latter. A judicial sale transfers to the purchaser the property of the judgment-debtor as the debtor will and places the purchaser in a higher position than that which the judgment-debtor by any private alienation could confer on him. Such a purchaser is competent to defend his possession and title by showing that the charge which it is sought to establish against the estate is fraudulent and void and therefore void. *GOMRAO SINGH v. BHUPDO NATH*. 2 N. W., 28

36 — *Purchaser subject to decree for sale*—*Incumbrance*—A decree holder having attached certain property in the execution of a decree as appeared as a junior. The decree-holder was referred to a civil suit and obtained a decree for the sale of the property in satisfaction of the former judgment-debtor. A then sued the judgment-debtor for the return of certain alleged consideration money and obtained a decree in execution of which he brought to sale and became purchaser of the same property of which the sale had been decreed as above mentioned. Held that N could only purchase the property subject to the decree for sale, and that the transactions subsequent to that decree had no effect to shake it off. *VIJAYRAM RAO v. RAJENDU LAL*. 5 N. W., 168

See *SOORAJ BUKH v. PAMJEEWARS*

[4 N. W., 5]

37 — *Fraudulent alienations before decree*—An auction-purchaser can question the fraudulent acts and alienations of the old proprietor in fraud of the decree. *RAJENDU v. HOWARD*. 3 Agra, 15

DEWAN LOY v. LIDDELL

9 W. R., 521

38 — *Fraudulent award, Right of purchaser to contract et*—The former tenant of a purchaser at a sale in execution of a decree is not bound by an award in fraud of the decree in which the judgment-debtors were parties. *ALHATTU v. RAO HARAN SINGH*. 7 N. W., 362

39 — *Right of purchaser to set aside deeds*—There is no authority for the proposition that the purchaser at a sale in execution of a decree of the right, title and interest of the judgment-debtor acquires by that purchase not merely the right, title, and interest of the judgment-debtor but any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made, even it might be by the judgment-debtor himself. *LALLA RAM SURIN LALL v. LOHABAS KOOER*. [18 W. R., 59]

[18 W. R., 59]

40 — *Right to set aside mortgages—Mortgage—Covenant not to alienate*—A

## SALE IN EXECUTION OF DECREE

—continued—

## 7 PURCHASER'S RIGHTS OF—continued.

gave a mortgage to B of certain property as a security for money lent and covenanted not to alienate the property by gift, lease, pawn, or otherwise, by which loss might be caused to the existing actual assets of the property. A subsequently granted a pawn to C. B obtained a decree against A for the amount of the loan, and the property was sold in default of payment. D was the purchaser at the auction sale. Held that D could maintain his suit against C to set aside the pawn and for possession. *RAJESWAR HISOORI DAS v. MEHAR MEH SATEM*. 1 B. L. R., A. C., 162

S. C. BROJO KISHORE DOSSIA v. MANOHAR SATEM. 10 W. R., 151

## (b) EASEMENTS.

41. — Right to easements.—The rule that the right to easements goes with the property when sold by the owner himself applies also when the property is sold by the Court in execution of a decree against him. *MAHARAJA LAKSHMI v. HEM CHANDER GOSSAINE*. 23 W. R., 623

## (c) EMBLEMENTS.

42. — *Right to emblements—Mortgage, Sale under*—On the 14th of July 1876, B obtained a decree against D directing D to pay the amount advanced upon a mortgage of D's lands within six months from the date of decree or, in default of payment the lands to be sold with liberty to B to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and B became the purchaser. At the time of the sale the lands were in the occupation of D's tenants under an agreement to give to D a moiety of the crops. On the 11th December 1877 F, another judgment-creditor of D, attached the crops on those lands which had been cut and stored by D's tenants since the date of the sale. Held that by the sale to B all right, title, and interest of D including his right to the moiety of the crops in the hands of his tenants passed to B, and no residual right remained in D on which F's execution could operate the crops not having been actually carried away and appropriated by D. *LAWD MORTGAGE BANK OF INDIA v. VISHNU GOVIND PATAYKAR*. 1 L. R., 2 Bom., 670

43. — *Crop standing on land sold in execution of a decree obtained by a mortgagee in possession*—A mortgagee in possession on his mortgage and having obtained a decree brought the land to sale in execution and the execution-purchaser was placed in possession. Held the mortgagee was not entitled to recover from the execution purchaser the value of the then standing crop. *PAMALINGA v. SAMIAPPA*. 1 L. R., 13 Mad., 15

## (d) RENT.

44. — Right to rents.—Rents paid for former proprietor after sale—Notice of title

## SALE IN EXECUTION OF DECREE

—continued.

## 7. PURCHASERS, RIGHTS OF—continued.

*of purchaser.*—The purchaser of a zamindari sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase; and if the tenants or raiyats, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. COLLECTOR OF RAJSHAHYE v. HURSOONDERY DEBIA

[W. R., 1864, Act X, 8

## 45. — Apportionment of rents—

*Purchaser of share of estate.*—A purchase at a sale in execution of a decree of one of several estates let in one patni is not bound by any agreement between the patnidar and other zamindars regarding their shares of the entire patni rent. Nor can he claim from the patnidar as his own share of the patni rent a sum bearing the same proportion to the whole patni rent as the sudder jumma bears to the sudder jumma of all the estates let out in patni. In order to obtain redress in such a case, either the patnidar or one or all of the zamindars may have their fixed patni rent properly apportioned among the several zamindars by a civil suit in which all the zamindars should be parties. PORESH NATH ROY v. BISHROOP DUTT

[W. R., 1864, Act X, 16

## (c) REVERSIONARY INTEREST.

## 46. — Reversionary right of

*grantor—Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Act VIII of 1859, s. 205—Civil Procedure Code, s. 266 (k).*—One N, the sole owner of a certain village, had a son J. J had two wives. By his first wife he had a son U. J's second wife was G, by whom he had a son whose widow was K, the defendant in the suit. J died leaving U his son, G his widow, and K his son's widow, and on his death U inherited the village. Prior to the year 1874, U had made a gift to G of 105 bighas situate in the village. In 1874 the rights and interests of U in the village were sold by auction and purchased by T, the ancestor of the plaintiffs. G by a deed of gift conveyed the 105 bighas to K and ultimately died on 26th January 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to G in lieu of her maintenance, which she was to hold rent-free for her life, and that she had been in possession thereof for twenty years. Further, that U had the right to resume the land and assess it to rent on the death of G, and all the rights and interests of U in the land were attached and sold in 1874. On second appeal it was contended that the interest of U in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. Held that U gave to G the usufruct of the land for her life in lieu of her maintenance; that after the gift the interest of U in the land was of the same character and carried with it the same consequences as the

## SALE IN EXECUTION OF DECREE

—continued.

## 7. PURCHASERS, RIGHTS OF—concluded.

reversion, which the lessor would have for land leased for life or years, and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have; and that U had a vested right in the land which was capable of being sold and that right passed to the auction-purchaser at the sale of 1874. *Koraj Koonwar v. Komul Koonwar*, 6 W. R., 34; *Ram Chunder Tantra Das v. Dhurmo Norain Chukarbatty*, 7 B. L. R., 341; 15 W. R., F. B., 17; *Tuffazool Husain Khan v. Raghunath Pershad*, 7 B. L. R., 156; 14 Moore's L. A., 40, distinguished. KACHWAIN v. SARUP CHAND

[I. L. R., 10 All., 462

## (f) STRIDHAN.

## 47. — Malabar Law—Personal decree

*against karnavan—Civil Procedure Code, s. 335.*—A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit for a private debt. In the execution proceedings, an objection petition was put in, stating that the shops were stridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale. Held that upon the facts found the plaintiff acquired nothing under the Court sale. ACHTA v. MAMMAVU . . . I. L. R., 10 Mad., 357

## 8. ERRORS IN DESCRIPTION OF PROPERTY SOLD.

48. — Subject of purchase—Certificate of sale, Description in—Obligation of purchaser to see that certificate is correct.—It is the business of an auction-purchaser to see that the sale certificate conveys to him what he supposes himself to have purchased, and it is not open to him to adduce evidence afterwards to prove that he purchased anything more than the certificate shows him to have taken under the sale. PEAREE MORUN MOOKERJEE v. GOSTO BEHARY DEY . . . 28 W. R., 104

49. — Certificate of sale more extensive than decree—Right of purchaser.—Where a decree-holder obtains an order for the sale of the judgment-debtor's interest in certain property, and, becoming purchaser at the sale which follows, receives a sale certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order. GOWREE KUMUL BHUTACHARJEE v. SURUT CHUNDER DOSS BISWAS 22 W. R., 408

50. — Subject of sale—Discrepancy between notification of sale and sale certificate—Right of purchaser.—Where on an execution sale there is a discrepancy between the conditions in the notification of what is to be sold and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority in

**SALE IN EXECUTION OF DECREE***—continued—***8. ERRORS IN DESCRIPTION OF PROPERTY SOLD—continued**

dealing with the conflicting claims of innocent third parties whose rights are affected by the variation. In execution of a decree for arrears of rent, an application was made for a sale of the tenure for the arrears of which the decree had been obtained. A notification was issued purporting to be a sale proclamation under Act VIII of 1859 s 349 and in pursuance of that notification the sale of the right, title, and interest of the judgment-debtor took place. *Held* that the tenure did not pass by that sale, notwithstanding that the sale certificate stated it was the tenure itself which had been sold. **UMA CHETRY** **SEN v GORIND CHANDRA MOZUMBAR**

(I C L R, 460)

51

*—Description of*

*tenure sold—Right of purchaser.*—A in satisfaction of a decree against B, caused the sale of a tenure styling it a jote jumma. C, the superior zamindar purchased the tenure as such for Rs 900; but failing to pay the balance of the purchase-money, the tenure with the same description was re-sold, and purchased by C for one rupee. A, on discovering his mistake in having advertised the property as a jote-jumma, when in fact it was a shamlat talukh (a more permanent and valuable holding) caused a sale of B's rights and interests in the shamlat talukh, and, having purchased them himself, was put into possession. A then sold for rent under Act X of 1833, when C intervened as in enjoyment of the rent, and A's suit was dismissed. In a suit by A to establish his right to the shamlat talukh.—*Held* that A was entitled to succeed, as he had acted *bona fide*, and that C could not be considered an innocent purchaser for a valuable consideration but a purely speculative purchaser, as he must have known that no such tenure as that which he purchased under the denomination of jote-jumma had any real existence. **HURO NATH POY v MOTHOORA NATH ACHARYA**

[7 W. R., 4]

52.

*—Description in*

*notification of sale—Sale under mortgage-decree—Peculiar purchaser.*—The proprietors of a talukh and mahal called B assessed with revenue at Rs 800-4-7, to which certain lands which had been gained by alluvion appertained, which lands had been formed into a separate mahal and assessed with revenue at Rs 88, mortgaged it in these terms: "We agree mutually to mortgage the said talukh B, and accordingly after mortgaging and hypothecating the whole of the mouzas, original and appended, yielding a jumma of Rs 800-4-7, along with all *original and appended* rights, water and forest produce, high and low lands, cultivated and uncultivated lands, etc., etc., and all and every portion of our proprietary prerogative, and demandable rights, without excepting any right or interest obtained or obtainable, etc." Subsequently, the mahal talukh B "together with original and attached mahal and all the samandari rights appertaining thereto," was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire talukh B,

**SALE IN EXECUTION OF DECREE***—continued—***8 ERRORS IN DESCRIPTION OF PROPERTY SOLD—concluded.**

*jurima Rs 800-4-7," but afterwards refused to perform the contract, and was sued for its specific performance. The plaintiff in this suit stated that the subject-matter of the contract was the "entire talukh B, jumma Rs 800-4-7," and the decree which the purchaser obtained for the specific performance of the contract referred to its subject-matter in similar terms. *Held* in a suit by the purchaser for the possession of the alluvial mahal that the terms of the mortgage were sufficiently comprehensive to include that mahal, and it was not intended by the entry of the jumma of mahal B, exclusive of the jumma of the alluvial mahal, to exclude the latter from the mortgage, the entry of the jumma being merely descriptive. Also that the alluvial mahal passed to the auction-purchaser at the auction-sale, under the words "attached mahal." Also that the sale to the plaintiff passed the alluvial mahal, the words "the entire talukh B" being sufficient to include it, the entry of the jumma of mahal B in the sale contract, plaintiff, and decree being merely descriptive. **GANTATJI v. LADAT ALI***

(I. L. R., 3 All., 787)

**9 JOINT PROPERTY**53 ——— *Sale of joint property as if*

*separate—Effect of sale—Right taken by purchaser.*—Under a sale in execution of a decree no property can be sold except that which belongs to the defendants in the suit. Accordingly, if under a decree in a suit against A alone for a debt for which B is jointly liable, an estate be sold in which B is entitled to an equal share with A, the interest of A alone is acquired by the purchaser. **KUNER CHANDER GHOSH v ASHROFF** . **Mahab., 847**

**SANKERENAD SURMAH BRUTTACHARIJE v. SUBROOPA DOSIA** . **8 W. R., 453**

54. ——— *Sole right of member of joint Hindu family in undivided property*

*—Decree in suit for damages for tort—Costs.*—There may be a valid sale upon an execution in an action of damages for a tort, of the share of undivided family property to which, if a part took place, a judgment-debtor would be individually entitled. Such damages in the costs recovered constitute a judgment-debt, in respect of which the judgment-creditor's rights are the same as those upon any other judgment for payment of money. **VINAYAMI GRAMINI v ATTAYAMI GRAMINI** . **1 Mad., 471**

55. ——— *Partnership property—Sale*

*decree against one of several partners in mercantile firm—Right against partnership property.*—A suit was brought by C against A, as manager of a firm and also against the firm itself, and a decree was passed accordingly. A was one of two partners in the firm. The other partner (B) was not named in the plaint. In execution of the decree, the right, title, and interest of A in a stable, which in fact belonged to the firm, was sold to the plaintiff. In a suit brought by the plaintiff against B, the other

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

partner in the firm, to recover possession of the property.—*Held* that the plaintiff was in no better position than a purchaser at a sale of partnership property made in execution of a decree against a single partner, and that he could not be allowed to effect a partial partition, which the judgment-debtor, to whose right he succeeded, would not have been entitled to obtain. All that the plaintiff could do was to bring a suit for an account and settlement of the whole concerns of the firm, and claim that interest in the property which upon a final settlement might be ascertained to belong to his judgment-debtor. *KALYANBHAI v. MOTIRAM JAMNADAS* . 10 Bom., 378

See *KESHAV GOPAL GINDE v. RAYALA* [12 Bom., 165]

56. ——— Property of co-parceners—*Undivided Share of one of several co-parceners—Purchase of Hindu family—Unascertained share*. Purchase of one of the co-parceners in a Hindu undivided family in the ancestral estate may before partition be seized and sold in execution for the separate debt in his lifetime. The purchaser of such an unascertained share cannot, before partition, insist on the possession of any particular portion of the undivided family estate, and he takes any such share subject to the prior charges or incumbrances affecting the family estate or that particular share. The attachment of a co-parcener's share in the family property under an ordinary money-decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against the share, right, title, and interest, in all other parts of the family property. *UDARAV SIVARAM v. RANU PANDUJI* . 11 Bom., 78

57. ——— Attachment and sale of the interest of one of several co-parceners in the undivided estate—*Mortgage by one co-parcener*.—In 1848 two members of an undivided family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 guntas of the mortgaged land to be attached and sold on account of the right and interest of one of the mortgagors only on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 guntas then were, to recover the same from him as being the property of the mortgagor whose right and interest therein had been attached and sold.—*Held* that the purchaser could take no more than the share of the co-parcener whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848. *PANDURANG ANANDRAY v. BHASKAR SHADASHIV* . 11 Bom., 72

58. ——— Property of joint tenants—*Share in joint family property—Family dwelling-house—Service rents—Right of purchaser*.—Where the interest of one of several joint tenants in a family

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

dwelling-house and in certain lands let out on service tenure is sold in execution, the purchaser is entitled to joint possession of the dwelling-house with the other shareholders, and also to a right to share in the other service rents. *Kowar Bijoi Kesal Roy v. Samasundari, B. L. R., Sup. Vol., 172: 2 W. R., Mis., 30*, commented on. *RAJANKANTH BISWAS v. RAM NATH NEOGY* . I. L. R., 10 Calc., 244

See *ESHAN CHUNDER BANERJEE v. NUND COOMAR BANERJEE* . 8 W. R., 239

59. ——— Property of joint tenure-holders—*Decree against one of several joint sharers—Effect of sale under such decree*.—In execution of a decree against one of several joint holders of a tenure, when it is clear that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure had he taken proper steps to do so or although the purchaser may have obtained possession of the whole tenure under the sale. But if, however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure must be considered as having passed by the sale. If the question is doubtful on the face of the proceedings, the Court must look to the substance of the matter, and not to the form or language of the proceedings. *JEO LAL SINGH v. GUNGA PRSHAD* [I. L. R., 10 Calc., 998]

See *NITAYI BEHARI SAHA PARAMANICK v. HARI GOVINDA SAHA* . I. L. R., 26 Calc., 677  
and *ANUNDA KUMAR NASKAR v. HARI DASS HALDAR* . I. L. R., 27 Calc., 545

60. ——— Property of joint family—*Suit to set aside sale—Refund of purchase-money*.—The sale of joint property governed by the Mitakshara law, in execution of a decree made on a debt which was not a necessity, is not valid and cannot be upheld, even though the proceeds are used to satisfy another decree on a bond by which money was borrowed on necessity. The parties suing for annulment of such invalid execution sale are bound to pay the auction-purchasers so much of the debt as would have been a burden on the estate. *BYRHO PRSHAD v. BASISTO NARAIN PANDEY* . 16 W. R., 31

61. ——— Personal decree against karnavan of tarwad—*Right of purchaser*.—If, in execution of a money-decree obtained against a person who happens to be the karnavan of a Malabar tarwad, the tarwad property is attached and sold, a purchaser at an auction-sale obtains nothing, and in such a case the question whether the purchase was made *bona fide* and for value is not material. *ERAYACHANDATHIL KOMBIACHEN v. KENATUMKORA LAKSHMI AMMA* . I. L. R., 5 Mad., 201

## SALE IN EXECUTION OF DECREE

—continued—

## 9 JOINT PROPERTY—continued

62. — *Right of minor brother—Sale advertisement under decree against entire property*—A minor brother's share in a joint family estate was held not liable under a sale advertisement which referred solely to the rights and interests of his elder brothers who did not represent him though the decree was against the entire property *PAM LOCHUN SBANA v UNVO POORNA DOSSHE* 7 W R., 144

*NETTIE FOX v. ODEET FOX* 10 W R., 241

63. — *Mortgage for legal necessity by managing brother of joint family—Sale in execution of decree obtained against mortgagor alone—Rights of purchaser and other member of joint family*—A, the managing member of a joint Hindu family governed by the Mitakshara law, for joint family purposes and legal necessity mortgaged the joint family property. The mortgagee subsequently sued A alone upon the mortgage obtained a decree and had the property comprised in the mortgage put up for sale. B a brother of A who was no party to the mortgage or to the suit thereon resisted the purchaser at the auction sale in his endeavour to get possession. In a suit by the purchaser against B and A. Held that B's interest in the joint family property was unaffected by the decree passed in the mortgage suit and that the purchaser was not entitled to the relief he sought as regards his share. *Subramaniam v Subramaniam* 1 L P 5 Mad., 125 followed. *ANILAK ROY v RUPAK ROY* I L R., 11 Calc., 293

64. — *Purchase by decree-holder of family property in execution of decree against member of joint family—Effect of sale—Right of purchaser* The property of an undivided Hindu family consisting of brothers having been hypothecated by one brother was sold in execution of a decree obtained against him alone upon the hypothecation bond and purchased by the decree-holder. Held in a suit by another brother to recover his share of the property sold, that the purchaser was only entitled to the interest of the judgment-debtor in the property sold and could not be permitted to prove that the debt for which the property was sold was contracted for family purposes by the manager of the family. *ANMUGAM v SARAFATRI*

[I. L. R., 5 Mad., 12

65. — In an undivided Hindu family consisting of two brothers, the elder, while managing the property during the minority of the younger executed a mortgage of family property in renewal of a former mortgage, executed by his deceased father as security for moneys lent for purposes neither moral nor illegal. The mortgagee, having sued the elder brother upon this mortgage brought to sale and purchased the property mortgaged. The younger having brought a suit for partition against the elder brother and the assignee of the mortgage and purchaser at the Court sale—Held (TURNER, C.J., and KIRWAN J., dissenting) that the

## SALE IN EXECUTION OF DECREE

—continued.

## 9 JOINT PROPERTY—continued

plaintiff was entitled to recover his share of the property without paying his share of the mortgage debt, and that it was immaterial whether or not the mortgage was executed to discharge a prior mortgage debt of the father. *SUBRAMANIAM v SUBRAMANIAM* I L R., 5 Mad., 125

66. — *Execution of decree against one brother—Rights of other brothers*—J purchased a 10 biswas share in a village, and I purchased a village, both of which properties were, at the time they were respectively purchased, mortgaged to secure one debt. J died leaving four sons. After J's death Y, whose village had been sold in execution of a decree for the sale of the mortgaged property sued R, eldest son of J, for rateable contribution in respect of the debt secured by the mortgage, and he obtained a decree for Rs 210 and costs, and directing the 10 biswas share to be sold in satisfaction of the decretal amount. Upon attachment of the share in execution of the decree, the three younger sons of J claimed 7½ biswas as belonging to them, and prayed that the same might be released from attachment. This objection was disallowed as made too late and the sale in execution of the decree took place. The sale certificate showed that the property sold was "the rights and interests" of R in the 10 biswas. The three younger sons of J subsequently brought a suit to establish their right to 7½ biswas out of the 10 and to set aside the sale to that extent. Held that the shares of the plaintiffs were unaffected by the sale and all that passed thereunder to the purchaser was the 2½ biswas share of the judgment-debtor. The plaintiffs were not bound by the decree in a suit to which they were not parties and by a sale to which they objected, and in the teeth of the terms of the sale certificate put forward to defeat them. *SUNDAR LAL v YAKUB ALI* I L R., 6 All., 362

67. — *Property of Hindu judgment-debtor—Right of purchaser*—Held that the property in the hands of a Hindu judgment debtor was liable to sale in the same way and to the same extent as would the other immovable property of a Hindu having sons be liable and that the question of the extent of the right to be sold should have been left an open question for adjudication in a suit between purchasers and other persons claiming right therein. *BRIDHO SINGH v DWARKA DASS* 1 Agra, 169

68. — *Sale of ancestral family property in execution of decree against father—Delay in impeaching sale*—A son's interest may pass on a sale of ancestral property in execution of a money-decree against his father, but whether it does or does not pass will have to be determined by the circumstances of each case. Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale. *BAJO KOSE v HIRAY DASS* I L R., 9 Calc., 495, 12 C L R., 292

69. — *Son's interest in joint ancestral property—Sale of right, title,*

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—continued.

## 9. JOINT PROPERTY—continued.

*and interest of father.*—The sale of the right, title, and interest of a father in ancestral property, in execution of a decree for a debt incurred by him, passes as well the right, title, and interest of the son, where the debt was not incurred for an immoral purpose, and where the purchaser has inquired whether there was a decree against the father, and that the property was properly liable to process and sale in satisfaction of the decree and has purchased the estate *bond fide* under the execution, and *bona fide* paid a valuable consideration for it. In determining whether the sale passed the right, title, and interest of the son, the nature of the debt and not the nature of the property must be considered. Unless it can be shown that the debt was incurred for an immoral purpose, the question as to the nature of the debt must be held to be determined against the son by there having been a decree against the father, and his right, title, and interest in the family property. **PANDIT HAIT RAM v. MULLU** [7 N. W., 110]

**70.** ——— *Right of father of joint Hindu Mitakshara family—Suit by sons to set aside sale.*—In execution of a simple money-decree against the father of the plaintiffs, who were members of a joint Mitakshara family, the right, title, and interest of the judgment-debtor in certain joint immovable property was sold in 1873, and the purchasers took possession of the whole property. In 1878 the plaintiffs sued to recover their shares in such property, on the ground that only the share of their father had legally passed to the purchasers. *Held* that the plaintiffs were entitled to succeed. **BHAGWAT DASSA v. GOUBI KUNWAR** [7 C. L. R., 218]

**71.** ——— *Mortgage by father of Mitakshara family—Notification of sale—Right, title, and interest.*—In consideration of an antecedent debt, the father of a family governed by Mitakshara law mortgaged a certain mouzah M, portion of the joint family property, by a bond containing the following clause: "I have pledged and mortgaged the right and interest of mouzah M." A decree directing "the estate mortgaged under the bond to be held liable" was obtained upon the mortgage, and in execution thereof, under Act X of 1877, "the right, title, and interest of the judgment-debtor" as set out in the proclamation of sale was sold. *Held* that the mortgagor must be taken to have mortgaged the entire interest of the family, and that, looking at the decree which declared the property mortgaged to be liable, the whole interest had passed under the execution-sale to the purchaser. **STUDD v. BRIJ NUNDUN PERSHAD SINGH** [9 C. L. R., 350]

**72.** ——— *Attachment of family property in execution of decree against Hindu father—Sale limited to interest of father on objection by sons—Right acquired by purchaser.*—In execution of a personal decree obtained against the father of an undivided Hindu family

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

and one of his sons, the creditor attached the family estate. The two remaining sons objected, by petition, to the attachment of their shares, and the Court directed that the sale should be confined to the right, title, and interest of the judgment-debtors. The creditor, having purchased at the sale, obtained possession of the whole estate. *Held* that the right, title, and interest of the father purchased by the creditor was only a right to obtain the share of that judgment-debtor by partition. **SUBAYYAN v. RUPPA NAGASAMI AYYAN** . I. L. R., 6 Mad., 155

**73.** ——— *Money-decree against father—Attachment of sons' shares.*—In a suit brought against the father of a Hindu family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, a decree was passed against the father only, and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father, — *Held* that, so far as the younger sons were concerned, the decree must be treated as a decree for money against the father, and that all that could be sold in execution of the decree against the father was the share of the father. **UMAMESWARA v. SINGAPERUMAL** . I. L. R., 8 Mad., 376

**74.** ——— *Impartible zamindari—Money-decree against zamindar—Attachment and sale of estate—Suit by son to recover after father's death—Right of purchaser.*—In execution of a money-decree obtained against the holder of an impartible zamindari, the creditor attached certain immovable property—portion of the zamindari—which he described as the property of the debtor. This was sold by the Court and purchased by L. A suit having been brought by the son of the judgment-debtor after his father's death to recover the property from L. — *Held* that all that L. acquired was the life-interest of the judgment-debtor in the property, and therefore the plaintiff was entitled to recover. **SIVAGANGA v. LAKSHMANA** [I. L. R., 9 Mad., 188]

**75.** ——— *Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.*—When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property, without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a

## SALE IN EXECUTION OF DECREE

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## 9 JOINT PROPERTY—continued

debt incurred for immoral purposes of the kind mentioned by *Tajmoolika Ch II*, s 43, and *Mann*, Ch. VIII, s 159 and one which it would not be their pious duty as sons to discharge. If, however, the decree, from the form of the suit the character of the debt recovered by it and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction purchaser acquires no more than that right and interest—i.e. the right to demand partition to the extent of the father's share. In this last mentioned case, the co-owners can successfully resist any attempt on the part of the auction purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder. *Gurthares Lall v Kantoo Lall 14 B L R 157* *Deendyal Lall v Jugdeep Narain Singh I L R 3 Calc.*, 193 *Saraj Bansi Koor v Shto Perard Singh I L R 5 Calc 143* *Bussur Lall Sahoo v Lechmessur Singh L R.*, 6 I A., 235 *Mattayon Chetti v Sanguli Fira Pandia Chennudambhar, I L R 6 Mad.*, 1, *Hurd Narain Sahu v. Roeder Perkasia Mitter, I L R.*, 10 Calc, 626; *Nanoms Babushan v Modun Mohan, I L R.*, 13 Calc, 21; *Ram Narain Lal v Bhawan Prasad, I L R.*, 3 All., 443, *Gaura v Nanat Chant, Weekly Notes, All.*, 1883, p 191; *Weekly Notes All.*, 1984 p 23; *Aspocur v Rama Subba Aiyar, II Moore's I A.*, 73 *Paul Chand v Man Singh, I L R.*, 4 All., 309 *Chamais Koor v Ram Prasad, I L R.*, 2 All., 267 and *Rama Dowl Singh v Gobind Singh I L R.*, 5 All., 334, referred to. *BASA MAL v MAHARAJ SINGH*

(I L R., 8 All., 205

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—Son's liability for father's debt—Sale of ancestral property—Bond fide purchaser—By the sale of ancestral property in execution of a mere money-decree against the father for his separate debt only the right title and interest of the father pass to the purchaser and nothing more and this holds good whether the purchaser is a stranger or the decree-holder himself. A purchaser at a Court sale cannot set up the title of a bond fide purchaser for value without notice. *Lafwickland H alchand v Karier D char, 9 Bom.*, 60, and *Sohagchand Golabchand v Bhanchand, I L R.*, 6 Bom., 139, followed. *BRIGATI HAN CHANDRA OKE v YASHVANTARAY SHRIKAT KROKAR* (I L R., 6 Bom., 489

77.

—Mitakshara law—Alienation, voluntary and involuntary, by the members of a family governed by the Mitakshara law—A Hindu governed by the Mitakshara law, after the attachment of a property part of his ancestral estate, to which he and his minor son B were jointly entitled as members of a joint Hindu family,

## SALE IN EXECUTION OF DECREE

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## 9 JOINT PROPERTY—continued.

conveyed by a deed of gift the whole of his interest in the ancestral property, including the property under attachment, to B five days after the execution of the deed of gift the property was sold in execution of the decree of the attaching creditor, C, and was purchased by C at such sale. Ten days after the sale, A instituted proceedings, under a 254 of Act VIII of 1959, to set it aside on the ground of irregularity. These proceedings were afterwards continued in the name of A, but virtually on behalf of the minor B, under the control and direction of the Collector, who had taken charge of his estate, and appointed a manager under Act XL of 1858. These proceedings terminated in 1974 by the application to set aside the sale being dismissed and the sale was therefore confirmed, and C took possession of the property. In 1977 a suit was instituted on behalf of B, by the manager appointed by the Collector, against C and A to recover possession of the property, on the ground (1) that when it was sold it was not the property of A, the judgment-debtor, and (2) that the property of a joint Hindu family could not be sold or alienated by, or taken in execution of, a decree against a single member of that family. *Held* (1) that the fact that the plaintiff, through his guardian, had actively intervened in the proceedings under a 256 of Act VIII of 1859, was no bar to the institution of the present suit on his behalf; (2) that C at the sale purchased the interest, whatever it was of A only, and was entitled to have it ascertained and allotted to him on partition; and (3) that although under the Mitakshara law a member of joint family cannot, or may not, be able to alienate his share or interest in the joint family estate, yet such share or interest can be taken in execution and sold by the holder of a decree against him. *COLLECTOR OF MOCHERY v HURDAT NARAIN SHARAI. I L R.*, 6 Calc., 425 5 C. L. R., 112

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Civil Procedure

*Code (Act VIII of 1959), s 261—Execution of decrees against a member of an undivided family by sale of his personal interest in the family estate which was an impartible zamindari, such interest, by reason of his death before the sale consisting only of the rents and profits then uncollected—On a sale of the right, title, and interest in an impartible zamindari, in execution of a decree against the zamindar, the head of an undivided family the question was whether (a) only his own personal interest (b) the whole title to the zamindari, including the interest of a son and successor passed to the purchaser. The proclamation of sale purported to relate to (a) only; and between the dates of proclamation and the auction-sale the zamindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances, it could sell, and was bound to sell (b); because the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son,—*Held**



# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

that the question of what the Court could or should have sold had not arisen. All that required decision was what the Court had sold. If (a) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (a) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. **PETTACHI CHETTIAR v. SANGILI VIRA PANDIA CHINNATAMBIAR** . . . **I. L. R., 10 Mad., 241**  
[**L. R., 14 I. A., 84**

**79.** ——— *Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandson of the same property subsequently to such sale, Effect of.*—In 1858 S mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, S being then dead, the defendant sued R, the son of S, to recover the money-debt, and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873, subject to defendant's mortgage-lien, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree, and recited that the purchaser bought the whole right, title, and interest of S. On the 3rd August 1882 the plaintiff purchased from R's sons the share of R in S's estate. The plaintiff sued the defendant to redeem the property. The Court of first instance rejected his claim. On appeal, the lower Appellate Court reversed that decree, and remanded the case for re-trial. Against this order of remand, the defendant appealed to the High Court. *Held*, restoring the decree of the Court of first instance, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely S's interest. By his purchase the defendant was to be regarded as having bargained for, and purchased the entire interest in, the land. **Nanomi Baburam v. Modhun Mohan, J. L. R., 13 Calc., 21**, followed. **SAKHARAM SHET v. SITARAM SHET**

[**I. L. R., 11 Bom., 42**

**80.** ——— *Joint Hindu family—Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, Sale in execution of—Sale certificate referring to rights and interest of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.*—If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property,

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation, and obtained a money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale certificate, only that right, title, and interest was sold. The auction-purchasers, having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as karta, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares. *Held* that, inasmuch as upon the terms of the sale-certificate no thing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate. *Per MAHMOOD, J.*, that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. **Simbhunath Panday v. Golap Singh, L. R., 14 I. A., 77** . **I. L. R., 14 Calc., 572**. **Deendyal v. Jugdeep Narain Singh, L. R., 4 I. A., 247** . **I. L. R., 3 Calc., 195**; and **Hurdey Narain Sahu v. Ruder Perkash Misser, L. R., 11 I. A., 26** . **I. L. R., 10 Calc., 626**, referred to. **RAM SARAI v. KEWAL SINGH** . . . **I. L. R., 9 All., 672**

**81.** ——— *Decree against father—Sale of ancestral estate in execution of money-decree—Son's rights and liabilities.*—A purchased the half share of the judgment-debtors in certain immoveable family property, at a Court sale held in execution of money-decrees against B and his brother, who were members of an undivided Hindu family. B's undivided son sued A—B and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was now the managing member of the family. *Held* that the Court sale was binding on the plaintiff's share. **Nanomi Baburam v. Modhun Mohan, L. R., 13 I. A., 1** . **I. L. R., 13 Calc., 21**, discussed and followed. **KUNHAL BEARI v. KESHAIA SHAN-DAGA** . . . **I. L. R., 11 Mad., 64**

**82.** ——— *Joint family—Mortgage by father and eldest son—Death of*

## SALE IN EXECUTION OF DECREE

—continued

## 9 JOINT PROPERTY—continued.

debt incurred for immoral purposes of the kind mentioned by *Gajnarathya Ch II, s. 48, and Mow, Ch. VIII, s. 159* and one which it would not be their pious duty as sons to discharge. If, however, the decree, from the form of the suit, the character of the debt recovered by it and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction purchaser acquires no more than that right and interest,—i.e., the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-oparceners can successfully resist any attempt on the part of the auction purchaser to obtain possession of the whole of the joint ancestral estate, or if he obtains possession may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder. *Gurkhar Lal v Kuntoo Lal, 14 B L R 15; Desai Lal v Jugdeo Narain Singh I L R 8 Cal., 199; Suraj Bhai Koer v Sheo Persad Singh, I L R, 5 Cal., 149; Bheerwar Lal Satoo v Lachmewar Singh I L R, 6 I A, 233; Matayan Chettis v Sangili Vira Pandia Chinnasambhar, I L R, 6 Mad., 1; Harid Narain Sahu v Rooder Perkaas Muter I L R, 10 Cal., 626; Nanom Babawan v Modan Mohan, I L R, 13 Cal., 21; Ram Narain Lal v Bhawan Prasad, I L R, 3 All., 443; Gaura v Nanak Chand, Weekly Notes, All., 1983 p. 194; Weekly Notes All., 1984 p. 23, Appover v Rama Subba Aiyar 11 Moore's I A, 75; Phal Chand v Man Singh I L R, 4 All. 309; Channil Kaur v Ram Prasad, I L R, 2 All., 267 and Rama Hand Singh v Gobind Singh, I L R 3 All., 334 refer to. BABA MAL v MAHARAJ SINGH*

[I L R, 8 All., 205]

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—Son's liability for father's debt.—Sale of ancestral property.—Bond fide purchaser.—By the sale of ancestral property in execution of a mere money-decree against the father for his separate debt, only the right, title, and interest of the father pass to the purchaser and nothing more, and this holds good whether the purchaser is a stranger or the decree-holder himself. A purchaser at a Court sale cannot set up the title of a bond fide purchaser for value without notice. *Lakshminand Hulechand v Kaster Dhar, 9 Bom., 60, and Seshagchand Golechand v Bhattachari, I L R, 6 Bom., 192, followed. BHAKHAI PAM CHANDRA OBE v YASHTANTARAY SHIBPAT KHOPKAR*

[I L R, 8 Bom., 489]

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—Mistakhsara law.—Alienation, voluntary and involuntary, by the members of a family governed by the Mistakhsara law.—A Hindu governed by the Mistakhsara law, after the attachment of a property part of his ancestral estate to which he and his minor son B were jointly entitled as members of a joint Hindu family,

## SALE IN EXECUTION OF DECREE

—continued

## 9 JOINT PROPERTY—continued

conveyed by a deed of gift the whole of his interest in the ancestral property, including the property under attachment, to B. Five days after the execution of the deed of gift the property was sold in execution of the decree of the attaching creditor, C, and was purchased by C at such sale. Ten days after the sale, A instituted proceedings under a 256 of Act VIII of 1959, to set it aside on the ground of irregularity. These proceedings were afterwards continued in the name of A, but virtually on behalf of the minor B, under the control and direction of the Collector, who had taken charge of his estate, and appointed a manager under Act XL of 1858. These proceedings terminated in 1974 by the application to set aside the sale being dismissed, and the sale was therefore confirmed, and C took possession of the property. In 1977 a suit was instituted on behalf of B, by the manager appointed by the Collector, against C and A to recover possession of the property, on the ground (1) that when it was sold it was not the property of A, the judgment-debtor, and (2) that the property of a joint Hindu family could not be sold or alienated by, or taken in execution of, a decree against a single member of that family. Held (1) that the fact that the plaintiff, through his guardian, had actively intervened in the proceedings under a 256 of Act VIII of 1859, was no bar to the institution of the present suit on his behalf; (2) that C at the sale purchased the interest, whatever it was of A only, and was entitled to have it ascertained and allotted to him on partition, and (3) that although under the Mistakhsara law a member of joint family cannot, or may not, be able to alienate his share or interest in the joint family estate, yet such share or interest can be taken in execution and sold by the holder of a decree against him. *COLLECTOR OF MONOHYR v HURDAI NARAIN BHANAI I L R, 5 Cal., 425. 5 C L R, 112*

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Civil Procedure

Code (Act VIII of 1959), s. 264.—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate which was an impartible zamindari, such interest, by reason of his death before the sale consisting only of the rents and profits then uncollected.—On a sale of the right title, and interest in an impartible zamindari in execution of decrees against the zamindar the head of an undivided family the question was whether (a) only his own personal interest, (b) the whole title to the zamindari, including the interest of a son and successor passed to the purchaser. The proclamation of sale purported to relate to (a) only, and between the dates of proclamation and the auction-sale the zamindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell and that, under the circumstances, it could sell, and was bound to sell (b); because the debts, the subject of the decrees under execution not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son.—Held

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

that the question of what the Court could or should have sold had not arisen. All that required decision was what the Court had sold. If (a) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (a) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. *PETTACHIR CHETTIAR v. SANGILI VIBA PANDIA CHINNATAMBIAR*. I. L. R., 10 Mad., 241 [L. R., 14 I. A., 84]

79. ———— Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandsons of the same property subsequently to such sale, Effect of.—In 1858 S mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, S being then dead, the defendant sued R, the son of S, to recover the money-debt, and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873, subject to defendant's mortgage-lieu, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree, and recited that the purchaser bought the whole right, title, and interest of S. On the 3rd August 1882 the plaintiff purchased from R's sons the share of R in S's estate. The plaintiff sued the defendant to redeem the property. The Court of first instance rejected his claim. On appeal, the lower Appellate Court reversed that decree, and remanded the case for re-trial. Against this order of remand, the defendant appealed to the High Court. Held, restoring the decree of the Court of first instance, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely S's interest. By his purchase the defendant was to be regarded as having bargained for, and purchased the entire interest in, the land. *Nanomi Babuasin v. Modhun Mohun, I. L. R., 13 Calc., 21*, followed. *SAKHARAM SHET v. SITARAM SHET*

[I. L. R., 11 Bom., 42]

80. ———— Joint Hindu family—Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, Sale in execution of—Sale certificate referring to rights and interest of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.—If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property,

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—continued.

covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation, and obtained a money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale certificate, only that right, title, and interest was sold. The auction purchasers, having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as karta, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares. Held that, inasmuch as upon the terms of the sale-certificate no thing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate. *Per MAHMOOD, J.*, that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. *Simbhunath Panday v. Golap Singh, L. R., 14 I. A., 77*. I. L. R., 14 Calc., 572. *Deendyal v. Jugdeep Narain Singh, L. R., 4 I. A., 247*. I. L. R., 3 Calc., 195; and *Hurday Narain Sahu v. Ruder Perkash Misser, L. R., 11 I. A., 26*. I. L. R., 10 Calc., 626, referred to. *RAM SARAI v. KEWAL SINGH*. I. L. R., 9 All., 672

81. ———— Decree against father—Sale of ancestral estate in execution of money-decree—Son's rights and liabilities.—A purchased the half share of the judgment-debtors in certain immoveable family property, at a Court sale held in execution of money-decrees against B and his brother, who were members of an undivided Hindu family. B's undivided son sued A—B and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was now the managing member of the family. Held that the Court sale was binding on the plaintiff's share. *Nanomi Babuasin v. Modhun Mohun, I. L. R., 13 I. A., 1*. I. L. R., 13 Calc., 21, discussed and followed. *KUNHALI BEARI v. KESHAVA SHANBAGA*. I. L. R., 11 Mad., 64

82. ———— Joint family—Mortgage by father and eldest son—Death of

## SALE IN EXECUTION OF DECREE

—continued—

## 3 JOINT PROPERTY—continued

*father and eldest son—Decree obtained by mortgage against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—In 1862 R and his son A mortgaged the property in dispute to R. In 1863 P died leaving a widow S and two sons C and A and P a minor. In 1864 and 5 the latter of whom acted for herself and as guardian of her minor son P settled the account with R the mortgagee obtained a fresh advance and passed a fresh mortgage bond to him. In 1865 A died. In 1867 R's son C filed a suit upon the mortgage and obtained a decree against the mortgaged property against S both as guardian of the minor P and also as a creditor in her individual capacity. At the Court's bid in execution of this decree D purchased the property in dispute in 1870. In 1881 P filed the present suit to recover possession of the property alleging that D's purchase was invalid as against him he having been a minor at the time of the Court sale. Held upon the merits that the debt for which the decree was passed being a family and ancestral debt, was binding upon the whole family including the plaintiff, who was therefore not entitled to disturb the execution-purchaser. **DAJI HIMAT v. DHRUPAKM SADARAM** [L. L. R., 12 Bom., 18]*

## 83 — Joint family—

*Money-decree—Decree against father alone—Purchaser at execution sale under said decree—How far such sale binding on the interest of the sons and parties to the suit or execution proceedings—In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale is to inquire what the parties contracted about in the case of a conveyance or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money decree. In the case of an execution sale the mere fact that the decree was a mere money-decree against the father as it arose from one person is a suit for the realization of a mortgage security directing the property to be sold is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person who had purchased it at an execution sale held in execution of a money decree obtained against the first defendant alone. The first defendant was the father of the three minor defendants and they constituted a joint Hindu family. The sons contended that only the father's interest was bought by the sale, and the lower Court decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution proceedings. **KASAB GADTATA v. MANJAPPA***

[L. L. R., 12 Bom., 691]

## SALE IN EXECUTION OF DECREE

—continued—

## 9 JOINT PROPERTY—continued

84. — *Sale for debt of father—Said by son to set aside sale—Failure to prove immoral purpose of debt—A sale in execution of a decree against a zamindar for his debt purported to comprise the whole estate of his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as being not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose. Held that the impeachment of the debt failing the suit failed, and that no partial interest, but the whole estate had passed by the sale, the debt having been one which the son was bound to pay. **HARDI NARAIN SINGH v. Ender Perkash Mistry L. L. R., 10 Cal., 62; L. R., 11 I. A., 26** (where the sale was only of whatever right title and interest the father had in property) **distinction** **MINAKSHI NAYDU v. KANDAM KANAKA RAMAYA GOUDAN** [L. L. R., 12 Mad., 142] [L. R., 16 I. A., 1]*

85. — *Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such a decree—Transfer of Property Act, s. 99—Sale of mortgaged property in execution of decree on a money bond for an interest due on the mortgage—The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family to secure a debt incurred by him for family purposes and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond and having obtained a personal decree against the two brothers merely brought to sale in execution part of the mortgaged property which was purchased by a third person. Held that the sale did not convey the interest of another undivided brother who was not a party to the decree. Held further per **KENYAL J.** that the sale in execution was invalid under the Transfer of Property Act, s. 99. **SATYU TAYAN v. MATHURAMI** [L. L. R., 12 Mad., 335]*

86. — *Judgment debt's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-shares not being parties to the decree or execution proceedings—Sale certificate—The question was whether the whole estate belonging to a joint family living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right. Held that, as the mortgage and decree as well as a sale certificate expressed only the father's right, the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract, but supported. The enquiry in recent cases regarding the liability of*

# SALE IN EXECUTION OF DECREE

—continued.

## 9 JOINT PROPERTY—continued.

the estate of co-shrers in respect of transfers made by, or execution against, the head of the family has been this, viz., what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances. *Upooroop Tewary v. Lalla Bandhjee Suhay*, I. L. R., 6 Cal., 749, distinguished *SIMBHUNATH PANDE v. GOLAP SINGH*

[I. L. R., 14 Cal., 572  
L. R., 14 I. A., 77]

## 87. ———— *Hindu law*—

*Joint family—Court-sale of right, title, and interest of the father, Effect of*—One R and his sons were members of an undivided family. In execution of certain money decrees passed against R, the lands in dispute were sold to various persons, from whom they were afterwards bought by the defendant. In 1875 R died, and in 1887 his sons and grandson filed this suit against the defendant to recover the lands. They alleged that the lands were service vatan lands and inalienable, and that the execution-sales affected nothing except R's life-interest, and that, on R's death, they (the plaintiffs) became entitled. They also contended that, even if the Court should find the lands were not service vatan lands, they were, at all events, ancestral property, and that the plaintiffs' interests therein were not affected by execution-sales under decrees to which they were not parties. Held on the evidence that, although the sale-proclamation and sale-certificate spoke only of the right, title, and interest of R as being offered for sale and purchased by the auction-purchasers, the entire family interest in the property was, as a fact, the subject of the auction-sales. The words "right, title, and interest" of the judgment-debtor are ambiguous words, which may either mean the share which he would have obtained on partition, or the amount which he might have sold to satisfy his debt; and it is in each case a mixed question of law and fact to determine what the Court intended to sell and what the purchaser expected to buy. *APPAPJI BAPUJI v. KESHAV SHAMRAY. KESHAV SHAMRAY v. APPAPJI BAPUJI*

[I. L. R., 15 Bom., 13]

88. ———— *Son's interest in ancestral property—Death of son before sale*.—Where the son died between attachment and sale, the judgment creditor was held to have no property in what he had attached, so as to entitle him to sell it in execution of his decree. *GOOR PERSHAD v. SHEODEEN*

4 N. W., 137

89. ———— *Right of purchaser—Sale of reversionary interest*.—A, a Hindu, was possessed of an undivided moiety in certain property, and was also entitled to a reversionary interest in the other undivided moiety contingent on his surviving his mother. In a suit against A, the Sheriff, under a writ of *fi. fa.*, seized and sold to B the right, title, and interest of A in the premises. In an *ex parte* suit by B, asking for a declaration that he was entitled to the contingent reversionary interest of A, as well as to his present possessory right,

# SALE IN EXECUTION OF DECREE

—continued.

## 9. JOINT PROPERTY—concluded.

*MACPHERSON, J.*, gave a decree for the present possessory right, but refused to make any decree as to the contingent reversionary interest of A. *KISTO DHONE GANGOOLY v. RABUTY DOSSES*

[1 Ind. Jur., N. S., 324]

90. ———— *Interest of co-widows in estate undivided*.—The co-widows of one and the same husband take a joint interest in one undivided estate. *Semble*—The interest of one or two such widows cannot be sold in execution of decree. *KATHAPETUMAL v. VENKABAI*

[I. L. R., 2 Mad., 194]

91. ———— *Right of purchaser under joint decree—Error in certificate*.—Where a joint decree for contribution which had been passed against a Hindu widow and the reversioner was executed against the latter as the sole surviving judgment-debtor, by the sale of his rights and interests in the property, the joint property was held to have been passed even though the sale certificate omitted the word "property." *CHOWHARY ZUHOORUL HUQ v. GOOROO CHURN ROY*

[15 W. R., 329]

## 10. MORTGAGED PROPERTY.

92. ———— *Mortgagor, Interest of—Sale under money-decree—Sale under decree enforcing mortgage*.—There are substantial differences between a sale in execution for a money-decree and a sale under a decree ordering a sale to enforce a mortgage. In the former case the Court proposes to sell whatever interest in the property would, under any circumstances, be available to creditors at the date of the attachment; in the latter case, whatever interest the mortgagor was, under any circumstances, competent to create, and did create at the time of the mortgage. *PONNAPPA PILLAI v. PAPPUVAYANGAR*

[I. L. R., 4 Mad., 1]

93. ———— *Interest taken by purchaser*.—Where the rights and interests of a judgment-debtor are sold in execution, the purchaser takes the land to which they relate, subject to such mortgages and leases as may be existing. *GOJAGUR ROY v. RAM KHELAWAN SINGH*

10 W. R., 384

94. ———— *Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code (1882), ss. 252–287*.—Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an inquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civil Procedure Code. *SHANTAPPA CHEDAMBABAI v. SUBBAO RAMCHANDRA YELLAPUR*

I. L. R., 18 Bom., 175

95. ———— *Purchaser of mortgaged property, Rights of—Right to set aside incumbrances*.—A purchaser of property sold under a decree in favour of a mortgagee cannot claim to set aside, as prejudicial to its rights, a *tikka*

# SALE IN EXECUTION OF DECREE

—continued—

## 10 MORTGAGED PROPERTY—continued.

potish granted by the mortgagor when those rights were not in existence. It cannot be maintained that the purchaser of property sold under a decree in favour of a mortgagee takes the property free from such lease or farm as the owner might have found to be expedient or convenient, provided the value of the property was not impaired and the operation of the mortgagee's lien not impeded. **DAI PERSHAD v. BHET BHUNACK SINGH** 10 W. R., 325

**93** ——— *Conditional sale executed before sale of execution, but after mortgagee's decree*—A purchaser under a decree for sale obtained by the mortgagee under a simple mortgage does not purchase subject to a conditional sale executed by the mortgagor after the prior mortgagee had obtained a decree of sale but before the property was actually sold. **RAJNARAIN SINGH v. SHEFRA MEAN** 7 W. R., 67

**87.** ——— *Nature of mortgagee's security—Sale by mortgagee—Rights of subsequent mortgagee—Civil Procedure Code 189, s. 259*—The security to which a mortgagee becomes entitled under the ordinary form of mortgage in the mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage and he cannot be deprived of this security by any subsequent charges on the property or prior unregistered charges which the mortgagor may create or have created. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor and the purchaser takes the property subject only to those incumbrances which were in existence at that date, though such of the subsequent incumbrances as may, at the time of the sale have taken out execution, may have a right to satisfy their claims from the surplus proceeds of the sale. In applying s. 259 of the Code of Civil Procedure to cases of the above description the words "the right title and interest of the defendant in the property sold" must be understood as meaning the right title, and interest which the decree ordered to be sold, i.e., the right title and interest which the judgment-debtor had in the property at the time of the mortgage. **KASANDAS LAIDAS v. PRANJIVAN ASHARAM** [7 Bom., A. C. 148]

**BRUJO KISHORE DOSSIA v. MAHOMED SIKREM** 10 W. R., 151

**S. C. BRAJARAJ KISHORI DAS v. MOHAMMED SALEM** 1 B. L. R., A. C., 152

**93** ——— *Right to redeem*—Where a decree holder sells a mortgagee's right and interest in property already mortgaged and declared liable to sale in liquidation of the debt for which it was mortgaged, the purchaser purchases merely the mortgagee's right to redeem. **LALLA JOOGUL KISHORE LALLA v. BHUKRA CHOWDHURY** [9 W. R., 244]

**99** ——— *Right of purchaser—Rights of respective mortgagees*—A mortgage made by way of security for money advanced remains a mortgage until the debt is satisfied, and

# SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued

the mortgagee-creditor has every right to sue to obtain a decree and sell that which is held by him as security for his money, without any regard to the proceeding of any other subsequent mortgagee or purchaser. A purchaser at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, has rights far superior to those of any other mortgagee or purchaser of a subsequent date. A subsequent purchaser, by payment of an earlier mortgage, and obtaining a decree for the money so paid does not acquire any rights belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt, not secured by any security connected with any portion of the land in dispute. **DOONEN ROY v. BILDER NARAIN SINGH** W. R., 1884, 345

**100** ——— *Purchase by mortgagee—Loan of mortgagee—Liability of purchaser—Incumbrances*—Certain mouzals were granted in zur-i-pehgi lease by G to plaintiff's ancestor. After G's death, his heir, F, pledged one of the mouzals, B, with others as collateral security, in a bond in favour of plaintiff, and some years later executed a zur-i-pehgi istaah in favour of defendant who obtained possession by paying to plaintiff the money due under the first zur-i-pehgi lease. Plaintiff then sued F alone or his bond and obtained a decree, in execution of which he sold a share in B and purchased it himself. In a suit for possession and to have the superiority of his lien declared over defendant's zur-i-pehgi—*Held* that plaintiff was not entitled to possession until he paid off the whole of the amount advanced by the defendant to clear off the debt due under the first zur-i-pehgi lease. *Held* also that the holder of a subsequent incumbrance, by paying off a prior incumbrance acquires all the rights of the latter so far as the amount actually paid by him for that purpose is concerned. **BEKOV SINGH v. HERN DIAL LALL** 24 W. R., 47

**101.** ——— *Right of purchaser of mortgaged property—First and second mortgages*—Where a mortgagee sues upon his mortgage bond and his claim is decreed, the decree should be satisfied out of the mortgaged property, and not out of the right title and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passed by the mortgage to the mortgagee and any interest which remained in the mortgagor, i.e., his equity of redemption. If there was a second mortgage, all that it could pass from the mortgagor was his equity of redemption and the decree in a suit on such mortgage could only authorize the sale of the equity of redemption, unless the first mortgagee was made a party, and his mortgage shown to be invalid and the second mortgage to have priority. **DOOLAL CHANDER DAS v. GOL or MONER DEBIA** 23 W. R., 380

**102.** ——— *Effect of sale—Parties*—The usual mode in the mofussil Civil Courts, of selling in mortgage suits "the right title, and interest" of the mortgagor or his heir, is not

# SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

correct, if deemed to be his right, title, and interest at the time of the sale. The intention of the Court is to pass to the purchaser the right, title, and interest both of the mortgagor and mortgagee. What passes to the auction-purchaser under the certificate of sale is the right, title, and interest of the mortgagor as it stood when he made the mortgage and not merely as it stood at the time of the Court-sale. One *U* mortgaged certain immovable property to *A R* (defendant No 1) for Rs 400 on the 7th May 1865. On the death of *U*, the mortgagee *A R* brought a suit (No. 311 of 1871) against his widow, *K* (defendant No. 2), but did not make his (*U*'s) children (who were minors) parties to it. On the 28th July 1871 *A R* obtained a decree for Rs 167, being the amount of principal and interest due on his mortgage, with further interest from the date of suit to date of payment. That decree directed satisfaction of the amount due under it out of the mortgaged property if it were not paid by the widow, *K* (defendant No. 2). *K* having failed to satisfy the decree, the Court, on the application of *A R* (the decree-holder), sold the mortgaged property on the 19th September 1872 for Rs 200 to the brother of *A R*. On the 7th August 1873 the auction-purchaser obtained a certificate of sale to the effect that he had purchased at the Court-sale "the right, title, and interest of *H*" (the widow) in the mortgaged property. On the 17th August 1871 the auction purchaser sold the property for Rs 700 to the father of the plaintiff. In 1877 the plaintiff sued *A R* (the mortgagee and decree-holder) to recover possession of the property with mesne profits. *U*'s widow *K* and children (two sons and a daughter) were defendants in the suit, the plaintiff alleging, in addition to the facts just stated, that these defendants had colluded with the tenants of the property in dispute and collected the produce thereof. Defendant No. 1 (*A R*) denied his liability. The answer of defendants Nos. 2, 3, 4, and 5 (respectively the widow, two sons, and a daughter of *U*) substantially was that the Court sale did not affect the rights of defendants Nos. 3, 4, and 5, as they had not been parties to the mortgage suit No. 311 of 1871, and that they were entitled to hold the property. The Subordinate Judge awarded the plaintiff's claim, holding that both the sales—viz., the Court-sale under the mortgage-decree in suit No. 311 of 1871 and the subsequently private sale by the auction-purchaser—were *bond fide* and binding on defendants Nos. 2, 3, 4, and 5, inasmuch as the debt for which the property was sold had been contracted by *U*. This decree was reversed on appeal, on the ground that the Court-sale extended only to the right, title, and interest of *K* (defendant No. 2) in the mortgaged property, and did not affect the rights of defendants Nos. 3, 4, and 5, who were not parties to it. On appeal to the High Court,—*Held* that the defect in the title of the purchaser (plaintiff) arose from the circumstance that the suit of *A R* (No. 311 of 1871) for foreclosure and sale was sufficiently constituted as to parties, both the sales having been found to be unimpeachable in all other respects, and that the defendants Nos. 3, 4, and 5 were only entitled to the same relief which they

# SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

would have obtained if they had been made parties to that suit—viz., the right of redeeming the property by paying off the mortgage. The High Court accordingly reversed the decree of the District Judge, and directed the defendants Nos. 3, 4, and 5 to pay to the plaintiffs, within six calendar months from date, the sum of Rs 100, with interest on the principal (Rs 400) from date of the institution of suit No. 311 of 1871 until payment. The Court further directed that, in default of payment, the mortgage should be foreclosed, and defendants Nos. 3, 4, and 5 precluded from redeeming the property which was delivered up to the plaintiff. *ABDULLA SAIBA v. ABDULLA*. . . . . I. L. R., 5 Bom., 3

See also *SHRINGAPURE v. PETHRE*

[I. L. R., 2 Bom., 662]

103. ————— *Decrees enforcing mortgages—Priority*—Certain immovable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held* that the purchaser of such property at the sale in the execution of the decree which enforced the earlier charge was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charge, notwithstanding the latter had obtained possession of the property in virtue of his purchase *Ayodhya Pershad v. Moracha Koorer*, 25 W. R., 254, distinguished. *JANAK DAS v. BADRI NATH* I. L. R., 2 All., 698

104. ————— *Right of prior mortgagee*.—On the 31st August 1863 *A* mortgaged his house to *B*, who brought a foreclosure suit, and on the 7th July 1865 obtained a decree against *A* for the sale of the house if the mortgage-debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court's sale on the 15th July 1870 and purchased by *C*. In an action brought by the plaintiff to recover possession of the house, on the ground that he had purchased it on the 2nd August 1863 at an execution-sale under a common money-decree against *A*.—*Held* that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor *A* passed in 1870 to *C*, whose purchase was entitled to preference to the plaintiff's purchase in 1868. *RAJJI NARAYAN v. KRISHNAJI LAKSHMAN* [11 Bom., 139]

105. ————— *Sale under mortgage for payment of Government revenue—Rights of respective purchasers*.—In 1855 a decree for an account was passed in the Supreme Court of Calcutta against *A*, an executor. *A* died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on 29th August 1866. It was then found that *A*'s estate was liable for Rs 1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment,

## SALE IN EXECUTION OF DECREE

—continued

## 10. MORTGAGED PROPERTY—continued

a writ of fieri facias was issued under which the property was sold by the Sheriff of Calcutta and conveyed by him to B on 1st April 1867. Previously to this, the representatives of A had on 11th January 1865, mortgaged the same property, together with other lands "for the purpose of paying the Government revenue of certain talukhs belonging to A deceased" and the mortgagee having obtained a decree on his mortgage, the property was sold to C under that decree on 3rd March 1867. In a suit for possession by C against B—*Held* that, though the sale to B was made for the express purpose of paying the debts of A, B's title was not to be preferred to that of C, who claimed under the mortgage of 1865, which was made for the purpose of paying Government revenue, and *semble* the result would be the same even if the mortgage of 1865 had not been made for the purpose of paying Government revenue as it did not appear that the mortgagee, at the date of the mortgage knew that there were unpaid creditors of A, and that A's representatives intended to misapply the money so advanced to them. *Greender Chander Ghose v. Lucknauth*, 1 L. R. 4 Cal. 89, followed. *HAJENDYSSA HIRER v. NILBATA BOSE*

(1 L. R., 8 Cal., 78)

8 C. L. R., 173 10 C. L. R., 113

106

Money decree—

*Decree enforcing hypothecation—Act X of 1877 (Civil Procedure Code), ss. 257, 315—Act VIII of 1859 (Civil Procedure Code) ss. 219, 259—* Certain immovable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money and was purchased by C, with notice that L held a decree enforcing a lien on such property. Subsequently L applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree and was purchased by S. S sued, by virtue of such purchase to recover possession of such property from C. *Held* that inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property and as C had purchased the property in suit with notice of the existing lien on it and subject to its re-sale in execution of the decree in execution of which S had purchased it, what actually was sold in execution of that decree to S was such property, and S was entitled to possession of such property under such sale. *Sales under Act VIII of 1859 and Act X of 1877 distinguished.* *SRES RAYAN LAL v. CHOTAY LAL*

1 L. R., 3 All., 647

107

Unauthorized

*sale of mortgaged property—Payment by vendor of decree—Lien of vendor—* The plaintiff as mortgagee of the land sold sued to recover land in purchase at a Court sale. The defendant alleged possession of the land from the widow of the man that he had bought the land had been mortgaged, and previous owner by whom it had paid off the mortgage that he (the defendant) was a minor son. The lower Court passed a decree for the plaintiff on the ground that the sale by the widow to the defendant was invalid, as she had not obtained a certificate of admi-

## SALE IN EXECUTION OF DECREE

—continued

## 10. MORTGAGED PROPERTY—continued

nistration to her husband under Act XX of 1864. *Held* that the defendant had a lien upon the land for the amount of the mortgage debt which he had paid and that the plaintiff could not set aside the sale to the defendant without refunding the amount secured by the lien. *KUTARI v. MOTI HAKIDAS*

(1 L. R., 3 Bom., 234)

108

Sham mortgage

—In 1861 J mortgaged certain lands to the defendant, who in 1864 sued upon the mortgage and obtained a decree for sale. The decree remained unexecuted by the defendant. In 1869 the lands were sold in execution of a money-decree against J, and the plaintiff became the purchaser. Thereupon the defendant attached the land in execution of the decree obtained by him in 1864. The Court found that the mortgage of 1861 was not a *bona fide* mortgage. In a suit for possession—*Held* that the plaintiff was entitled to succeed. The decree obtained in 1864 being based upon a collateral mortgage, gave the defendant no claim as against a subsequent *bona fide* purchaser for value. What was purchased by the plaintiff at the execution sale in 1869 was the real interest of J in the lands in question, not his interest as diminished by a fictitious derogation arising out of a sham transaction. *GORI WASTDEV v. MANANDE NARAYAN BHAT*

1 L. R., 3 Bom., 30

109

Suit for rent

*after execution of mortgage-decree—P got a decree on a mortgage bond in the terms of a compromise by C and others to the effect that the amount due should be paid by instalments, the property mortgaged remaining hypothecated. Meantime one M got a decree against C, and in execution sold part of the property—viz., a house,—subject to the lien of P, bought it in herself, and sold it again by private sale to plaintiff, who realized rent for some months. When M was put in possession, P petitioned the Court, objecting, but being referred to a regular suit he executed his original decree, bringing the hypothecated property to sale, and bought it himself, without, however, getting possession from the Court till many months later. Plaintiff then sued the tenant of the house in the Small Cause Court for rent, and P intervened as a party to the suit claiming the rent which had fallen due from the date of his getting possession. *Held* that the plaintiff was not in a position to maintain the suit, his possession having been put an end to by P, whose lien on the property was anterior to the sale under which plaintiff purchased.* *POORNO CHUNDER BOSE v. NOBIN CHUNDER GHOSH*

(14 W. R., 77)

110

Sale of decrees

*holder's rights and interests—Not ce of assignment—* Where the rights and interests of decree-holders in a decree are sold in execution, the party purchasing *bona fide* without any knowledge of a previous assignment of those rights and interests is entitled to the proceeds of the purchased decree free from any trusts or obligation in favour of the assignees. *ACHINX SANKO v. JUGESHWAR OOPADHYA*

(20 W. R., 408)



## SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

**111.** ————— *Notice.*—*G* borrowed money from *S*. He then borrowed money from *D*, mortgaging as security the property in suit. After that he borrowed from plaintiffs, executing a bond by which he again mortgaged the same property. Subsequently plaintiffs obtained a decree by which the mortgaged property was declared liable to sale for the amount decreed, sold the property in execution, and purchased it themselves. They were disturbed from possession by defendants in execution of a rent-decree under which they ousted plaintiffs, and got their own names registered as proprietors. Plaintiffs now sued for declaration and enforcement of their rights as purchasers at the above sale. Defendants claimed as purchasers in execution of a money-decree obtained against *G* by the first creditor, *S*, alleging that they paid off the money due to the second creditor, *D*, and were entitled to hold possession, their purchase having been previous to that of the plaintiffs. *Held* that, in purchasing the rights and interests of *G*, defendants purchased his right to redeem property already subject to two mortgages, and as they purchased with full notice, they could only retain possession by paying off both mortgages. *Held* also that plaintiffs purchased not merely the equity of redemption, but *G*'s rights and interests as they were when the mortgage was created subject to the mortgage held by *D*, but free from subsequent incumbrances. *NARAIN SAHOO v. OCHHOT SAHOO* . . . 14 W. R., 233

*See WAJED HOSSEIN v. HAFEZ AHMED REZAH*  
[17 W. R., 480]

**112.** ————— *Money-decree—Mortgage-decree—Notice—Civil Procedure Code (Act XIV of 1882), s. 287.*—A creditor obtained two decrees against his debtor, one being a mortgage-decree to enforce his lien on certain property, and the other a simple money-decree. In execution of the second decree, the property over which the judgment-creditor had a lien was sold and was purchased by a third person. Subsequently, in execution of the first decree at the instance of the judgment-creditor, this same property was advertised for sale, but on the auction-purchaser objecting, the judgment-creditor brought a suit against him to enforce his lien on the property in the hands of the auction-purchaser. *Held* that it lay on the plaintiff, in order to entitle him to recover in the suit, to show that the defendants purchased with notice of the lien. *Held* further that the fact that for some purpose, at some time or other, the judgment-creditor informed the Court of the mortgage, is not evidence of notice on the auction-purchaser. *NURSING NARAIN SINGH v. ROGHOO-BUR SINGH* . . . I. L. R., 10 Cal., 609

**113.** ————— *Priority.*—The defendant advanced to *A* four sums of money on four bonds, in each of which certain property was hypothecated. The first two bonds contained a stipulation that, until the debt was discharged, the borrower would not mortgage or sell the property hypothecated. The defendant brought a suit to recover the amounts

## SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

due on all his bonds, and obtained a simple money-decree, in execution of which he brought the property mentioned above to sale, and became the purchaser. The plaintiff now sued for a re-sale of the property by virtue of a mortgage of the same, duly registered. The last two of the defendants' bonds were executed after the Registration Act of 1864 came into force, but were, however, unregistered. *Held* that, if the plaintiff had come in and offered to satisfy so much of the decree obtained by the defendant as related to the first two bonds, he would have been clearly entitled to assert that nothing could pass by the sale in execution of the decree on the other bonds, but the rights of the judgment-debtor, subject to his mortgage; but that, as he did not do so, the auction-sale, having been made in satisfaction, *inter alia*, of the debts due on the mortgage-bonds containing the condition against alienation, passed the full proprietary right to the defendant. *RAJAN RAM v. BAINES MADHO*

[5 N. W., 81]

**114.** ————— *Effect of sale—Estoppel.*—On 10th September 1863 *A* mortgaged a house to *B*, who registered the deed, but did not obtain possession of the premises. On 2nd July 1868 *A* mortgaged the same house to *C*, who registered the mortgage-deed and took possession of the premises. On 10th October 1868 *B* sued on his mortgage, and obtained a decree against *A*'s son, who was a minor, and who was represented by his mother as his guardian. She, however, had obtained no certificate of administration under the Minors Act, XX of 1864. On 17th December 1869 the mortgaged property was sold by the Court in execution of *B*'s decree. The plaintiff bought it, and obtained a certificate of sale. On the plaintiff's attempting to take possession of the property, the defendant, who was *C*'s widow and heiress, resisted him, and he thereupon sued to recover it. *Held* that the plaintiff was entitled to possession. He stood, at least, in the same position as had been occupied by *B* before the sale, and *B*, as prior mortgagee, had a superior title to that of defendant, who claimed under a subsequent deed. Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale. *KHEYRAJ JESUR v. LINGAYA*

[I. L. R., 5 Bom., 2]

**115.** ————— *San-mortgage—Registration of certificate of sale—Civil Procedure Code, 1877, s. 287—Notice—Warranty of title.*—A buyer of property at an execution-sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a san-mortgage of previous date. When the Court sells the right, title, and interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property, and if by concealment of a san-mortgage he sold property as

## SALE IN EXECUTION OF DECREE

—continued

## 10 MORTGAGED PROPERTY—continued

free of that charge he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If then the Court sell only the right title and interest of the judgment-debtor set to all existing equities against the property sold the registration of the Court's conveyance (i.e. certificate of sale) cannot enlarge the scope of that conveyance and discharge the property from any unregistered incumbrance which was binding on the judgment-debtor. *Per MELVILL, J.*—In the case of execution sale under s. 257 of the Civil Procedure Code (Act X of 1877) notice is given to purchasers that the sale only extends to the right title and interest of the judgment-debtor and that the Court ordering the sale does not warrant the title. This being so, it seems clear that a person who buys an avowedly doubtful title and pays for it on that understanding cannot claim to be a purchaser without notice. *GOBHAGCHAND CULACHAND v. BHAI CHAND*. I. L. R., 8 Bom., 193.

See *LAKSHMANDAS SARUPCHAND v. DASHAT*

[I. L. R., 6 Bom., 168]

and *RUPCHAND DADUSA v. DAVIATRAY VITHAL RAY* I. L. R., 6 Bom., 490

## 110 Mortgage-debt

*payable by instalments—Money-decree obtained by mortgage for two instalments—Sale of mortgaged property in execution of money decree for each instalment without notice by mortgagee of lien for future instalments Property sold free of incumbrances—Civil Procedure Code (Act XIV of 1882) ss. 27-287—The effect of ss. 237 and 257 of the Civil Procedure Code plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien which he must know of in his application for sale and on the Court the duty of specifying the same in the proclamation. Where therefore in execution of a simple money-decree obtained for some of the instalments due on his mortgage-bond a mortgagee brought to sale the property which he held in mortgage but in his application for execution did not mention his lien on the property for the instalments that were still to fall due—*Held* that the purchaser if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien. *Agarwal v. Lakshmi* I. L. R., 12 Bom. 678. *Kieranj v. Lingay* I. L. R., 5 Bom., 2. *Shreegiri v. Salvador Vas* I. L. R., 5 Bom., 5; and *Dando v. Rast* I. L. R., 20 Bom., 290 referred to. *RAMCHANDRA VITHRAM v. JAI RAM**

I. L. R., 22 Bom., 689

## 117

*Mortgagee not in possession—Registered lease—Effect of sale in transferring property to purchaser—A mortgaged house was sold to B in 1871, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently in 1886, A leased the same land to C. That lease was registered, and C entered into possession. In 1887 B obtained a decree upon his mortgage and in execution attached and sold the mortgaged property. C, who had applied to have*

## SALE IN EXECUTION OF DECREE

—continued

## 10 MORTGAGED PROPERTY—continued

this attachment of the land removed and failed in his application, sued to establish his right under the lease and recover possession. *Held* that, under the lease of 1886, he could only take what the mortgagee had to give him viz., a lease subject to the registered mortgage. Where a decree is obtained upon his mortgage by a mortgagee and the mortgaged property is sold under the decree for the purpose of paying off the mortgagee, the interest of both mortgagee and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned although the officer of the Court may only have described the sale as one of the right title, and interest of the mortgagee. It is not the practice in the mofussil to require the mortgagee to convey to the purchaser the transfer takes place by estoppel. *SURESHJI SHAI KHOS v. SALVADOR VAS* I. L. R., 5 Bom., 5

## 118

*Mortgage with out possession—Right of mortgagee as against the purchaser—Difference between a mortgage valid as against a private purchaser for valuable consideration and one valid as against a purchaser at a Court sale—Priority—Optional registration.—On the 19th September 1871 the land in dispute was mortgaged by L (defendant No. 1) to the plaintiff for Rs. 125. The deed of mortgage was not registered. By it defendant No. 1 agreed to pay interest at the rate of one pie per rupee per mensem and it was provided that the mortgagor was to remain in possession for a period of twenty five years in lieu of principal and interest and that the mortgagee was not to claim the property back unless he paid the principal and interest that might accrue due in twenty five years from the date of the bond. On the 8th July 1872 the land was sold in execution of a decree against the father of L and purchased by B (defendant No. 2) who obtained possession under the certificate of sale. In 1874 the plaintiff (the mortgagee) sued L and B for possession of the property. It was contended for B (defendant No. 2) that the mortgage did not bind him, because he was a purchaser for value without notice of the mortgage and because it was not accompanied with possession. *Held* that, although the mortgage to the plaintiff might have been without possession, it would bind the mortgagee himself and was therefore binding as against defendant No. 2 who purchased at a Court sale under a decree obtained against the mortgagee. A purchaser at such a sale takes only that which the judgment-debtor could himself honestly dispose of. Possession or registration is necessary to validate a mortgage in the Decan or elsewhere in the Presidency of Bombay (except Gujarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court sale. *BAPTISI BHALU v. SATYANAMARAI**

[I. L. R., 6 Bom., 490]

See *CHITRAM v. GENU* I. L. R., 6 Bom., 515

## 119

*Unregistered sub-mortgage—Sale—Subsequent unregistered mortgage of same property—Decree on latter mortgage and*

## SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

*sale in execution—Sale certificate registered—Priority—Interest passing on sale of mortgaged property in execution of a money-decree and of a decree in mortgage*—One *H* and his sons *B* and *C* executed a son mortgage of certain ancestral property in plaintiff's favour in 1885. The mortgage was unregistered. In 1886 the same property was mortgaged by *C* alone by a deed which was also unregistered. In 1889 *C*'s mortgagee obtained a decree on his mortgage for sale of the mortgaged property, and in execution put up the property to auction in 1892, when defendant purchased it. Defendant got his sale-certificate registered. In 1894 the plaintiff brought this suit to enforce his mortgage-lien by sale of the mortgaged property. The defendant contended that, as to *C*'s share, his certificate of sale having been registered his claim had priority to the plaintiff's unregistered mortgage. *Held* that the plaintiff was entitled to a decree. His claim was superior to the defendant's. The defendant had purchased the interest which *C* had mortgaged in 1889. But that mortgage was unregistered and was therefore subject to the plaintiff's mortgage, which, although unregistered, was earlier in date. The defendant, by registering his certificate of sale, could not enlarge the estate which the certificate conveyed to him. By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interest both of the mortgagor and mortgagee passes to the purchaser. But by a sale of mortgaged property in execution of a money decree obtained by the mortgagee against the mortgagor, the interest of the defendant (mortgagor) alone passes to the purchaser. *MAGANLAL v. SHAKRA GIRDHAR*. I. L. R., 22 Bom., 845

## 120.

*Mortgaged land subsequently sold by mortgagee in execution of a money-decree—Purchaser at such sale with notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Civil Procedure Code (VIII of 1859), s. 213.*—Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies, even though the mortgage deed has been registered. In 1867 *R* and *G* mortgaged certain lands to *G R* by a registered deed of that date. In 1870 *G R* obtained a money-decree against *R* and *G*, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage, and in February 1872 obtained possession through the Court. In the meantime *G R* brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April 1872 ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against *R*, *G*, and

## SALE IN EXECUTION OF DECREE

—continued.

## 10. MORTGAGED PROPERTY—continued.

*G R* to recover the lands. *Held* that the plaintiff was entitled to recover. *G R* (the mortgagee), when bringing the land to sale in execution of his decree, was bound by s. 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not therefore retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment debtor's interest in the property brought by the judgment-creditor to sale. *AGARCHAND GUMANCHAND v. RAKHMA HANMANT*. I. L. R., 12 Bom., 678

## 121.

*Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption*—On the 21st December 1871 three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money decree against one *D*, and in August 1872, in execution of that decree, sold the said groves, and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* was found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact, he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May 1880 *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit, which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves. *Held* that, notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title, and interest of the mortgagors, as they existed at the date of the mortgage of the 21st December 1871, with which would go the rights and interest of the mortgagee; and although at a sale under a decree for sale by a mortgagee the right, title, and interest of the mortgagor which is sold is his right, title, and interest at the date of the mortgage, and any right, title, and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognized by the Transfer of Property Act. *Muhammad Samud-din v. Man Singh*, I. L. R., 9 All., 125, followed. *GAJADHAR v. MULCHAND*

I. L. R., 10 All., 520

## SALE IN EXECUTION OF DECREE

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## 10 MORTGAGED PROPERTY—continued

122. — *Purchase of mortgaged property by mortgagee at judicial sale on leave alta nisi to bid*—Where mortgagees executed their decree on the mortgage, and having obtained leave to bid at the judicial sale, purchased the property. *Held* that they could not be held to have purchased as trustees for the mortgagors, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchasers. **MANABIR PERSHAD SINGH v. MACNAGHTEN** I L R., 16 Calc., 682 [L R., 16 I A., 107]

**DAKSHINA MOHAN ROY v. BASUMATI DEBI**  
[4 C. W. N., 474]

123. — *Equity of mortgagors*—In a suit for possession by the certified purchaser of one-third of certain immovables which had been sold in execution of a decree obtained by the mortgagee against the defendant as mortgagor, it appeared that the defendant had in a previous execution sale at the instance of a second mortgagee of the same property bought the same subject of his own first mortgage. The High Court held that the plaintiff should be treated not as a purchaser, but as a mortgagee in respect of his purchase-money. They then directed that only so much of the original mortgage debt as should be apportioned against the share bought by the plaintiff should be realized in his favour. *Held* that this ruling and direction were founded on a misapprehension on that the purchaser had a right to possession of the property which he had bought, and that the defendant had no equity to prevent it. **LUTF ALI KHAN v. FETTER BANARDOO** [L R., 18 I A., 129 I L R., 17 Calc., 23]

124. — *Rights of purchasers under mortgage-decree—Purchases in execution by decree-holders—Title of purchaser holding a decree on a mortgage which had preceded his opponent's decree*—The plaintiffs and defendants, either party holding a separate decree against the same estate, had both purchased in execution. Both parties claimed the proprietary right and possession, the defendant holding the latter. The first of the decrees in date was the plaintiffs' for money against the representative of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees having got a decree upon their mortgage against the widow, purchased at the sale in execution, and defended their possession which they obtained. *Held* that the defendants, in whose favour the decree had been made upon a *bona fide* mortgage without notice that if mortgagor had been only holding benami for her husband, had the better title; that the High Court had disallowed an objection taken by the plaintiffs, distinguished from the defendants.

## SALE IN EXECUTION OF DECREE

—continued.

## 10 MORTGAGED PROPERTY—continued

widow was the real owner, had not been set up or decided in the Court of first instance. **MADHON MOHTYER HOSSAIN v. KISHORI MOHAN ROY** [I L R., 22 Calc., 809 L R., 23 I A., 129]

125. — *Purchase of equity of redemption by decree-holder under s. 214 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption*—A mortgaged certain land to B, but remained in possession thereof. Subsequently A sold a portion of the said land to C in consideration of her paying off the mortgage-debt due to B. C entered into possession, but was unable to satisfy the debt. C died, and A sued C's daughter and legal representative for damages sustained by him from the non-payment of the purchase-money by C. A obtained a decree, and the money not being paid as therein decreed, applied for execution, and brought to sale the equity of redemption vested in C by virtue of the sale. By leave of the Court, A bid at the Court sale and bought the right of redemption and recovered back possession of the land sold to C. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain movable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the Court sale for the equity of redemption. The defendant contended that A was bound to give credit for the full value of the land under mortgage. *Held* that, having obtained leave of the Court to bid under s. 214 of the Code of Civil Procedure, A's position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagee on account of his equity of redemption, is the cash payment for the equity of redemption plus the debt, i.e., the amount undertaken to be paid to the mortgagee, and that for these amounts A was bound to give credit. **KRISHNASAMI ATTAR v. JANAKI AMMAL** I L R., 18 Mad., 153

126. — *Application for re-sale in execution of decree—Judgment-debtor purchasing benami—Rights of mortgagee*—Upon an application made on the 18th August 1891 for execution of a mortgage decree, the mortgaged property was sold and the judgment-debtor purchased it benami at a low price. Thereupon the decree-holders made an application on the 12th November 1891, asking the Court to set aside the benami purchase and re-sell the property. The first Court found that the purchase was not benami, and confirmed the sale on the 12th April 1892, but the lower Appellate Court came to a contrary conclusion and set aside the sale on the 27th July 1892. The High Court in second appeal accepted the finding of the Appellate Court as regards the purchase being benami, but upheld the sale with the remark that the said property and any other property of the

## SALE IN EXECUTION OF DECREE —continued.

### 10. MORTGAGED PROPERTY—continued.

debtors might be sold in satisfaction of the mortgage-debt. This judgment was passed on the 4th August 1893. On an application for execution made on the 3rd December 1894, objections were raised on the ground that the property was not liable to be sold again in execution of this decree. *Held* that the previous sale under the mortgage-decree was no bar to a fresh sale under the same decree. *Ram Autar Singh v. Tulsi Ram, 5 C. L. R., 227; Otter v. Lord Paux, 2 K. & J., 650, and 6 DeG. M. & G., 638; and Lutf Ali Khan v. Futeh Bahadur, I. L. R., 17 Calc., 32, referred to.*

RAGHUNATH SAHAY SINGH v. LALJI SINGH  
[I. L. R., 23 Calc., 397]

127. ———— *Transfer of Property Act (IV of 1882), s. 88—Suit for sale on a mortgage—Purchase at auction-sale by decree-holder—Further execution sought against other property comprised in the mortgage—Amount for which decree-holder must give credit to mortgagee.*—A mortgagee decree-holder in a suit for sale under s. 88 of the Transfer of Property Act, 18-2, brought part of the mortgaged property to sale, and, with the leave of the Court, purchased it himself. The amount realized by the sale being insufficient to satisfy the mortgage-debt, the decree-holder applied for execution against the remainder of the property comprised in the mortgage. *Held* that the decree-holder was not bound to give credit to the mortgagor to the amount of the market value of the mortgaged property purchased by him, but only to the amount of the actual purchase-money. *Mahabir Parshad Singh v. Macnaghten, I. L. R., 16 Calc., 682; Sheonath Doss v. Janki Proshad Singh, I. L. R., 16 Calc., 132; and Ganga Pershad v. Jowahir Singh, I. L. R., 19 Calc., 4, referred to.*

MUHAMMAD HUSEN ALI KHAN v. DHARAM SINGH  
[I. L. R., 18 All., 31]

128. ———— *Transfer of Property Act (IV of 1882), ss. 92 and 63—Decree for sale on a mortgage—Order absolute for sale—Civil Procedure Code (1882), ss. 291 and 310A.*—Ss. 291 and 310A of the Code of Civil Procedure, 1882, will apply to a sale held in virtue of an order absolute for sale passed under s. 89 of the Transfer of Property Act, 1882, although no power is given under that Act. to postpone the operation of an order under s. 89. *RAJARAM SINGHI v. CHUNNI LAL . I. L. R., 19 All., 205*

But see *KEDAR NATH RAUT v. KAIL CHURN RAM . I. L. R., 25 Calc., 703*

129. ———— *Sale in execution of a decree for sale on a mortgage—Stay of sale on payment into Court of decretal amount and costs—Civil Procedure Code, s. 291—Transfer of Property Act (IV of 1882), s. 89.*—*Held* that s. 291 of the Code of Civil Procedure must be taken to have modified s. 89 of Act IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such

## SALE IN EXECUTION OF DECREE —continued.

### 10. MORTGAGED PROPERTY—concluded.

debt and costs has been paid into the Court that ordered the sale. *Rajaram Singhi v. Chunni Lal, I. L. R., 19 All., 205, followed. HARIJAS RAI v. RAMESHAR . I. L. R., 20 All., 354*

### 11. DECREES AGAINST REPRESENTATIVES.

130. ———— *Liability of legal representative of deceased person—Right of bonâ fide purchaser without notice at execution-sale.*—A bonâ fide purchaser without notice for valuable consideration at an auction-sale is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative. The legal representative of a deceased person, though not a party to the suit, will be bound by the execution sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title. *Edalji Hormaji v. Mahabu Begum, Special Appeal No. 266 of 1869, considered. NATHA HARI v. JANKI [8 Bom., A. C., 37]*

131. ———— *Decree against widow in representative capacity—Right and interest acquired by purchaser.*—A suit was brought against A's widow upon a bond given by A. In execution of the decree obtained against the widow, A's property was put up and sold. The advertisement of sale in one place said that the property to be sold was the property of the widow, and in another the rights and interests of the debtor. *Held* that the property intended to be sold, and sold, was the rights and interests, not of the widow personally, but of the widow as A's representative. (*Dissentiente CAMPBELL, J., who held that a public sale carried only the rights which were expressed, and not those which ought to have been expressed, in the proclamation of sale.*) *BUKSH ALI SOWDAGUR v. ESBAN CHUNDER MITTER . W. R., F. B., 119*

S. C. ISHAN CHUNDER MITTER v. BUKSH ALI SOWDAGUR . Marsh., 614

See also *COURT OF WARDS v. COOMAR RAMA-PUT SINGH . 10 B. L. R., 294*

S. C. GENERAL MANAGER, RAJ DURBUNGHA v. RAMPUT SINGH . 14 Moore's I. A., 605  
[17 W. R., 459]

and *SOTISH CHUNDER LAHRY v. NILCOMUL LAHRY . I. L. R., 11 Calc., 45*

132. ———— *Property sold as right and interest of widow—Property wrongly described—Right of deceased debtor—Purchaser, Right acquired by.*—Where in execution of a decree in the presence of the widows of the original debtor, the

## SALE IN EXECUTION OF DECREE

—continued—

## 11 DECREEES AGAINST REPRESENTATIVES

—continued—

property in dispute was a lien as the right and interest of the widows—*Held* that the auction purchaser under the circumstances of the case acquired by the purchase the right and interest of the original debtor in the property though in the sale notice first on those of the widows were advertised to be sold. **TARA KANT BRATTACHARJEE v. LUTHER DABEA TARA KANT BRATTACHARJEE v. WISE** 3 May, 8

133 Interest of persons as representatives—*Property wrongfully decreed*—*Civil Procedure Code 1859 s. 403*—Where a property is decreed at the time of an execution sale as the property of judgment debtors who were sued as mere representatives of a deceased judgment debtor, *prima facie* what is sold is the property of the deceased debtor and even if the decree is in terms as if it were a personal decree and does not follow the wording of Act VIII of 1859 s. 403 yet it must be construed as if it was for the debt of the deceased. **LALLA SEETA LALLA v. PAM BENS THAKOOR**

[24 W R., 383]

134 — — — — — *Contents of application for execution and of a notification and proclamation of sale*—*Sale of interests of minor*—*Civil Procedure Code 1859 ss. 212-213*—Where an application for execution of a decree exists to give the names of all the parties as required by s. 212 Act VIII of 1859 even if it shall appear from other parts of the proceedings who those parties are, the parties named must be understood to be the parties defendants against whom the execution of the decree is sought. Parties present at a sale are not bound to refer to the decree as laid down in **Ishak Chander Mitter v. Bukeh Ali Soudagar, Marah, 613** nor must they be considered as knowing its contents unless they are stated in the notification of sale. The proclamation and notification under s. 241 are intended to inform persons what is to be sold and to give the names of the parties defendants whose rights and interests in it are to be sold. In the case of a sale in execution of a decree against a party as a representative of a deceased person the proper course is to give in the description of the property to be sold the name of the defendant against whom the decree was obtained and in describing what was to be sold, to say the right, title and interest of the defendant as the representative of the deceased. A guardian has no right or interest in a minor's property and the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of a decree. The purchaser in this case was held to have acquired under his purchase no title to the property of the minor the property not having been described as the property of the minor. **ABDOOL KUREEM v. JACOB ALI**

13 W R., 58

135 — — — — — *Guardian not properly appointed*—*Act XX of 1854—Articles—Mad. Reg. V of 1854—Form of decree*—*J* (defendant No 1) brought a suit (No. 374 of 1861)

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—continued—

## 11. DECREEES AGAINST REPRESENTATIVES

—continued—

a suit the plaintiff's father G. On a mortgage bond dated the 2nd April 1853, G having died before any decree was passed his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of M (defendant No 2) the sister of G, on the ground of want of due service of process upon G and his widow. M was substituted as defendant in the suit, and a new decree was made in her favour. That decree was reversed on appeal, by the District Court which allowed J's claim. In execution of the decree of the Appellate Court, the mortgaged property was sold and purchased by J for Rs 20. J obtained certificates of sale reading thus "J, son of I, plaintiff, G, son of A, deceased, supplement or (substitute) his sister M defendant" and it certified that J had purchased "all the right title, and interest which the said defendant had in the said property." J was put into possession of the property. In 1877 the plaintiff (son of the original mortgagor G) filed the present suit against J and M, alleging that the mortgage bond on which J had obtained his decree had been forged by J, and contending that the decree and subsequent proceedings under it did not affect his rights inasmuch as he had not been made a party to them. The prayer in the plaint was that the decree and sale should be set aside and the property restored to his possession. The defence of J substantial was that the suit and appeal were defended by persons who were proper guardians of the plaintiff's, and had been in the management of his property. M did not appear. The subordinate Judge rejected the plaintiff's claim, holding that M was his guardian and manager of his property in the previous suit and appeal, and that the mortgage bond was genuine. On appeal that decree was reversed by the District Judge on the ground that the plaintiff had not been represented in the previous litigation by a guardian duly appointed under Madras Regulation V of 1853 and was no party to it. He accordingly allowed the plaintiff's claim. On second appeal to the High Court—*Held* that on the death of G the plaintiff was his sole heir, that the equity of redemption in the mortgaged property vested in him, and that the inheritance was wholly unrepresented in the previous litigation, inasmuch as M was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Regulation V of 1853, ss. 2, 19-21 or under Act XV of 1864, nor was she appointed his guardian *ad litem* in the mortgage suit. **Ishak Chander Mitter v. Bukeh Ali Soudagar, Marah, 614**, distinguished. **JATHA NAIK v. VENKATAPPA** 1 L. R., 6 Bom., 14

136 — — — — — *Sale in execution of a decree against a deceased person represented by a minor son*—*How far such son's effects interest of an heir not party to decree or execution proceedings*—*K.* a Mahomedan woman who was a co-sharer in a certain khiti vatan, died indebted, and was sued after her death as "represented by her

## SALE IN EXECUTION OF DECREE

—continued.

11. DECREES AGAINST REPRESENTATIVES  
—continued.

minor son represented by his guardian." A decree having been obtained against *K*, as so represented, her share in the khoti was put up for sale in execution, and was purchased by the plaintiff, who obtained a sale certificate reciting that the right, title, and interest of *K* in the said khoti had been purchased by him. He now sued the defendants, who were *K*'s co-sharers in the khoti, to recover the profits of *K*'s share which they had received. *K*, besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution-proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff. *Held* that the plaintiff was entitled to the whole of *K*'s share. The debt due by *K* was one for which the daughter was equally responsible; and having regard to the form of the suit and the execution proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of *K*'s share, and would acquire a title unimpeachable by the daughter. *KHURSHAT BIBI v. KESO VINAYEK*

[I. L. R., 12 Bom., 101]

137. — *Representatives of deceased Mahomedan—Sale subject to mortgage—Power of heirs to alienate.*—The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage, a judgment-creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. *Held* that the sale was subject to the mortgage. *Held* also that the question with respect to the powers of the heirs and the rights acquired by the mortgagee and the purchaser under the execution, in a suit between the latter, was to be determined not by Mahomedan law, but by the principles of "justice, equity, and good conscience." *Semhle*—That even if the Mahomedan law applied, the sale in execution would be subject to the mortgage. *CAMPBELL v. DELANEY*

[Marsh., 509]

138. — *Purchaser of share of estate, Rights of—Purchase from some of the heirs—Absent heir, Reappearance of—B R, a Mahomedan, had incurred debts for repairs to a house of which he owned an 8 annas share and after his death his daughter S, who was entitled to a 5 annas share of his estate and who had taken charge of his property and obtained a certificate under Act XXVII of 1860, directed further repairs to be done to the estate. The debts then incurred by B R and S not having been paid, the creditor brought a suit against S, as representing her father's estate, to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by H in May 1874. B R at his death left also a sister, who was entitled to a 3 annas share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she, in January 1874, sold her interest in the house to M. In a suit by M against S and H for possession of the share so purchased by him,—*Held* that S did not represent the*

## SALE IN EXECUTION OF DECREE

—continued.

11. DECREES AGAINST REPRESENTATIVES  
—continued.

whole estate of B R, and the share purchased by the plaintiff did not pass under the execution sale to H; the plaintiff, therefore, was entitled to recover. *HENDRY v. MUTTY LALL DHUR*

[I. L. R., 2 Calc., 395]

139. — *Purchase of interest of some of the heirs—Heir not party to suit—Right acquired by purchaser—A, a Mahomedan, died possessed of immoveable property and leaving a widow, a daughter, and a sister B, his heiresses according to Mahomedan law. B was entitled to a one-sixth share of an undivided moiety of a certain portion of the property which was situated in Calcutta. After A's death, the L Bank sued his daughter and her husband and two of her husband's brothers in a mofussil Court to realize certain mortgage securities executed by A to the Bank, and obtained a decree by consent. Neither the widow nor B, who was then absent from the country, were parties to this suit. The Bank, in execution of their decree, caused certain property of A, including the undivided moiety of the Calcutta property, to be sold by the Sheriff of Calcutta. The defendant became the purchaser at this sale, and obtained possession of the property. The certificate of sale stated that what was sold was "the right, title, and interest of A, deceased, the ancestor, and of the defendants (naming them), the representatives, in a moiety of a piece of land situate," etc. B afterwards sold and assigned her share in (among other properties) the above-mentioned undivided moiety of the Calcutta property to the plaintiff who now sued the purchaser at the execution sale to recover the subject of his purchase. *Held* by GARTH, C. J., KEUR and JACKSON JJ. (MARKBY and AINSLIE JJ. dissenting), that the decree and the execution founded upon it did not affect the share of B in the estate of A, and consequently that the property in question did not pass to the defendant under the sale made by the Sheriff. *ASAVATHEENESSA BIBI v. LUTCHMIPUT SINGH*. I. L. R., 4 Calc., 142*

S. C. ASHUTF ALI. LUTCHMIPUT SINGH

[2 C. L. R., 223]

140. — *Mahomedan law—Decree against heir of deceased Mahomedan.*—Under Mahomedan law, a decree against one heir of a deceased debtor cannot bind the other heirs. A mortgage having been executed by a Mahomedan, a suit was after his death brought against two of his heirs, his sister, who was entitled to a 6 annas share in his property, not having been made a party to the suit. A decree was made by consent, and in execution of that decree the right, title, and interest of the mortgagee were sold. The assignee of the sister then sued the purchaser to recover her 6 annas share without making the original mortgagee a party. *Held* that the mortgage was not a necessary party to the suit, and that the share of the sister, notwithstanding that the right, title, and interest of the mortgagee had been sold, was not affected by the sale, and that the plaintiff as her assignee was

## SALE IN EXECUTION OF DECREE

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—continued—

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## 11. DECREES AGAINST REPRESENTATIVES

## 12. RE-SALES—continued

—concluded—

entitled to recover SITA NATH DASS & LUCHMIPPY SINGH 11 C. L. R., 288

141. Mortgage by one of the heirs of deceased—Direction in will for payment of debts—Decree against heirs for debt of ancestor—Charge on property—A testator by his will directed payment of all his debts and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity which by its terms was to be satisfied out of the assets left by the testator one of the heirs mortgaged his share in twelve properties left by the testator. Subsequent to the mortgage, one of the mortgaged properties was sold in execution of the creditor's decree. The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage. Held that as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator the property sold in execution of the creditor's decree had been sold subject to the mortgage and the mortgagee was entitled to execute his decree against that property. *Baldev Singh v. Dooli Chaudhary* 1 L. P. & C. L. R. 402 disapproved. *Raj Bahadur Singh v. Mohan Chandra Chowdhary* 1 L. R., 9 Cal., 408 11 C. L. R., 685

142. — Civil Procedure Code s. 231—Sale in execution of decree against deceased Mahomedan estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid—F, a Mahomedan woman died, leaving her husband and several minor children as her representatives. In execution of a money decree obtained against F, the creditor attached certain land which belonged to F, and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree holder. Held, in a suit brought by the children of F, to set aside the sale on the ground (inter alia) that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid. *Kashanmad v. Kutti*

[L. R., 12 Mad., 90]

## 12. RE-SALES

143. — Defaulting purchaser, Liability of—Civil Procedure Code (Act X of 1877), ss. 293, 297, 306, 308.—The provisions of s. 293, Act X of 1877 (Civil Procedure Code) for making a defaulting purchaser at a sale liable for any deficiency on a re-sale, extend to all sales, whether of moveable or immovable property and also to re-sales held under ss. 293, 303, and 304. *Rajdevi Kooner v. Rajdevi Kooner* 1 L. R., 7 Cal., 337 9 C. L. R. 23

144. — Time allowed for payment of purchase money—Civil Procedure Code 1857, s. 251—Direction of officer conducting sale to allow reasonable time for payment of purchase money—The provisions of s. 251 of the Civil Procedure Code gave the officer conducting a sale of moveable property a discretion to allow the purchase-money to be paid at a reasonable time after the sale has been made. *Hareed Alam v. Sher Chander Lam* 4 N. W., 37

145. — Civil Procedure Code 1857, s. 254—Computation of period within which to put the balance of the purchase-money under a 254, Act VIII of 1859 the day of sale was excluded. *Amayee Ischem v. Koordas Aji* 3 Agra, 204

146. — Failure of purchaser to pay deposit—Civil Procedure Code, 1857, s. 254.—Failure to deposit the sale price—According to s. 254, Civil Procedure Code 1857 the property had to be put up again for sale on the purchaser failing to make deposit, and it was the deposit only which could be forfeited and not any right which a decree-holder might have under his decree. In the case of a re-sale the judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale. *Joonas Singh v. Gora Buxer Lal* 7 W. R., 110

147. — Defaulting purchaser—Amount leviable from defaulting purchaser—Interest—Civil Procedure Code, 1857, s. 254.—When the proceeds of an eventual sale were less than the price bid by a defaulting purchaser, the difference was leviable from him under s. 254 Code of Civil Procedure, but was levied without interest. *Sooraj Buxer Singh v. Sreekishan Doss*

[9 W. R., 500]

See *Sooraj Buxer Singh v. Sreekishan Doss*

[6 W. R., 128]

148. — Failure to pay deposit—Failure to pay balance of purchase-money—Civil Procedure Code 1857, s. 253.—The provisions of s. 253 Act VIII of 1859 were held applicable in a case where the re-sale did not forthwith take place on the day of the sale, but on a subsequent date. It was only on failure of a purchaser to pay in the balance of the purchase-money under a 253 and not on failure of the purchaser to make the deposit required by s. 253, that the purchaser could be compelled to pay up the difference between the first and second sales. *Ajoodhya Pershad v. Gopal Dutt Misser*

[17 W. R., 271]

149. — Civil Procedure Code 1857 ss. 293, 294—Failure to pay deposit—Re-sale—Redress against defaulter—Bidding without permission of Court—Bona fide purchase—A purchaser of property at a Court-sale who fails to pay the deposit (5 per cent on the purchase-money) directed to be paid by s. 303 of the Civil Procedure Code is a defaulting purchaser within the



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—continued.

## 12. RE-SALES—continued.

meaning of s. 273 of that Code, and liable, as such, to make good any deficiency of price which may happen on a re-sale and all expenses attending the same. *JAYHERBHAI v. HARIBHAI* I. L. R., 5 Bom., 575

150. *Civil Procedure Code, 1859, s. 254.*—A purchaser at an execution-sale having defaulted to pay in the purchase-money, the property was ordered to be re-sold. Before, however, the re-sale took place, another sale of the same property was effected at the instance of another judgment creditor, but at a lower price than on the first occasion. *Held* that there was no re-sale such as was contemplated in ss 253 and 251, Act VIII of 1859, and that the first purchaser was not liable for the difference between his bid and the price obtained at the same sale. *BISOKHA MOYEE CHOWDHRAIN v. SONATUN DOSS* . . . 16 W. R., 14

151. *Act VIII of 1859, s. 254.*—In execution of a decree, certain property of the judgment-debtor was attached and put up for sale and a portion thereof was knocked down to a purchaser for a sum sufficient to satisfy the decree. The purchaser, however, having made default in payment of the purchase-money, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it in the former sale. *Held* that the decree-holder was not debarred by what took place at the former sale from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold. *KHERODA MAYI DAS v. GOLAM ABARDARI*

[13 B. L. R., 114; 21 W. R., 149]

152. *Civil Procedure Code, 1859, s. 254.*—*Held* by PHEAR, J. (AINSLIE, J., dissentiente), that if for any good reason the auctioneer at an execution-sale under the Code of Civil Procedure does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will; he must simply declare that no sale has been effected and reopen the bidding. *Held* by PHEAR, J. (AINSLIE, J., dissenting), that where the Judge countersigned the certificate of sale in the following terms, "H P, having made the purchase for Rs 700, stated that he made the purchase for D K," he accepted D K as purchaser in H P's bid; and that, when a second sale became necessary, the difference of price became recoverable from the apparent first purchaser under Act VIII of 1859, s. 254, and recourse should first have been had to D K, who should have been allowed to show cause against an order of payment. *HUREE RAM v. HUR PERSHAD SINGH* . . . 20 W. R., 80

*Held* (on appeal under the Letters Patent confirming the judgment of PHEAR, J.) that the party purchasing at an execution-sale under the Civil Procedure Code in the character of an agent cannot be made liable as a principal; and a proceeding upon the contract under s. 254 in such a case must

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## 12. RE-SALES—continued.

be taken against the principal. *HUREE RAM v. HUR PERSHAD SINGH* . . . 20 W. R., 397

153. *Civil Procedure Code, 1859, s. 254.*—Where property had been sold under a decree, and the purchaser at the execution sale had made default in paying the purchase-money, the remedy of the judgment-creditor was not limited by s. 254 of Act VIII of 1859 to a suit against the defaulting purchaser. He was entitled to recover the balance of his debt from his judgment-debtor, who might perhaps have his remedy against the defaulting purchaser. *ANANDRAY BABUJI v. SHEKH BABA* . . . I. L. R., 2 Bom., 562

154. *Civil Procedure Code, 1859, s. 293.*—*Defaulting purchaser answering for loss by re-sale—Description of property at sale and re-sale, Difference of.*—The sale contemplated by s. 293 of the Civil Procedure Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293. *Semle*—That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit, and not by an application under s. 293. *BAJINATH SARAI v. MOHEEP SARAIN SINGH* [I. L. R., 16 Cal., 535]

155. *Civil Procedure Code, 1859, ss. 293, 306.*—*Liability of defaulting purchaser.*—At a sale in execution of a decree a decree-holder who had obtained leave to bid, was alleged to have made a bid through his agent of Rs 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure, and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by re-sale; the petition was rejected. On appeal, *Held* that the property, having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure, was resold within the meaning of s. 293. *VALLABHAN v. PANGUNNI* . . . I. L. R., 12 Mad., 454

156. *Civil Procedure Code, s. 293.*—*Order for recovery of deficiency on re-sale—Right of suit to set aside order—Certificate of amount of deficiency.*—*Held* that a suit will lie to set aside an order passed under s. 293 of the Code of Civil Procedure. *Held* also that the fact that the certificate provided for by s. 293 of the Code has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency

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—continued.

## 12 RE-SALES—continued.

announcing a re-sale of property sold in execution of a decree but not paid for. *TAPSEMI LAL v. BHONDI NANDAN RAI*. I L R., 19 All., 22

157 ———— *Civil Procedure Code (Act XI of 1882), ss. 293, 306, 309, 309, 356*  
—*Decision on 'Re-sale'* — Put up to sale —  
—*Messing of Construction—Default in depositing purchase-money* — S. 213, Civil Procedure Code extends to re-sales held under ss. 306 and 309 and there is no substantial difference between the words "re-sold" and "re-sale" which occur in ss. 309 and 309 and the words "put up again and sold" which occur in s. 306. *Pawdhani Salas v. Raj Pans Kocor*, I L R., 7 Cal., 337 relied upon. S. 309, Civil Procedure Code, does not apply to a case in which the property is put up again and sold forthwith under the provisions of s. 306 Civil Procedure Code. *RAJENDRA NATH ROY v. RAM CHANDER SINGH*. 2 C. W. N., 411

158 ———— *Re-sale by Collector—Sale to set aside sale* — The plaintiff purchased the right title and interest of a judgment-debtor in a certain jumma sold in execution of a Small Cause Court decree. Subsequently the same land was sold by the same creditor in execution of another decree obtained in the Collector's Court and the defendant purchased. In a suit to set aside the second sale, — Held that, when a tenure has once been sold in execution of a decree of a Civil Court, the Collector's Court has no power to put it up again as the property of the former tenant. *SAMIRADDE KHALIFA v. HABIS CHANDRA*

[3 B. L. R., A. C. 49 13 W. R., 451 note

WAHID ALI v. SADIQ ALI

[12 B. L. R., 487 note 17 W. R., 417

MOJOY MOHLE v. DELA GRANT KULAV

[12 B. L. R., 492 note

PRAN BANDHU SIKKAR v. SARENTYNDARI DEBI

[3 B. L. R., A. C. 52 note 10 W. R., 434

TIRTHANAND THAKOOR v. PARESMOY JHA

[10 B. L. R., 142 note 13 W. R., 449

DOWLAT GAZI CHOWDHRY v. MUKHAR

[12 B. L. R., 485 note 15 W. R., 341

159 ———— *Collector Power of, to set aside sale and to order a re-sale* — A sale of certain property by the Collector in execution of a decree was set aside by the Collector on the application of the decree-holder and a re-sale took place at which the decree-holder purchased the property for Rs. 50. The purchase-money was duly paid into Court. Subsequently a third party applied to the Collector to set aside this sale, and offered Rs. 400 for the property. The Collector made an order setting aside the sale and ordering a re-sale; the bidding at such re-sale to commence at Rs. 0. The re-sale accordingly took place. The decree-holder applied to the Subordinate Judge to set aside the re-sale and to confirm the previous sale to her. On reference to the High Court, — Held that the re-sale by the Collector was a nullity and that the question with

## 12 RE-SALES—concluded

regard to the confirmation of the previous sale should be dealt with by the subordinate Judge as if the Collector had issued no orders on the subject. *Ganpatram Issar v. Isakji Adinji*, I L R., 15 Bom., 322, followed. *BAI AMRIT v. MADHAV MANOR*. I L R., 15 Bom., 694

See *NARAYAN v. RASULKHAN*

[I L R., 23 Bom., 531

## 13 PURCHASERS, TITLE OF.

### (a) GENERALLY.

160 ———— *Title given by sale—Implied warranty of title—Careat employer* — In a sale of immovable property made by a Civil Court in execution of a decree there is no implied warranty by the execution-creditor of the title of the judgment debtor, the maxim "*careat employer*" applying. *DHONDU MATURADAS NAIK v. RAMJI VALAD HANMANTA KAKDA*. 4 Bom., A. C., 114

*KRISHNAPPA VALAD SANTU v. PANCHAPPA VALAD GURPADAPA*. 6 Bom., A. C., 253.

*JUNNAL ALI v. TIRBHEE LALL DOS*

[12 W. R., 41

161. ———— *Principle of "careat employer"* — Where a party purchases an estate sold in execution after notice that parties other than the judgment-debtor claim rights and interests in the property, the rule of *careat employer* applies. *SHAHABUDDIN CHOWDHRY v. RAMCHITTA CHAKREBORTY*. 9 W. R., 556

162 ———— *Ground for setting aside sale—Writ of fieri facias* — A sale by the Sheriff to a bond fide purchaser for valuable consideration will not be set aside on the ground that the judgment creditor had communicated with the Sheriff and desired him to stay the sale. The purchaser need not trace back his title beyond the *f. fa.* *KAMINER DOBBER v. GOORNOWY DOBBER*

[1 Ind. Jur., N. B., 359

163 ———— *Warranty—Careat employer* — In a sale in the execution of a decree of the rights and interests of a judgment-debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described. Where therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue registers were proclaimed for sale in the execution of a decree and sold, described as recorded and the sons of the judgment-debtor subsequently sued the purchaser to recover their interests in such share and obtained a decree for such interests, and

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13. PURCHASERS, TITLE OF—continued.

the suit was maintainable. The provisions of s. 257 of Act VIII of 1859 apply to applications made under s. 256 of that Act, and to those only. *Held* therefore that, inasmuch as *K* objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in s. 256 of Act VIII of 1859, *K* was not precluded by the terms of s. 257 of that Act from maintaining his suit. COURT OF WARDS v. GAYA PRASAD. I. L. R., 2 All., 108

166. \_\_\_\_\_ Sale in execution set aside—  
\_\_\_\_\_ execution of a different decree—

166.  
Second sale in execution of a different decree—  
First sale subsequently confirmed in suit for that  
purpose—Title of purchasers at first sale—Civil  
Procedure Code (1892), ss. 311, 132.—Certain  
immovable property was sold in execution of a  
decree, but on objections being raised by the judg-  
ment-debtors under s. 311 of the Code of Civil  
Procedure, the sale was set aside. After the sale had  
been thus set aside, the same property was again sold  
in execution of another decree. Subsequently in a  
suit brought by the purchasers at the first sale (in  
which suit the judgment-debtors, who alone were  
made defendants, confessed judgment) the first sale  
was confirmed. The purchasers at the first sale then  
sued the purchasers at the second sale for possession  
of the property sold. Held by STRACHEY, C.J., that  
the second purchasers having acquired their title at a  
time when the first sale had been set aside, their title  
was not affected by the subsequent confirmation of  
the sale and was good as against the first purchasers.  
Held further (by STRACHEY, C.J., and BANERJI, J.)  
on the finding that the decree confirming the first sale  
had been passed in a suit to which the purchasers  
at the second sale were no parties, and had, moreover,  
been obtained by means of collusion between the  
plaintiffs and the judgment-debtors, that such decree  
could not defeat the title acquired by the purchasers  
at the second sale. *Dagdu v. Panchamsing Ganga-  
ram*, I. L. R., 17 Bom., 375; *Konapa v. Janardan*, 11  
Bom., 193; *Adhur Chunder Banerji v. Aghore Nath  
Aroo*, 2 C. W. N., 589; and *Ram Chunder Sadhu  
Khan v. Samir Ghazi*, I. L. R., 20 Cal., 25, dis-  
tinguished. *Zain-ul-abdin Khan v. Muhammad  
Asghar Ali Khan*, I. L. R., 10 All., 166; *L. R.*, 15  
I. A., 12, referred to by STRACHEY, C.J. *BANKE  
LAL v. JAGAT NARAIN*. *BANKE LAL v. DAMODAR  
DAS*. I. L. R., 22 All., 168

(b) CERTIFICATE OF SALE.

167. ————— Position of purchaser with certificate—Certificate of purchase by Registrar—Conveyance—Suit for partition—Declaration of right to share—Rules of Court, 415, 431.—The position of a purchaser at a sale in execution of a decree of the High Court after he has obtained a certificate from the Registrar under rule 415 of the Rules of Court is that of a person clothed with a right to a conveyance in virtue of a contract; he

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## SALE IN EXECUTION OF DECREE

—continued

## 12. PURCHASER'S TITLE OF—continued

does not hold save as regards the parties to the contract of sale, the position of an owner. When the sale is confirmed, the purchaser is entitled to a conveyance, and not to be obtained a conveyance, the property in the estate purchased does not, having regard to rule 431 pass to him so as to give him rights as against parties not bound by the decree under which the sale took place. All that passes to him as against the defendant in that suit is an equity in the estate and a right to a conveyance of the property, and therefore as the estate in the property purchased has not passed, the purchaser is not entitled to maintain a suit for partition. In such a suit he could not on partition give a good conveyance to the parties interested in the estate, nor would he be entitled to a declaration of his share in the property. *JANTA MULL KHOSLA v. TARA KISHORE DAS* I. L. R. 10 Cal. 252

123 ——— Title of purchaser without certificate—*Possession*—*Registered certificate of sale*—*Field No.*—*Code of Civil Procedure Act VIII of 1859 and XII of 1862*—A purchaser of immovable property at a Court-sale under the Civil Procedure Code Act VIII of 1859, who has been put into possession by the Court, has thereupon a complete title against all persons bound by the decree, notwithstanding that he has no certificate of sale, or one only which has not been registered. *Rajkishore Mookerjee v. Basila Madhusudan* 21 W. P. 347, followed. *Quere*—How far the above ruling will be affected by the language of a Sile of Act XII of 1862. *Pritham Narayan v. BAJJI SACHARAM* I. L. R. 7 Bom. 254

129 ——— *Suit to recover possession of property purchased*—*Quere*—If it is admitted that the plaintiff purchased immovable property at a Court-sale he can recover without producing the certificate of sale. *SARADIA CHITABARA MANA DESHIA SWAMIAK v. JANAKIA BHAI ANMAL* [I. L. R. 5 Mad. 54]

170 ——— Evidence of title of purchaser—*Sale of immovable property*—*Confirmation of sale*—The order confirming a sale of immovable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential. *Doorga Narain Sen v. Banay Madhusundaram* I. L. R. 7 Cal. 379 (followed). *TARA PRASAD MITRA v. NEDD KISHORE GHIS* [I. L. R. 9 Cal. 442 12 C. L. R. 448]

171 ——— Completion of title of purchaser—*Payment of purchase-money and confirmation of sale*—*Civil Procedure Code, s. 316*—Under a S. 6 of the Civil Procedure Code (Act I of 1877) the title of a purchaser at a Court-sale becomes complete upon his payment of the purchase-money and confirmation of the sale by the Court. When the sale is admitted, production of a certificate is not necessary to entitle the purchaser to maintain a suit. *Pada Mahomed v. Redman*, 10 Bom. 423.

## SALE IN EXECUTION OF DECREE

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## 13. PURCHASER'S TITLE OF—continued

*Lallabai Lakshman v. Naval Mir Kama-ram Harna*, 12 Bom. 247; and *Harkisandas Norundas v. Ras Ikaly* I. L. R. 4 Bom. 155, distinguished. *NAIGAN TIRAPPA v. BHASIKER PAKHATA* [I. L. R. 10 Bom. 444]

172 ——— *Sale in execution of decree of Revenue Court*—*Delivery of possession*—*Act XI III of 1873 (N.W. P. East Act)* s. 76—*Act XII of 1881 (N.W. P. East Act)* s. 172—*Property sold in execution of a decree of a Revenue Court vests in the purchaser on completion of the sale and payment of the full price*. In order to perfect his title it is not necessary that he should obtain a sale certificate or should be put into possession by the Collector. *Held* therefore that a suit by a purchaser at a sale in execution of a decree of a Revenue Court for possession of the property was maintainable although his sale certificate might be an invalid document and the Collector had not put him into possession. *MUZAFFAR HUSSAIN v. ALI HUSSAIN* [I. L. R. 5 All. 297]

173 ——— *Purchaser at execution sale*—*Suit for possession of property*—*Proof of title*—*Act VIII of 1859, ss. 257, 259*—*Held* that it was not incumbent on a purchaser at an execution-sale under Act VIII of 1859 which was confirmed in his favour under that Act, when suing for possession of the property, to produce a sale certificate, but it was competent for him to prove his purchase otherwise. The confirmation of the sale in his favour was *prima facie* evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed. *Doorga Narain Sen v. Banay Madhusundaram*, I. L. R. 7 Cal. 379, referred to. *JAGAN NATH v. BALDIO* I. L. R. 5 All. 305

*KALSH DAS VEDHAR C. HIR NATH BOH CHOWDHURY* W. R. 1884, 279

174 ——— *Purchaser at successive execution sales*—*Purchaser at second sale obtains certificate of sale and possession of property prior to grant of certificate to purchaser at first sale*—*Proviso*—On the 24th December 1880 the plaintiff purchased a house at an auction-sale in execution of a decree against the owner, one S. The sale was confirmed on the 4th January 1881, but the certificate of sale was not issued until the 19th June 1880. On the 23rd January 1880 the defendant purchased the same house at a sale in execution of a money-decree against S. That sale was confirmed on the 23rd February 1880, and a certificate was issued on 24th March 1880. The defendant got possession from the judgment-debtor in April 1880. The plaintiff now sued for possession. It was contended for the defendant that, he being completed his title under the auction-sale and obtained possession before the plaintiff had taken out his certificate, he had acquired a better title than the plaintiff. *Held* that the plaintiff was entitled to recover. By his prior purchase he had obtained an equitable interest

# SALE IN EXECUTION OF DECREE

—continued.

## 13. PURCHASERS, TITLE OF—continued.

in the property, although he had not obtained a sale certificate. The defendant therefore purchased subject to the plaintiff's equitable interest; and that title having subsequently been perfected by the issue of the certificate, the plaintiffs were in a position to sue for possession. *YESHWANT BABURAY v. GOVIND SHANKAR*. I. L. R., 10 Bom., 453

175. ———— *Certificate of sale granted to the representative of deceased purchaser—Civil Procedure Code (1882), s. 316.*—When a sale in execution has become absolute, the Court can, under s. 316 of the Civil Procedure Code (Act XIV of 1882), grant the certificate prescribed therein to the representatives of a deceased purchaser. *IN RE VINAYAK NARAYAN. IN RE DATTA-TRAYA KRISHNA DATAR* I. L. R., 24 Bom., 120

176. ———— *Period from which title of purchaser dates—Date of sale—Date of confirmation of sale.*—The title of a purchaser at a judicial sale which has been confirmed and been made absolute relates back to, and takes effect from, the date of the sale, and does not commence only on the date of the confirmation of the sale. *LUCHMIN NATH v. MAHA-RAJA OF VIZIANAGRAM* 7 N. W., 310

177. ———— *Confirmation of sale—Liability of purchaser for Government revenue.*—The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as zamindar and partly as patnidar. The sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May 1873. Between the date of the sale and the confirmation a considerable sum became due for Government revenue on the whole property, and to prevent its being sold the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant,—*Held* that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and therefore she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation. *BHRYUB CHUNDER BUNDOPADHYA v. SOUDAMINI DABEE* [I. L. R., 2 Calc., 141

178. ———— *Application for possession—Period from which right to apply accrues—Civil Procedure Code, 1859, ss. 263, 264—Civil Procedure Code, 1877, ss. 318, 319.*—*A* obtained a money-decree against *B* on the 25th January 1872, in execution of which property belonging to *B* was sold on the 9th of September 1874. *A* himself becoming the purchaser. The sale was confirmed on the 9th of October 1874, but the certificate of sale was not issued till the 23rd of January 1878. *A* applied for possession on the 2nd of April 1879. *Held* that the right to apply for possession contemplated in the ss. 263 and 264 of the Civil Procedure Code (Act VIII of 1859) corresponding with ss. 318 and 319 of the Civil Procedure Code (Act X of 1877) accrued

# SALE IN EXECUTION OF DECREE

—continued.

## 13. PURCHASERS, TITLE OF—continued.

on the date the certificate of sale was issued, and not on that on which the sale was confirmed; and that therefore the period of limitation against the purchaser counted from the former date. *BASAPA v. MARYA* I. L. R., 3 Bom., 433

179. ———— *Certificate of sale, Application for—Civil Procedure Code (Act XIV of 1882), s. 316—Court Fees Act (VII of 1870), s. 6.*—An application by an auction-purchaser for a certificate of sale need bear no Court-fee stamp, since by s. 316 of the Civil Procedure Code (Act XIV of 1882) it is not even required to be in writing. *HIBA AMBAIDAS v. TEKCHAND AMBAIDAS* [I. L. R., 13 Bom., 670

180. ———— *Unregistered certificate of sale—Interest of purchaser—Second sale of same property in execution of subsequent decree—Interest of purchaser at such subsequent sale subject to interest of purchaser under prior sale—Registered certificate of second sale—Act VIII of 1859.*—In 1884 the plaintiff brought the present suit against the defendant to recover possession of a certain house which he had purchased at a sale held on the 15th March 1880 in execution of a money-decree obtained against one *C*. He obtained a certificate of sale on the 3rd January 1880, which was registered on the 13th of the same month. The defendant had previously purchased the same property at a sale held on the 22nd November 1875, in execution of a decree obtained by him as mortgagee against the said *C*. The defendant had obtained a certificate of sale and was put into possession, but had not then registered the certificate. He subsequently obtained another certificate, which was registered in June 1892. In a suit by the plaintiff for possession,—*Held* that the plaintiff could not recover. The defendant had acquired under the Civil Procedure Code (Act VIII of 1859) by the sale and the confirmation of it a beneficial interest, and the plaintiff by his subsequent purchase in execution of the money-decree against *C* took subject to that interest. The grant to the defendant of the second certificate, which was registered, sufficiently proved that the sale to him had been confirmed. *CHINTAMANRAY NATU v. VITHABAI* I. L. R., 11 Bom., 588

181. ———— *Proof of title without production of certificate of sale—Civil Procedure Code, 1859, s. 259—Registration Act, 1866, s. 49—Omnia presumuntur rite esse acta.*—Assuming that s. 49 of the Registration Act, 1866, required that a certificate of the sale of land in execution of a decree passed under the Civil Procedure Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title. If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court. *VELAN v. KUMARASAMI* [I. L. R., 11 Mad., 296

182. ———— *Title of auction-purchaser without certificate of sale—Confirmation of sale,*

## SALE IN EXECUTION OF DECREE

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## 13. PURCHASERS' TITLE OF—continued.

*Effect of*—The plaintiff as an agriculturist sued the defendant to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband) and that therefore the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held therefore that he had failed to prove his title, and accordingly directed that the mortgage account should be taken under the Dekkan Agriculturists' Relief Act (XVII of 1879). The defendant afterwards found his sale certificate and obtained a review of the above order but on review the Subordinate Judge confirmed his decision holding that as the sale certificate was unregistered, it could not be received in evidence. The defendant then obtained a fresh certificate registered and renewed his application to the Subordinate Judge who reversed his previous order and rejected the plaintiff's claim. The plaintiff appealed to the District Judge who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court, *Held* that the order of the District Judge should be discharged. A sale certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed or his representative cannot, after the sale has been confirmed, dispute the title of the purchaser at the sale. The order confirming the sale completes the title of the latter as against the former. **KUNJAL PASACHAND v. BHIMABAI**

(I. L. R., 12 Bom., 589)

183. — Statement in certificate of sale.—Evidence—Said to enforce charge against purchaser.—A statement in a sale-certificate granted by a Court, that the purchase is subject to a charge, is not conclusive evidence against the purchaser when it is sought to enforce the charge by suit. **BAMA CHANDRA JOSHI v. HAZI KASSIM**

(I. L. R., 18 Mad., 207)

184. — Purchasers at successive execution-sales.—Title obtained by first purchaser.—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser.—Priority.—Civil Procedure Code (Act XIV of 1882) s. 815.—Limitation.—Confirmation of sale.—On 27th February 1886 the plaintiff purchased certain land at a Court-sale held in execution of a decree. On the 10th March 1886 the same property was put up for sale in execution of another decree and purchased by the defendant. The sale to the defendant was confirmed on 3rd July 1886, and the sale to the plaintiff not until the 21st July 1886. Certificates of sale were issued to both plaintiff and defendant on the same day, viz., on the 2nd September 1886, and on the 14th February 1887 the defendant was put in possession. In 1889 the plaintiff brought this suit to recover possession. The defendant relied on s. 316

## SALE IN EXECUTION OF DECREE

—continued.

## 13. PURCHASERS' TITLE OF—continued.

of the Civil Procedure Code. He contended that, as under that section the title of a purchaser at a Court-sale vests at the date of the confirmation of the sale to him, his (the defendant's) right was superior to that of the plaintiff inasmuch as the sale to him was confirmed on the 3rd July 1886, while the sale to the plaintiff was not confirmed until afterwards, viz., on the 21st July. *Held* that the plaintiff was entitled to recover. By his prior purchase he had acquired an equitable or incchoate title to the property which was subsequently perfected by the certificate of sale. Nothing therefore passed to the defendant under the second sale. The words "the title to the property shall" in s. 316 of the Code of Civil Procedure mean the full perfected title arising on the sale becoming absolute. It is that title which under the section does not vest in the purchaser until confirmation. That provision, however, need not necessarily be construed as destroying any lesser interest which arises by reason of general equitable principles. *Quare*—Whether the provision in s. 316 as to the date at which the title of the purchaser is to vest does not apply only as between the parties to the suit and persons claiming through or under them. *Per JAYDIN J.*—The reference to parties and persons claiming under them would be surplusage if the Legislature had intended the addition to apply to third parties. **DAGDA v. PANCHAMINGO**

(I. L. R., 17 Bom., 375)

185. — Title of auction purchaser who has not obtained a certificate of sale.—Civil Procedure Code (1882), s. 316.—Although the auction purchaser at a sale held in execution of a decree may not obtain a full title until a certificate has been granted, this must not be considered as necessarily destroying any lesser interest which arises by reason of general equitable principles. **Dagda v. Pancham Singh Gangaram** (I. L. R., 17 Bom., 375), and *Het Ram v. Baldeo*, Weekly Notes, 411 (1891), 54, approved. **CHIBDO v. PIRAI LAL**

(I. L. R., 19 All., 188)

186. — Certificate of sale.—Civil Procedure Code (Act XIV of 1882), s. 316.—Auction-purchaser.—Confirmation of possession.—Title of auction-purchaser.—Suit for damages for cutting trees.—An auction purchaser under the Code of Civil Procedure has a good equitable or incchoate title to the property sold, and when the sale certificate is actually granted, it makes the title absolute and makes that title relate back to the date of the sale, so as to warrant him when the sale is confirmed and a certificate granted under s. 316, Civil Procedure Code, in bringing an action for damages for any injury to that property committed before the confirmation of the sale. So where the defendant cut the trees that stood on a property before the confirmation of its sale, *Held* that the plaintiff who is the auction purchaser of the property can bring a suit after the date of the confirmation of sale for damages against the defendant for cutting the trees. **Dagda v. Pancham Singh Gangaram**, I. L. R., 17 Bom., 375, and

## SALE IN EXECUTION OF DECREE —continued.

### 13. PURCHASERS, TITLE OF—concluded.

*Prangour Mozoomdar v. Hemanta Kumari Debya, I. L. R., 12 Calc., 597, referred to. ADHUR CHUNDER BANERJEE v. AGHORE NATH AROO*

[2 C. W. N., 589]

### 14. DISTRIBUTION OF SALE-PROCEEDS.

187. ——— Civil Procedure Code, 1882, s. 295 (1859, ss. 270, 371)—*Effect of, on rights by contracts—Object of procedure under those sections.*—The purport of ss. 270 and 271 of Act VIII of 1859 (with which s. 295 of Act X of 1877 corresponds) was not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing on the same footing, and in respect of whom there is no rule for otherwise determining the mode in which proceeds of property sold in execution shall be distributed. *HASOON ARBA BEGUM v. JAWADOONNISSA SATOODA KHANDAN* . . . I. L. R., 4 Calc., 29

*RAJCHUNDER SHAHA v. HUMOHUN ROY*  
[22 W. R., 98]

188. ——— (1859, s. 270)—*Property not sold in execution of decree.*—S. 270 of the Civil Procedure Code did not apply to a case in which property has not been sold in execution of a decree. *BISHEN CHUNDER SURMA CHOWDHRY v. MUN MOHINEE DABEE* . . . 8 W. R., 501

*BALAJI RANCHANDRA v. GAJANAN BABAJI*  
[11 Bom., 159]

189. ——— Civil Procedure Code (Act XIV of 1882), ss. 295, 310A—*Bengal Tenancy Act (VII of 1885), s. 174—Sale in execution of decree—Deposit by judgment-debtor—Rateable distribution.*—S. 295, Civil Procedure Code, does not apply to deposit made by the judgment-debtor either under s. 174, Bengal Tenancy Act, or under s. 310A of Civil Procedure Code. *BIHARI LALL PAUL v. GOPAL LAL SEAL* . . . 1 C. W. N., 695

190. ——— *Imperfect attachment of immoveable property—Private alienation after such attachment—Civil Procedure Code, ss. 274, 276; sch. IV, No. 141.*—A judgment-debtor whose property had been attached in execution of a money-decree sold the property, and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting and prior to the sale, the holders of other money-decrees against the same judgment-debtor preferred applications purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bond fide* transaction, entered into for valuable consideration. *Held* that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in the manner provided by s. 274 of the Civil Procedure

## SALE IN EXECUTION OF DECREE —continued.

### 14. DISTRIBUTION OF SALE-PROCEEDS —continued.

Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place. Also *per MAHMOOD, J.*—While s. 395 of the Code gives a special right to judgment-creditors, as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale; and therefore, until the sale takes place, no such right can be enforced. *BISHEN CHUNDER SURMA CHOWDHRY v. MUN MOHINEE DABEE, 8 W. R., 501, referred to. GANGA DIN v. KUSHALI I. L. R., 7 All., 702*

191. ——— *Rights created by s. 295, how affected by insolvency and vesting order—Insolvent Act (11 & 12 Vict., c. 21), s. 49.*—An order under s. 295 of the Civil Procedure Code affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights which are not affected by the insolvency. *Soodal Chunder Law v. Russick Lall Mitter, I. L. R., 15 Calc., 202, cited. HOWATSON v. DURRANT*

[I. L. R., 27 Calc., 351  
4 C. W. N., 610]

192. ——— *Rateable distribution—Assets realized "by sale or otherwise."*—The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code. *SEW BUX BOGGLA v. SHIB CHUNDER SEN* . . . I. L. R., 13 Calc., 225

193. ——— *"Assets."*—Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under s. 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time. *VISVANATH MAHESHWAR v. VIRCHAND PANACHAND*  
[I. L. R., 6 Bom., 16]

194. ——— *"Whenever assets are realized," Meaning of—Deposit of 25 per cent. of purchase-money—Assets.*—The words "whenever assets are realized" in s. 295 of the Code of Civil Procedure really mean "whenever assets are so realized as to be available for distribution amongst the decree-holders." The 25 per cent. of the purchase-money deposited at a sale in execution of a decree is not "assets" within the meaning of

## SALE IN EXECUTION OF DECREE

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## 14 DISTRIBUTION OF SALE-PROCEEDS

—continued

s 203 but a mere deposit and therefore not immediately available for payment to the decree-holder *Pishanata Maher v. Virchand Lamachand* I L R 6 Bom 18, distinguished. *Jegendra Nath Sircar v. Gobind Chander Adda*, I L R, 19 Cal 232 distinguished and commented upon. *HAFIZ MAHOMED ALI KHAN v. DAMODAR PRA MANICK*, I L R, 18 Cal., 242

185

Money paid by

debtor under arrest in satisfaction of decree—*As sets*—Money paid by a judgment-debtor under arrest in satisfaction of the decree against him are not assets realized by sale or otherwise, under s 203 of the Civil Procedure Code Act X of 1877. s 203 of the Civil Procedure Code (Act X of 1877) must be read as if the words "from the property of the judgment debtor" were inserted after the word "realized." *PRESHOTANDA'S TRISHOTANDA'S v. MAHANT S'RAJSHABHI HARISHABHI*

[I L R, 6 Bom., 588]

198

Execution of

decree—Attachment of property—Payment into Court of money due under decree—*Assets realized by sale or otherwise*—G and C held decrees against B, and took execution of them and the judgment debtor's property was attached but no sale took place. The judgment-debtors paid into Court the sum of Rs. 1200 on account of G's decree. Held that G was entitled to the sum of Rs. 1200 paid into Court by the judgment-debtor and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree holders under s 205 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment debtor. *GOPAL DAT v. CHUNNI LALL*

[I L R, 8 All., 67]

197

Distribution of

proceeds of execution—*Assets realized by sale or otherwise in execution*—*Monies realized by Receiver appointed by decree-holder*—*Equitable execution*—Rents of property under attachment which have been realized by a Receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of s 25 of the Code of Civil Procedure. The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution." *PISK v. MAHARAJ BAHU DOOK SING*

I L R, 28 Cal., 772

[4 C W. N., 27]

198.

Realization of

proceeds of sale—*Sale under agreement sanctioned by Court*—*Sale not of the right or interest of judgment-debtor in property*—P, the plaintiff, in a suit No. 363 of 1886, obtained a decree for Rs. 14,728, in execution of which certain immovable property was attached, including the premises 22, Strand Road, which was subject to certain trusts created by a deed, dated the 2nd February 1883, executed by the father

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE PROCEEDS

—continued

of the judgment debtors, who with one M were trustees of the deed. At the time of the attachment a suit No. 448 of 1893 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22, Strand Road, and the other properties, in that suit on the 20th March 1893, a decree was made declaring the valid trusts and charging the premises 22, Strand Road, with the payment of certain specific sums. In 1891 the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22, Strand Road sold freed from the trusts to provide for the trusts by setting apart a sufficient sum out of the purchase money, and to have the balance divided between the judgment-debtors, and, by the decree in that suit, dated the 2nd September 1892 the trustees of the deed were authorized to sell the premises 22, Strand Road, and were directed out of the proceeds of sale to set aside Rs. 1500-0 to provide for the trusts, next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority, the trustees, on the 25th February 1893 entered into an agreement with one J L for sale to him of the premises 22, Strand Road, for Rs. 14,700. On the 8th August 1893 a notice was issued at the instance of P calling on the judgment-debtors to show cause why the premises 22, Strand Road, should not be sold in execution under her attachment. On the 25th August 1893 the trustees of the deed of 2nd February 1883 gave notice to P of an application to be made in the suits Nos. 363 of 1886 and 441 of 1891 for the removal of her attachment or in the alternative for an order that the agreement for sale entered into by the trustees with J L be carried out, that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of P, that the balance be paid to the credit of suit No. 363 "as subject to the said attachment," and that the premises 22, Strand Road, be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with J L; that the sale-proceeds be paid to W, a member of the firm of the attorneys for P, who out of such proceeds was to pay Rs. 145,000 to the trustees, and make other payments directed by the order, and pay the balance into Court to the credit of suits Nos. 363 of 1886 and 441 of 1891, "the said P retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase-money was paid to W, who, after making the payments directed, paid the balance into Court. Whilst in the hands of W, the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments. Held, on an application by P to have the money paid out to her in part satisfaction of her decree, that it could not be treated as



## SALE IN EXECUTION OF DECREE —continued.

### 14. DISTRIBUTION OF SALE PROCEEDS —continued.

"assets realized by sale or otherwise in execution of a decree" within the meaning of s 295 of the Code of Civil Procedure. The sale of the property under the order of the 14th September 1833 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title, or interest of the judgment-debtors or of any property belonging to them. To constitute a "realization within the meaning of s. 295, there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to P in respect of her lien, the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of s 295, but the balance in W's hands was less than the amount due to P, and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate. *Purshotam Dass v. Mahanant Surajbharthi*, I. L. R., 6 Bom., 688, and *Sewbhux Bagla v. Shib Chunder Sen*, I. L. R., 13 Cal., 225, referred to and approved. *PROSONNO-MOYI DASSI v. SREEVAUTH ROY*

[I. L. R., 21 Cal., 809]

199. ——— *Right of rival decree-holder to show decree of another is barred.*—Where property has been attached in execution of decree, it is competent to a rival decree holder to show that the attachment should not issue, as the decree under which it issued was barred by lapse of time; and the Court, if satisfied that the decree is so barred, is competent to see that the decree-holder who took out execution does not share in the distribution of the sale-proceeds. *RADHA GOBIND SHAH v. OOOZEER* . . . . . 15 W. R., 219

200. ——— *Court to adjudicate on conflicting claims.*—The Court having jurisdiction to adjudicate the conflicting claims of attaching creditors is the Court in which the attached money is deposited. *WOOMA MOXEE BURJONYA v. RAM BUKSH CHETLANGE* . . . . . 16 W. R., 11

201. ——— *Decree of Small Cause Court—Judge sitting as Small Cause Court and as Subordinate Judge.*—The Judge of a Court of Small Causes sitting in the exercise of his powers as a Subordinate Judge is not one and the same Court, but two different Courts. *Held* therefore that the holder of a decree made by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably, under s 295 of Act X of 1877, assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court. *HIMALAYA BANK v. HURST* . . . . . I. L. R., 3 All., 710

## SALE IN EXECUTION OF DECREE —continued.

### 14. DISTRIBUTION OF SALE-PROCEEDS —continued.

202. ——— *Decree passed by Subordinate Judge—Decree by same Court in exercise of its Small Cause jurisdiction—Rateable distribution of assets.*—Certain moveable property was at first attached in execution of a money-decree passed by a Subordinate Judge in his Small Cause jurisdiction, of which a part was afterwards sold. In execution of a money-decree passed by the same Subordinate Judge in his ordinary jurisdiction, the remaining property was attached and sold. Prior to the date of this sale, the applicant applied for execution of a money-decree passed in his favour by the same Subordinate Judge in his Small Cause jurisdiction, and prayed for rateable distribution of the proceeds along with other decree-holders. *Held* that the application must be allowed. Although a Subordinate Judge invested under Act XIV of 1869, s 28, with Small Cause powers acquires the jurisdiction of two Courts, he does not become the Judge of two Courts, but remains the Judge of a subordinate Court. *MALHARI v. NARSO KRISHNA*

[I. L. R., 9 Bom., 174]

203. ——— *Rateable distribution of assets—Transfer of application for execution.*—Where property attached in execution of a decree of a Munsif's Court is, or becomes, subject to an attachment issued from a Subordinate Judge's Court, the holder of the decree in the Munsif's Court, in order to share rateably in the assets under s. 295 of the Code of Civil Procedure, must apply to the District Court to transfer his application to the subordinate Court. *Gopeenath Acharjee v. Achcha Bibee*, I. L. R., 7 Cal., 553, and *Jetha Madhavi v. Nageralli Abhramji*, I. L. R., 4 Bom., 472, approved. *MUTTALAGIRI v. MUTTATYAR*

[I. L. R., 6 Mad., 357]

204. ——— *Attachment by more than one judgment-creditor of property of judgment-debtor in Court—Priority—Civil Procedure Code (Act X of 1877), s. 272.*—In execution of a decree of a Munsif's Court, the plaintiff attached certain money, the proceeds of decrees which her judgment-debtor had obtained against third parties then lying in a Small Cause Court to her credit, and subsequently obtained an order from the Munsif directing the same to be paid to her in satisfaction of her decree, which order was duly communicated to the Small Cause Court Judge. Subsequently the defendant, who held another decree against the same judgment-debtor, attached the same sale-proceeds. The Small Cause Court Judge then proceeded, under s 272 of the Civil Procedure Code, to inquire whether the plaintiff was entitled to any priority over the second attaching creditor, and having decided that question in the negative, divided the sale-proceeds rateably between them. In a suit brought by the plaintiff, under the above circumstances, to recover from the defendant the portion of the sale-proceeds so paid to him,—*Held* that s. 295 of the Civil Procedure Code had no application, inasmuch as the plaintiff had not applied to the Small Cause Court

## SALE IN EXECUTION OF DECREE

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## 15 DISTRIBUTION OF SALE-PROCEEDS

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Judge to execute her decree and it had never been transferred to the Court for execution; and that the proviso in s. 7 is merely intended to mean that any question of title or priority is to be determined by the Court in which or in whose custody the property is, and not by the Court which made the order of attachment. *Held* also that, previous to the order by the Munsif directing the payment to be made to the plaintiff the Small Cause Court Judge would have had jurisdiction to deal with the question he had tried, but as that order was made prior to the attachment by the defendant, the judgment-debtor had no interest in the money which could be so attached, the effect of that order being to vest the property in the money in the plaintiff, and to take it out of the disposal of the Small Cause Court Judge; and consequently the order for distribution was wrong and the plaintiff was entitled to the decree sought. *Quære*—Whether an order made by a Court under s. 272 was intended by the Legislature to be a final order. *GOPINATH AGGARWAL v. AGGARWAL BIKER*

[I. L. R., 7 Cal., 553 9 C. L. R., 385]

205. — *Decree in Small Cause suit and decree in regular suit in Subordinate Judge's Court*—Two decrees were passed against the same defendant in the Court of a District Munsif and on the Small Cause side of a Subordinate Judge's Court in the same district respectively. The holder of the decree in the Small Cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Judge's Court directly and not through the District Court. *Held* that the order for rateable distribution was right. *KELU v. VISHNIA*

[I. L. R., 15 Mad., 345]

206. — *Rateable distribution of assets—Civil Procedure Code, 1877, s. 206—Attachment of salary*—The salary of a karkun, who was employed in the Second Class Subordinate Judge's Court of Ankleswar was attached, in execution of a decree of the First Class Subordinate Judge's Court of Surat, by an order issued by the Surat Court, directing the Ankleswar Court to stop and remit every month a moiety of the said karkun's salary to itself (the Surat Court) until satisfaction of the decree. While the decree of the Surat Court was thus in course of execution another judgment-debtor of the karkun, who had obtained a decree in the Ankleswar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under s. 205 of the Civil Procedure Code, Act X of 1877. *Held* that the application was not sustainable inasmuch as the decree of the Surat Court was being executed by itself, and not by the Ankleswar Court, to which the order of attachment was sent as the head of a department, or as "the officer whose duty it was to disburse the salary," and not as a Court executing the decree

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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of another Court. *KRISHNASHANKAR v. CHANDRASHANKAR* . . . I. L. R., 5 Bom., 193

207. — *Attachment—Rateable distribution of assets—Proceeds of sale under decrees of Small Cause Court*—Certain moveable property was attached in execution of decrees of the Small Cause Court at Ahmedabad. After the attachment, but before the sale of the attached property other creditors of the same judgment debtor obtained decrees against him in the Court of the Subordinate Judge at the same place, and applied to it for the attachment of the same property in execution of their decrees. The Subordinate Judge accordingly attached it by prohibitory orders issued to the Judge of the Small Cause Court. After the sale, the holders of the decrees obtained in the Subordinate Judge's Courts claimed a rateable share in the assets realized by the Small Cause Court, under s. 295 of Act X of 1877. *Held* that they were not entitled to any share in the assets until after satisfaction of the decrees of the Small Cause Court. *JETHA MADHAVJI v. NAJIBALLAH AHMEDJI* . . . I. L. R., 4 Bom., 472

208. — *Rateable distribution of assets realized in execution*—B obtained a decree against A and another in the High Court under its original civil jurisdiction. In execution of that decree A's property was attached by the Second Class Subordinate Judge of Bijapur, and an order for sale was made. D obtained a decree against A alone in the Court of the First Class Subordinate Judge of Sholapur and obtained from that Court an order for the attachment and sale of A's property, which was already attached by the Second Class Subordinate Judge of Bijapur. He then applied to the Second Class Subordinate Judge of Bijapur for rateable distribution of the assets realized under s. 295 of the Civil Procedure Code (Act XIV of 1852). The Second Class Subordinate Judge of Bijapur rejected the application, and he thereupon applied to the High Court. *Held*, following *Jeika v. Najerali*, I. L. R., 4 Bom., 472, and *Krishnashankar v. Chandrasankar*, I. L. R., 5 Bom., 193, that D was not entitled to share in the assets. *DATTATRAYA v. RAHIMTELLA NURMAHOMED KHOSLA*

[I. L. R., 18 Bom., 458]

209. — *Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in Small Cause Court transferred to High Court—Rateable distribution of assets realized in execution*—The plaintiffs obtained a decree in the High Court against the defendant, and in execution attached goods in the defendant's shop. These goods, however, were already under attachment in execution of certain decrees obtained in the Small Cause Court against the defendant. On the 4th September 1896, by an order of the High Court made on the application of the plaintiffs, the execution proceedings in the Small Cause Court suits were transferred to the High Court, and

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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it was ordered that the attached property should be realized by the High Court. The records of the execution-proceedings in those suits were lodged in the Prothonotary's office. On the 26th September 1895 the decree-holder in one of the Small Cause Court suits obtained an order from the Judge in Chambers directing the Sheriff to take charge of the attached property and realized it by sale. The Sheriff accordingly sold the property and certified the sale to the Prothonotary's office. The plaintiffs subsequently (under the rules of the Sheriff's office) applied to the Prothonotary for payment to them of the amount realized or so much thereof as should satisfy their decree. The plaintiffs were directed to give notice of their application to the holders of the Small Cause Court decrees. *Held* that the holders of the Small Cause Court decrees were entitled to share rateably with the plaintiffs in the High Court suit in the proceeds of the property sold in execution by the Sheriff. *JAYNARAYAN MEGHRAJ v. ISMAIL KARAM-ALI* . . . . . I. L. R., 20 Bom., 377

210. ————— *Rateable distribution of assets—Preliminaries to right to share in application for execution.*—An application for execution must not only have been made before the assets come into the hands of the Court, but must also be on the file and undisposed of, to entitle a decree-holder under s. 295 of the Code of Civil Procedure to share rateably in the assets realized by another decree-holder in execution of his decree against the same judgment-debtor. *TIRUCHITTAMBALA CHETTI v. SESHAYANGAR* . . . . . I. L. R., 4 Mad., 383

211. ————— *Rateable distribution of assets, Preliminaries to right to share in—Prior application for execution requiring amendment.*—The circumstance that the petition of one of several decree-holders in applying for execution requires amendment because of the list of property being incomplete, is no ground for declaring such application to be superseded by a later application, made before the completion of the necessary amendment, by another co-decree-holder for execution. *AHMED CHOWDREY v. KHATOON* 7 C. L. R., 537

212. ————— *Rateable distribution of assets, Preliminaries to right to share in.*—Several decree-holders executing various judgments, for the most part of very ancient date, against the estate of one R, were in contest in respect of the proceeds of a Government promissory note, which had long been under attachment, but was eventually sold with accumulated interest for Rs. 69,000, in accordance with an expression of the High Court's opinion upon appeals presented by two of the decree-holders. Upon that opinion being made known, one of the decree-holders, K K, made, as it were, a fresh attachment of the note, and applied for the sale of it; whereupon it was sold in the Court of the Subordinate Judge, who ordered payment in full to K K and two others (B and S), who were acting jointly in execution, and the

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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surplus to be rateably divided among the other execution-creditors. One of these then brought a suit to establish a preferential claim. *Held* that K K, who, as soon as it was ascertained that the fund might be so made use of, first applied for the sale of it, was the person who came under the Code of Civil Procedure, s. 270, and was entitled to payment in full; and that B and S had been overpaid, and were liable to repay the surplus to the other decree-holders. *SRISH CHUNDER SIRCAR CHOWDREY v. SHIB NARAIN PAL. SHIB NARAIN PAL v. KOONJO KAMINNEE DABEE* . . . . . 22 W. R., 466

213. ————— *Order as to proceeds on application of third party.*—An order by a Principal Sudder Ameen made on the application of a third party, that certain sale-proceeds which he had already directed to be rateably distributed among certain decree-holders should be withheld from one of them, was held to have been made without jurisdiction. *MAHARAJAH OF BURDWAN v. HEERARALL SEAL* [11 W. R., 54

S. C. IN THE MATTER OF THE PETITION OF DHIRAJ MAHTAR CHAND BAHADUR [2 B. L. F., A. C., 217

214. ————— *Rival decree-holders—Claimants under same decree.*—S. 270, Act VIII of 1859, applied only to rival decree-holders claiming under different decrees, and not to persons claiming under the same decree. *ABID ALI v. MUNNOO BYAS* . . . . . 2 Agra, 183

215. ————— *Separate sales in execution of decrees.*—Application was made for execution of a decree for money against R and also for execution of a decree for money against R and another person jointly and severally. Certain immoveable property belonging to R was sold in execution of the first decree, the assets which were realized by such sale being sufficient to satisfy the amounts of both decrees. Such property was then sold a second time in execution of the second decree. *Held*, under these circumstances, that the second sale should be set aside, not being allowable with reference to the provisions of s. 295 of Act X of 1877. *RATI RAM v. CHITRANJI LAL* . . . . . I. L. R., 3 All., 579

216. ————— *Rateable distribution of sale-proceeds—Same judgment-debtor—Sale in execution of decree—Execution-proceedings.*—Where a judgment-creditor has obtained a decree against two judgment-debtors, A and B, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against A alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civil Procedure Code to share rateably in the sale-proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution-proceedings

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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to ascertain the respective shares of joint judgment-debtors. In *Shambhoo Nath Poddar v Luckynath Dey* 1 L. R. 9 Cal. 920 it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share ratably with a person who has obtained a decree against the same judgment-debtor and other persons. *Deboki Nandan Sen v Hart* 1 L. R., 12 Cal., 294

## 217 — Decree-holders

sharing ratably in sale-proceeds must be *bona fide* decree-holders. The words "decree-holders" or "persons holding decrees for money against the same judgment debtor" in a 205 of the Code of Civil Procedure signify *bona fide* decree-holders. A Court is bound in cases falling within this section to satisfy itself whether the claimants are *bona fide* decree holders within the meaning of the section; and where it is unable to satisfy itself as to the *bona fide* of the claim the Court should exclude such claimant from the distribution of assets. *In re Frederick Daes* [1 L. R., 11 Cal., 42

## 218 — Ratable distribution

*Creditor with joint decree*—Where property belonging to A has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale-proceeds, and amongst them a creditor who has obtained a decree against A and B such latter creditor is entitled, under a 205 of the Civil Procedure Code to share in the proceeds of the sale of A's property. *Shambhoo Nath Poddar v Luckynath Dey* 1 L. R., 9 Cal., 920

## 219 — Decree execution

of, by several judgment-creditors against one and the same judgment-debtor—*Ratable distribution*—The plaintiff obtained a decree against two persons P and S for a sum of money and one of the defendants obtained another decree against P and R the latter being the father of S and son of other defendants also obtained decrees against all those three persons. The plaintiff now brought a suit claiming to have a share of the amount realized by the sale of the properties of P, the common judgment-debtor under the three decrees, by ratable distribution for the liquidation of his decree not a farthing of which was realized, although the decrees of the defendants had been partly realized from judgment-debtor other than P. It appeared that the properties of P were specified in the execution proceedings and in the sale proclamation separately and the amount realized by the sale of his properties was separately stated. Held that no question of the ascertainment of the shares of the judgment-debtors or of the application of the "principle of marshalling" arose in this case, and that the plaintiff was entitled to ask for a refund of the money paid to the defendants, under a 205 of the Code of Civil Procedure out of the assets realized by the sale of the properties of P. *Deboki Nandan Sen v Hart* 1 L. R., 12 Cal., 294, distinguished.

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE PROCEEDS

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*Shambhoo Nath Poddar v Luckynath Dey* 1 L. R., 9 Cal., 920, *Nimbaj Talwar v Indra Feakats* 1 L. R., 15 Bom., 693 referred to. That it is only the unsatisfied portion of the decree that ought to be taken into account in a question of rateable distribution there being no reason why any amount should be set apart in favour of a decree-holder in proportion to any sum covered by his decree which has already been realized. *SARAY CHANDRA KUNDU v DOYAL CHAND SHAL* 3 C.W.N., 388

## 220

## Ratable distribution

*of sale proceeds—Same judgment-debtors—Separate and joint judgment-debtors—Marshalling of assets between decree-holders—Decree of Small Cause Court, Transfer of—The plaintiffs in this suit obtained a decree against all three defendants A, B and C. In execution of such decree, they attached two sets of securities (i) municipal bonds, the joint property of B and C; and (ii) Government loan notes, the property of Calone. These were sold by the Sheriff, but, before they were so sold, the holders of decrees in two other High Court suits came in and applied to the High Court for execution of their decrees, which decrees were against Calone. These last mentioned decree-holders now claimed to participate ratably with the plaintiffs in this suit in the realized proceeds of both the above-mentioned securities. The plaintiffs in this suit contended that such decree-holders, having decrees only against C, were not claiming against "the same judgment-debtors" as themselves within the meaning of a 205 of the Civil Procedure Code. Held that, as regards the proceeds of the Government loan notes, the sole property of C, the plaintiff's decree and the other two decrees were all decrees "against the same judgment debtors, and that therefore, as regards that fund, all three sets of decree-holders were equally entitled and must share thereon ratably. Held further that, as regards the other fund, the proceeds of the property of B and C only the plaintiffs in this suit were entitled thereto since the other decree-holders had no decrees against B and C, and therefore not "against the same judgment-debtors" as was the decree of the plaintiffs. Held further that the plaintiffs having two funds to proceed against, whilst the other decree-holders had but one of these two the equitable principle of marshalling should be applied, and the plaintiffs required to satisfy themselves as far as possible out of the fund not available to the other decree-holder, before they had recourse to the other fund common to all and as regards the latter fund the plaintiffs should claim against the same only as creditors for the then unsatisfied balance of their debt ratably with such other decree-holders. *Shambhoo Nath Poddar v Luckynath Dey*, 1 L. R., 9 Cal., 920 and *Deboki Nandan Sen v Hart* 1 L. R., 12 Cal., 294 considered and followed. Another holder of a decree—A Small Cause Court decree passed against all three debtors A, B and C—had previously to the said attachments by the Sheriff in this suit himself attached the same securities through the*

# SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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Small Cause Court. He did not, however, at any time get his decree transferred to the High Court. He now came in in these execution-proceedings and claimed to share rateably in both funds on the same footing as the plaintiffs in this suit. *Held* that, not having had his Small Cause Court decree transferred to the High Court before the realization of the said securities, or indeed at any time, he was not entitled to share in either fund. *Muttalagiri v. Muttayyar, I. L. R., 6 Mad., 357*, followed. *NIMBAJI TULSIRAM v. VADIA VENKATI*. I. L. R., 16 Bom., 683

221. — and s. 285—*Attachment by Small Cause Court—Transfer of decree to superior Court.*—Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution-proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharya v. Achcha Bibee, I. L. R., 7 Calc., 553*; *Bykant Nath Shaha v. Rajendro Narain Rai, I. L. R., 12 Calc., 353*; and *Bhugwan Dass Bogla v. Bunko Behary Bajpie, Suit 130 of 1894*, unreported. *Muttalagiri Nayak v. Muttayyar I. L. R., 6 Mad., 357*, and *Nimbaji Tulsiram v. Vadia Venkati, I. L. R., 16 Bom., 683*, not followed. *CLARK v. ALEXANDER*. I. L. R., 21 Calc., 200

*HAR BHAGAT DAS MARWARI v. ANANDARAM MARWARI*. . . . . 2 C. W. N., 126

222. — *Rateable distribution—Sale-proceeds—Competing decree-holders—Purchase by permission of Court.*—Where there are competing decree-holders, who have applied for execution of their decrees, s. 294 of the Civil Procedure Code (Act X of 1877) must be taken as subject to the provisions of s. 295, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree. *SERINTAS v. RADHANAI*. I. L. R., 8 Bom., 570

223. — *Rateable distribution—Decree-holder for unascertained mesne profits who has applied for execution, Right of—Civil Procedure Code, 1882, s. 294.*—The holder of a decree for unascertained mesne profits who has applied to the Court to ascertain the amount thereof and to attach immovable property under s. 255 of the Code of Civil Procedure comes within the purview of s. 295, and is entitled to share rateably with the attaching creditor in the assets realized. S. 294 must be read with s. 295, and to give effect to both sections the receipt to be given by the decree-holder, who has obtained leave to bid from the Court and has purchased the property sold, can only be accepted for so much of the judgment-debt as the assets applicable to its discharge may suffice to satisfy. *VIRARAGAYA AYYANGAR v. VARADA AYYANGAR*. . . . . I. L. R., 5 Mad., 123

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## 14. DISTRIBUTION OF SALE-PROCEEDS

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224. — *Rateable distribution—Sale in execution for creditor who has not attached.*—Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of s. 295 of the Civil Procedure Code. *MEGH LALL POOREE v. SHIB PERSHAD MADI*

[I. L. R., 7 Calc., 34

*S. C. MEGH LALL POOREE v. MOHAMMED DUTT JHA*. . . . . 8 C. L. R., 389

225. — *Rateable distribution—Civil Procedure Code, 1882, s. 266.*—One C obtained a decree against L and M for rent due from them, and, in execution thereof, applied for the attachment and sale of two houses, with their compounds and the ground underneath them (in respect of which property the said rent had fallen due), belonging, respectively, one to each of his judgment-debtors. The properties were accordingly sold on the 23rd July 1879, and the sale-proceeds handed over to C. In the meantime, on the 18th February 1879, D, a judgment-creditor of M under a money-decree, applied for the attachment and sale of the same immovable property (excepting the houses) of his judgment debtor which had been previously attached under C's decree for rent. On the realization of the sale-proceeds, D applied, under s. 295 of Act X of 1877, for a rateable proportion of the assets realized by the sale of M's property in execution of C's decree. *Held* that D was not entitled to such rateable proportion of the assets. *MANIKLALL v. LAKHA MANSING*. . . . . I. L. R., 4 Bom., 429

226. — *Pauper suit—Civil Procedure Code, 1859, s. 309—Prerogative of the Crown.*—With a view to recover the amount of Court-fees which J would have had to pay had he not been permitted to bring a suit, as a pauper, the Government caused certain property belonging to B, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount to be attached. This property was subsequently attached by the holder of a decree against B, which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of Court-fees J would have had to pay had he not been allowed to sue as a pauper, the principle that Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya v. Collector of Kanara, I. L. R., 1 Bom., 7*, applied in this case. *COLLECTOR OF MORADABAD v. MUHAMMAD DAIM KHAN*. . . . . I. L. R., 2 All., 198

227. — (1859, s. 271)—*Property sold subject to mortgage.*—The proviso of s. 271 of Act VIII of 1859 was intended to apply

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to a case where the property is actually sold subject to a mortgage and where the transaction is such that the purchaser is buying only the equity of redemption it did not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser **FAKHER BUX v. CHUTTERBHAREE CHOWDHURY**

[12 B. L. R., 513 note: 14 W. R., 209]

**FUTUH ALI alias NAFSA MEAH v. GREGORY**  
[8 W. R., 115, 13]

**JOY CHUNDER GHOSH v. RAM NARAIN PODDAR**  
[21 W. R., 43]

*See PURNESHUREE DOSSEE v. NODIN CHUNDER TAYLOR* . . . 24 W. R., 305

228 ———— *Right of mortgagee who has obtained money decree to share in surplus proceeds*—Where a mortgagee suing upon his bond obtains a money-decree without any declaration of lien, he is in the same position as if he had not taken any mortgage at all, and in taking out execution his claim to a rateable distribution of surplus sale proceeds of attached property is founded upon s. 271 of the Civil Procedure Code, 1859

**PADMA KANT ROY v. SADAYUT MAHOMED KHAN**  
[21 W. R., 88]

229 ———— *Right of mortgagee to take residue of sale-proceeds and retain his lien as mortgagee*—Plaintiff in a suit on an instalment-bond on which he had obtained a money-decree, having asked for and obtained the residue of the sale proceeds after all the judgment-creditors had been fully satisfied, was held not to have abandoned his right as mortgagee **BOLAKEN LAL v. CHOWDHURY BUNGESE SINGH**

. . . 7 W. R., 309

230. ———— *Execution of decree—Attachment by mortgagee—Surplus proceeds*—Pending a suit against A and N upon a bill of exchange, A deposited with the plaintiff, as security for the amount due upon the bill, the title-deeds of property belonging jointly to N and himself. The plaintiff subsequently got a decree for the amount due upon the bill. Thereafter one S, in execution of a decree against A and N, attached certain property of theirs, including the mortgaged property, and caused it to be sold and the surplus sale proceeds, after satisfaction of S's decree, were paid into Court to the credit of his suit. Intermediately between this attachment and sale, the plaintiff also attached under his decree on the bill of exchange the mortgaged and other property of A and N, and after the plaintiff's attachment N ratified the equitable mortgage made by A. The sale under S's attachment having taken place, the plaintiff sued A and N and the purchasers at such sale of the mortgaged property for foreclosure or sale thereof, and obtained a decree declaring that he had a good equitable mortgage of A's share in the joint property, and for an account and sale in default of payment; and the plaintiff subsequently, on 26th May 1873,

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got an order under his decree upon the bill of exchange for payment to him of the surplus sale-proceeds lodged in Court to the credit of S's suit, and for sale of certain of the properties other than the mortgaged property, which he had attached. Under this order the money was paid out to the plaintiff, and the properties were advertised for sale. **MAC PHERSON, J.**, having, on an application by A, set aside this order and directed that the plaintiff should refund into Court the money paid out to him, and that the sale should be stayed, the Court on appeal refused to set aside the order of the 26th May but made the plaintiff undertake to pay into Court the mortgage-money with interest if the same should be received by him from the defendants in the mortgage-suit **BANK OF BENGALE v. NUNDOLALL DOSS**

[14 B. L. R., 509]

231. ———— *Satisfaction of mortgage-lien out of surplus proceeds*—Where seven different properties belonging to the same mortgagor had been hypothecated to three different persons, and all of them sued upon their bonds and obtained decrees which were followed by simultaneous sales in execution,—*Held* that, as all the properties were sold at the instance of all the mortgagees for the satisfaction of their decrees, and therefore of their respective mortgage-liens, and the decrees of the mortgagees should be satisfied out of the entire sale-proceeds in the order in which the liens on the properties had been created. **GOPIN SINGH v. KISHA LALL** . . . 25 W. R., 187

232. ———— *Provisions—Lis pendens—Sale subject to mortgage*—Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution of one of the decrees,—*Held* that, notwithstanding the whole interest of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by cl. (b) of s. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his incumbrance **JANOKY BULLER SINGH v. JOHNUDDIN MAHOMED ABU ALI SOMER CHOWDHURY**  
[I. L. R., 10 Cal., 567]

233. ———— *Mortgage—Allowance of set-off of purchase-money against amount of decree—Suit for share of sale proceeds—Principle of distribution*—In execution of a decree against M the plaintiff attached and advertised for sale certain property in mouzah A. At that time there were pending proceedings in execution of two other decrees obtained against M by the first and second defendants respectively. These two decrees were obtained on a bond executed by M, by which an 8 annas share of mouzah A was

## SALE IN EXECUTION OF DECREE

—continued.

## 14. DISTRIBUTION OF SALE-PROCEEDS

—continued.

hypothecated as collateral security; and in execution of these decrees the defendants brought to sale, and themselves purchased, not an 8 annas share only, but the whole of mouzah A, and were allowed by the Court to set off the purchase-money against the amounts due to them under their decrees. At the same time, the plaintiff's execution case was struck off on 30th June 1860. In a suit brought by the plaintiff under s. 295 of the Civil Procedure Code for his share of the sale-proceeds of mouzah A, in which the defendants contended that, a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution, and that, if any rateable distribution were allowed, they were entitled to have an allowance made in respect of a mortgage which the plaintiff held in a 2 annas share of mouzah A, which they had paid off subsequently to the transactions now in question,—*Held* that the fact of the set-off being allowed in exercise of the power given in s. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors. *Held* further that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage from the amount of the purchase-money before the Court could determine the amount rateably distributable among the parties concerned. *Quære*—Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made. *TAPONDI HORDANUND BHARATI v. MATIURA LALL BHAGAT* . I. L. R., 12 Cal., 499

## 234.

*Decree for money—Causes of action—Mortgage-decree—Mortgagee purchasing under his own decree, Execution of decree by.*—The cause of action given by the last paragraph but one of s. 295 of the Civil Procedure Code does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same, and a suit brought by a person claiming to be entitled to be paid a share of sale-proceeds under that section, and, to recover the same from another to whom such sale-proceeds have been ordered to be paid, if brought before they have been actually paid to such other person, is premature and should be dismissed. Every decree, by virtue of which money is payable, is to that extent a "decree for money" within the meaning of that term as used in s. 295, even though other relief may be granted by the decree; and the holder of such decree is entitled to claim rateable distribution of sale-proceeds with holders of decrees for money only under that section. There is nothing in s. 295 which takes away the right from a mortgagee who has obtained a decree upon his mortgage to proceed against the property of his mortgagor other than that subject to his mortgage. Thus the holder of a mortgage-decree which directs that the amount be realized from the mortgaged property and from the mortgagor per-

## SALE IN EXECUTION OF DECREE

—continued.

## 14. DISTRIBUTION OF SALE-PROCEEDS

—continued.

sonally is entitled to claim rateable distribution under that section, and is not in the first instance bound to proceed against his mortgage security and exhaust that. A mortgagee who has obtained a decree on his mortgage is not restricted to proceedings in the first instance against his mortgage security before proceeding against other property of his mortgagor; but when he sells any portion of the property, the subject of his mortgage, and purchases it himself, he is bound, before he can proceed further against the mortgagor or claim rateable distribution under s. 295, to prove that there is still a balance due to him, and that the property sold and purchased by him realized a fair amount,—the mere fact of the property having been sold at auction not being alone sufficient to prove its value,—and this ought to be inquired into most carefully by the Court to which an application is made to further execute the decree or to share rateably under s. 295. *HABT v. TARA PRASANNA MUKHERJI* . I. L. R., 11 Cal., 718

## 235.

*Mortgage—First and second mortgagees—Sale of mortgaged property in execution of decree of second mortgagee—Suit by first mortgagee for re-sale of property in execution of his decree.*—On the 22nd March 1878 the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March 1878 the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June 1878 the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance with the provisions of s. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money-decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances. *JAGAT NABAIN RAI v. DHUNDHEY RAI*

[I. L. R., 5 All., 566]

See *GUR SAHAI v. RAM DIAL* . 7 N. W., 91

## 236.

*Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale.*—Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors. By an agreement subsequently made it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881. In May 1881 B, a puisne

## SALE IN EXECUTION OF DECREE

—costs added

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—costs added

mortgagee applied to the Court for payment to him of ₹ 100 of the sum, alleging that A was entitled only to ₹ 1000 and ₹ 250 costs, but not to any of the rent in preference to his claim as second mortgagee. The claim of B was rejected on the 7th May 1881 and the whole amount paid out to A. In February 1882 B (who had filed a suit on the 2nd March 1881) obtained a decree upon his mortgage. On the 13th May 1881 B sued to recover ₹ 510 paid to A on account of rent on the 7th May 1881. The lower Court dismissed the suit on the grounds (1) that A was entitled to treat the arrears of rent as interest and (2) that the sum was barred by limitation. Held on second appeal that B was entitled to recover the sum claimed. **SIVARAMA v. SIVARAMA**

[L. L. R., 9 Mad., 57]

337

The meaning of s. 226 of the Civil Procedure Code is that, when immovable property is sold in execution of decrees or orders, the sale for the discharge of incumbrances, the proceeds are to be applied in satisfaction of incumbrances according to their priority. **SHAKI RAM v. SHRI LAL**

[L. L. R., 7 All., 378]

238.

*Execution of decrees—Payment of proceeds before completion of sale—Interest on purchase-money from date of sale to date of completion—Civ. Procedure Code 1882, ss. 204, 315.*—Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution-sale before the date on which the sale is confirmed, yet s. 315 of the Code implies that this may be done. The Court, however, under special circumstances, may refuse to pay over to the decree-holder the purchase-money until the sale is confirmed, but in such case it should provide for due payment of interest on the money detained. Held that, under the special circumstances of this case the decree-holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed. **JOONDEO NATH SINGH v. GOBIND CHANDER ADDI**

[L. L. R., 13 Cal., 252]

239

*Execution—Order of distribution—Appl. on for further execution—Notice—Civ. Procedure Code 1882 s. 622.* A and subsequently B obtained decrees against X in execution of which the same land was attached, and B obtained an order for rateable distribution. Neither decree was satisfied. A then applied for attachment of other property and the same was fixed for 23rd September. On 24th September B filed a petition for further attachment under ss. 200, 214, and also a petition for rateable distribution under s. 226 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 226, because no application for execution was pending. Held on appeal that the petition for execution was wrongly rejected, but that the High Court

## SALE IN EXECUTION OF DECREE

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could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 226 for rateable distribution. The proper remedy was by a suit. **VEKKATARAMAN v. MARILINGAYATY**

[L. L. R., 9 Mad., 508]

240

and s. 210—

*Claim to rateable distribution on order s. 215—Sale pending attachment—A claim under s. 226 of the Civil Procedure Code is not enforceable as an attachment against a sale, which an assignment is rendered void by the provisions of s. 216. **Ganga Datta v. Khushal***

[L. L. R., 15 Cal., 771]

241.

and s. 234—

*So for refund of rateable amount.*—A and C each obtained a decree against the same judgment-debtor and applied for execution. C in execution of his decree attached certain immovable property and with the permission of the Court purchased the same under s. 294 of the Code of Civil Procedure and set off his purchase-money against the decree. If claimed that the proceeds of the sale to C should be rateably distributed under s. 226 of the Code and that C should either consent to have the property re-sold or pay into Court the rateable proportion due to M. C objected to a re-sale or to pay. Held that C must be compelled to refund the rateable amount due to M. by summary process in execution. **MADHUR v. CHAFFARI**

[L. L. R., 11 Mad., 358]

242.

and ss. 235,

480—*Application on for execution on necessity of an order to share in a distribution under s. 235—Attachment before judgment Effect of—Decree-holder with an attachment before judgment Omit to only to apply for execution under s. 235 effect of on right to share in a distribution.*—A decree-holder who has attached before judgment is not entitled to rank under s. 235 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution and as such to obtain in execution a rateable share of the property which he has attached, unless subsequently to his decree, he has applied for execution under s. 235 et seq. of the Civil Procedure Code. s. 490 of the Civil Procedure Code does not by implication confer upon a decree-holder who has attached before judgment the right to come in under s. 235 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment endures and becomes an attachment in execution. **PARLOTT v. SWAFFHAM v. JORDAN**

[L. L. R., 12 Bom., 400]

243.

Decree for

*money—Same judgment-debtor—Decree for enforcement of lien and against judgment debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.*—U held a money-decree against B P and P in execution whereof he caused to be a tachee and sold certain



# SALE IN EXECUTION OF DECREE

—continued.

## 14. DISTRIBUTION OF SALE-PROCEEDS

—continued.

property belonging to *B*. *D* held a decree against *B*, *P*, *R*, and *S*, which, so far as *P*, *B*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U*'s execution was rejected. Held that, there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code, because it directed a sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in *D*'s decree and only three in *U*'s would not deprive *D* of the right to share rateably. *Shumbhoo Nath Poddar v. Lucky Nath Dey*, I. L. R., 9 Calc., 920, referred to *Debohi Nandan Sen v. Hart*, I. L. R., 12 Calc., 294, *Jagat Narain Pal v. Dhundhey Rai*, I. L. R., 5 All., 566; and *Hart v. Tara Prasanna Mukerji*, I. L. R., 11 Calc., 718, distinguished. *DELHI AND LONDON BANK v. UNCOVENANTED SERVICE BANK, BAREILLY*

[I. L. R., 10 All., 35]

244. ——— *Rateable distribution—Decree for money—Mortgage-decree.*—The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant having brought to sale the property attached, the plaintiff applied, under the Civil Procedure Code, s. 295, for rateable distribution, which was refused. The plaintiff then brought to sale the mortgage premises, which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under s. 295. Held that the plaintiff's decree was a "decree for money" within the meaning of s. 295, and that he was entitled to recover the sum claimed. *Per curiam*—The property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt. *KOSIMACHI KATHER v. PARKER*

[I. L. R., 20 Mad., 107]

245. ——— *Rateable distribution—Assets realized in execution.*—*A*, *B*, and *C* held money-decrees against the same judgment-debtor. *A* attached by a prohibitory order dated in December funds of the judgment-debtor in the hands of *D*. In January *B* attached in execution the

# SALE IN EXECUTION OF DECREE

—continued.

## 14. DISTRIBUTION OF SALE-PROCEEDS

—continued.

same funds. In February they were paid into Court, and subsequently on the same day *C* attached them as money due in the custody of the Court. Held that the funds should be rateably distributed between *A* and *B*, and that *C* was not entitled to participate therein. *SRINIVASA AYYANGAR v. SEETHARAMAYYAR*

[I. L. R., 19 Mad., 72]

246. ——— *Decree-holder. Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale-proceeds.*—A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart v. Tara Prasanna Mukerji*, I. L. R., 11 Calc., 718, distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. *SHRONATH DOSS v. JANKI PRASAD SINGH*

[I. L. R., 16 Calc., 132]

247. ——— *Execution—Decree—Rateable distribution of proceeds of decree—Power of Court to enquire into bonâ fides of the decree-holders while distributing such proceeds—Practice.*—In distributing the proceeds of execution under s. 195 of the Civil Procedure Code (Act XIV of 1882), the Court has power to enquire into the *bonâ fides* of the several decree holders that apply for rateable distribution, if the same has been called in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-debtor in execution to refund. *In re Sunderdass*, I. L. R., 11 Calc., 42, followed. *CHHAGANLAL v. FAZARALI*

[I. L. R., 13 Bom., 154]

248. ——— *Purchaser of decree against estate of a deceased person by the legal representative of such deceased person—Right of such purchaser to participate in proceeds realized in execution of decree.*—*H K* was the holder of a decree in suit No. 657 of 1869 for Rs. 69,467 against the firm of *H B & Co.*, and in execution thereof he attached a certain house belonging to the estate of one *H D*, deceased, who had been a partner in that firm. *A* (the respondent) was the legal representative of *H D*. On the 9th November 1886 *P* purchased the decree from *H K* for Rs. 18,000, which sum she obtained for the purpose as a loan from *C P & Co.* As a security for this loan, she gave *C P & Co.* a letter, dated the 9th November 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime another decree, viz., in suit No. 8 of 1870, had

## SALE IN EXECUTION OF DECREE

—continued

## 14 DISTRIBUTION OF SALE PROCEEDS

—continued

been obtained against the firm of *H B & Co.*, and had been, prior to the 9th November 1890, purchased by the appellant *M* who had also prior to the 9th November 1890 applied for execution. On the 6th April 1897 the attached house was sold by the Sheriff and realized Rs. 45,000. On the 5th September 1897 an order was made in Chambers that the Sheriff should divide rateably the moneys in his hands in suit No. 657 of 1890 between *M* and *F*. *M* appealed, and contended that by the transaction between *F* and *H K* the decree in suit No. 657 of 1890 had been extinguished as against the estate of *H D* and that the said transaction amounted in law and fact to a purchase on behalf of the estate of *H D* of the properties attached in the said suit or the proceeds thereof. *Held* confirming the order appealed from that *F* was entitled to a rateable proportion of the moneys in question. She was only liable under the decree held by the appellant *M* as the representative of *H D*. So far as she might have had property of her own not derived from *H D*'s estate, available for the purchase of *A K*'s decree, she stood in the same position as a third party who might have purchased *H K*'s share of the proceeds before they were realized. The purchase of *H K*'s share with her own money could not prejudice *M* any more than if an entire stranger had purchased. The fact that she borrowed the money and gave the share as a security to the lender did not affect the question. If the money did not come from *H D*'s estate, it could not matter whether it came directly from *F*'s pocket or from another person at her request. If the money was derived from a source having no connexion, directly or indirectly, with the estate indebted, there is no distinction, in principle, between the representative of the indebted estate and a stranger. *MURUMOHAN DAS JAISONDAS v. VIZAL* I L R., 13 Bom., 171.

## 249 — Effect of vesting

*order in insolvency*—A debtor against whom several decrees had been passed filed his petition in the Insolvent Court at Madras and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and another decree-holder now applied to the same Court in execution of his decrees for the attachment of other property and for rateable distribution of the proceeds of sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both these applications. *Held* that the order rejecting the application for rateable distribution was wrong and that the District Court had power to set it aside on revision under s. 622 of the Civil Procedure Code. *VRANAGHAVA v. PARASURAMA* I L R., 15 Mad., 372.

## 250. — and a 276—At

*factum before judgment of fund in hands of third party—Decree afterwards obtained—Assignment by judgment-debtor of fund subsequently to the attachment—Creditors attaching the fund subsequent to*

## SALE IN EXECUTION OF DECREE

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## 14. DISTRIBUTION OF SALE PROCEEDS

—continued

*the assignment—Fund by consent paid over to Sheriff by third party—Relative claims of assignees of fund and subsequently attaching creditors—Assets realized by sale or otherwise in execution—Misdescription, in order of attachment, of property attached*—On the 8th July 1900 the plaintiff brought a suit (332 of 1900) against *G* for Rs. 2,237, and on 18th July obtained an attachment before judgment of certain money belonging to *G* in the hands of the B. B. and C. I. Railway Company. On the 5th August 1900 *W* got a decree in the suit for Rs. 2,008 with interest and costs, and on the 13th August 1900 applied for execution. On the 24th September 1900 *G* made an assignment in favour of his attorneys, Messrs. Wadia and Ghandy, of the fund belonging to him (expressed to be Rs. 7,815) in the hands of the Railway Company, subject to the attachment levied on the same by *W*. This assignment was intended to secure costs incurred by Messrs. Wadia and Ghandy as attorneys for the defendant. Notice of this assignment was at once given to the Railway Company. In February 1891 the Bank of Bengal attached the sum of Rs. 7,815 in the hands of the Railway Company, in execution of a decree obtained by the Bank against *G* in suit 190 of 1890, and subsequently other creditors of *G*, who had obtained judgment against him, applied for execution and obtained attachments on the sum in question. On the 26th May 1891, under a consent order in suit 383 of 1890, the Railway Company paid over to the Sheriff of Bombay the sum of Rs. 68,411 0, which was the amount admitted by the Company to be due to *G*, after making all just deductions. It was contended by Messrs. Wadia and Ghandy that, under the above assignment, they were entitled to the fund assigned to them, subject only to the claim of the plaintiff who had, at the date of assignment, already attached the said fund, and that subsequent attaching creditors had no claim to the said fund. *Held* that the fund in question must be regarded as "assets realized by sale, or otherwise, in execution of a decree" within the meaning of a 295 of the Civil Procedure Code. *Held* also that, under the provision of a 299, the claims of the subsequent execution-creditors were "claims enforceable under the attachment of the plaintiff within the meaning of a 276 of the Civil Procedure Code," and that the assignment to Messrs. Wadia and Ghandy was void, as well against the claims of the creditors of *G*, who applied for execution before the 26th May 1891, as against those of the plaintiff to the fund in the hands of the Sheriff of Bombay. *Held* further that the attachment was not limited merely to such portion of the fund as covered the amount of the decree, but was a valid attachment in the form in which it was made, namely, on the whole fund in the hands of the Railway Company. It was argued that the attachment was actually made only on Rs. 6,000, and that it did not therefore include the whole fund, which was of larger amount. *Held* that the misdescription in the order of attachment was a mere *falsa demonstratio*, and that the entire sum in the hands of the

## SALE IN EXECUTION OF DECREE —continued.

### 14. DISTRIBUTION OF SALE-PROCEEDS —continued.

Railway Company was attached. The description of the property must be reasonably accurate, under the circumstances, and such as with reasonable certainty identifies the property. If it is such, it ought to be held sufficient. **SORABJI EDULJI WARDEN v. GOVIND RAMJI** . . . I. L. R., 16 Bom., 81

251. ———— *Same judgment-debtor—Sale of lands under attachment—Disposal of amount realized—Rateable distribution.*—A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee, then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realized paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realized by the sale of the villages attached and sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court, —Held (1) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of s. 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and (2) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold. **GRANT v. SUBRAMANIAM** [I. L. R., 22 Mad., 241

252. ———— *Proceeds of sale how applicable—Priority of holder of unregistered mortgage to holder of money-decree—Transfer of Property Act (IV of 1882), s. 97.*—The plaintiff held a mortgage of certain land belonging to the first defendant. The mortgage was not registered. The second defendant M was a mortgagee of the same land under a mortgage which was subsequent in date, but was duly registered. M obtained a decree upon this latter mortgage, and applied in execution for sale of the land. The plaintiff intervened, but his claim was rejected on the ground that M's mortgage was registered and had priority to his mortgage, which was not registered. The land was sold by auction to R (defendant No. 4), and the proceeds of the sale were partly applied in satisfaction of M's claim, and a further sum of Rs 164 was paid to one S (defendant No. 3), who had obtained a money-decree against the mortgagee (defendant No. 1). A balance of Rs 103 8-11

## SALE IN EXECUTION OF DECREE —continued.

### 14. DISTRIBUTION OF SALE-PROCEEDS —concluded.

was paid into Court, and subsequently returned to defendant No. 1 (the mortgagor). The plaintiff now sued for payment of his mortgage-debt out of the proceeds of sale or from the defendants. The lower Court held that S could not be called upon to refund the money which had been paid to him out of the proceeds, and that the plaintiff had a cause of action only against the mortgagor (defendant No. 1) not merely for the balance of Rs 103 8-11, but for the whole of his claim. On appeal to the High Court, —Held that the claim of the plaintiff in virtue of his mortgage, although unregistered, was prior to that of S under his money-decree. The plaintiff's earlier mortgage was postponed to that of M, because it was not registered, but the plaintiff had the right of a second mortgagee over the balance in virtue of his mortgage. The proceeds of the sale, after satisfying the first incumbrancer (M) became payable first to the other incumbrancers, if any, and then to the mortgagor (defendant No. 1). S could only take any balance that remained subject to the equitable right of the plaintiff. **PADMANABH BOMBHENYI v. KHEMU KOMAR NAIK** . . . I. L. R., 18 Bom., 684

### 15. WRONGFUL SALES.

253. ———— *Wrongful attachment in execution—Attachment under warrant issued by Court.*—A party is not liable to damages in respect of an attachment made under a warrant issued by a Court. **RAJ BULLUB GORE v. ISSAN CHUNDER HARRAH** . . . 7 W. R., 355

254. ———— *Wrongful attachment—Liability of decree-holder and purchaser to refund to owner loss caused by sale of property wrongly seized and sold.*—In execution of a decree against a judgment-debtor, his right, title, and interest in an elephant was sold. In a suit by a third party against the decree-holder and the purchaser for recovery of the elephant or its value, on the ground that the elephant was his property, and not the property of the judgment-debtor, —Held that the decree-holder, as well as the purchaser, was liable to make good the loss caused by such sale. **KANAI PRASAD BOSE v. HIRACHAND MANU**

[5 B. L. R., Ap., 71: 14 W. R., 120

See **SUBJAN BIRSE v. SARIUTULLA**

[3 B. L. R., A. C., 413: 12 W. R., 329

**RAYNOR v. SUNGHEER SINGH** . . . 5 N. W., 211

255. ———— *Goods wrongly sold in execution—Suit by owner.*—A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings. **SHIBOO NARAIN SINGH v. MUDDEN ALLX. NATADAR NANDI v. KALI DASS PALI** . . . I. L. R., 7 Calc., 608: 9 C. L. R., 8

## SALE IN EXECUTION OF DECREE

— continued —

## 14. WRONGFUL SALES—continued

250. — Property of co-sharers wrongly seized and sold—*debt to recover shares*—Where under an order of buying a share and after its sale in execution the purchaser keeps the share of a partner, they need not sue to reverse the sale in order to recover their shares, nor are they bound to sue to establish their right as part owners of the land within the time allowed for actions to set aside sales in execution. *ATHROODIA v. EUGENIOVICH BASHKIN*

[W R., 1884, 322]

GENGA NARAIN BEHTIA v. COLLECTOR OF MIDNAPUR 6 W R., 47

257. — *Co-sharers' suit by a share-damages for sale against decree-holder*—The defendant in execution of a decree against a seized certain movable property, which was claimed under a 246. Act VIII of 1859 by B B was, on investigation found to be a part owner of the property. B's claim was rejected and the sale took place the property being sold to the purchaser and the proceeds handed over to the defendant in satisfaction of his decree. The plaintiff declared that the sale extended over the right, title and interest of the co-sharers and had no effect on B's claim. In a suit by B for damages against the defendant occasioned by the loss of the property of which he was a joint owner, it was held that the defendant was not liable. *TAKHTEDDIN MULLA v. NANTHOLLA SHIRAZ*

[5 B. L. R., App. 73 note 11 W R., 528]

258. — Sale of property of person not party to execution proceedings—*Joint decree executed against separate property*—Decree against karnavans a decree before partition—Execution was not one of the shares after partition.—The karnava of a Malabar taluqdah borrowed money for purposes which rendered the debt binding on the taluqdah. The creditor obtained a decree against the karnava in 1859. In 1862 a partition of the taluqdah property took place. In 1861 property which had fallen on partition to the present plaintiff's share was attached and brought to sale in execution of the decree of 1859. He was not bound as a party in the execution proceedings. He did not sue to set aside the sale in execution of the decree as invalid, that the sale did not bind the plaintiff. *Sankara v. Kala, 1 L. R., 18 Mad. 22* referred to. *KUTHAPPA NAMBIA v. KRISHNA KRISHNAIA* 1 L. R., 18 Mad., 451

259. — Decree against karnava of taluqdah on taluqdah debt before partition—*Execution against one of the shares after partition*—Joint decree executed against separate property—in a suit for Declaration that certain land was not liable to be attached in execution of a decree obtained in 1850 it appeared that the decree was passed against the judgment-debtor as karnava of a Malabar taluqdah, and that it was for a debt incurred for purposes binding on the taluqdah. In 1852 a partition took place and been come to between the members of the taluqdah under which the property in suit had been allotted to the plaintiff. It was held that the

## SALE IN EXECUTION OF DECREE

— continued —

## 15. WRONGFUL SALES—concluded

state of things when the debt was contracted must be looked to, and at that time the karnava was competent to bind all the members of the taluqdah. Any subsequent arrangement in the family could not affect their obligation to the creditor who was not a party to it. The plaintiff's property therefore was liable notwithstanding the partition. *KUTHAPPA NAMBIA v. KRISHNAIA* 1 L. R., 18 Mad., 452 note

## 16. INVALID SALES

## 16. DEATH OF DECREE-HOLDER BEFORE SALE.

260. — Effect of decree-holder's death on validity of sale—*Civil Procedure Code, 1877, ss. 355, 356—Order confirming sale*—A judgment-debtor applied that an execution sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside and disallowed such application and made an order confirming such sale. *Held per FRANKS, J.*, that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside. *Per STANLEY, J.*, that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 355 and 356 of Act X of 1877, as the Court executing the decree should have proceeded under those sections. *Per OLDFIELD, J.*, and *FRANKS, J.*, that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 355 and 356 of Act X of 1877 could not be adapted to execution proceedings. As such sale had been published and conducted according to law, it had properly been confirmed. *DIXON v. MORAY FISCH* 1 L. R., 3 All., 759

## (3) DEATH OF JUDGMENT-DEBTOR BEFORE SALE.

261. — Effect of judgment-debtor's death on validity of sale—*Sale to mortgagee—Civil Procedure Code 1882, ss. 234, 235*—The first mortgage of certain immovable property obtained a decree for the sale of the property, caused the property to be attached, and then ceased to prosecute the execution proceedings. The second mortgage then obtained a decree for sale of the property, caused it to be attached, and put up for sale and purchased it himself. The first mortgage then applied for sale, and the property was put up for sale and purchased by him. After the order for this sale was made, and before it took place, the judgment-debtor died, and

## SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

the sale took place without his legal representatives being made parties to the execution-proceedings. *Per* OLBFIELD, J., that the sale to the first mortgagee was not void because the judgment-debtor had died before it took place, and it took place without his legal representatives being made parties to the execution-proceedings, inasmuch as the provisions of s. 368 of Civil Procedure Code were not applicable to the case of the death of a judgment-debtor, and there was nothing in s. 234, even if that section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of his property has been ordered, to imply that the sale is absolutely void if no legal representative has been brought on the record. *Dulari v Mohan Singh, I. L. R., 3 All., 759, and Gulabdas v Lakshman Narhar, I. L. R., 3 Bom., 221, referred to. Per* STRAIGHT, J., that there was no legal obligation on the first mortgagee to resort to the procedure of s. 234 of the Civil Procedure Code, since the sale to the second mortgagee had passed to him the rights and interests of the judgment-debtor, and the legal representatives of the judgment-debtor had none of his property in their hands; and there is no provision in the Code of Civil Procedure which required the first mortgagee to make the second mortgagee a party to the proceedings in execution of the former's decree and the latter could not have successfully objected to the sale in execution of that decree, and therefore that sale was not voided by the death of the judgment-debtor antecedent to its taking place. *Stowell v. AUDRIA NATH*

[I. L. R., 6 All., 255]

**262.** — Death of judgment-debtor after attachment, but before sale in execution—*Subsequent sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss. 234, 311.*—S. 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment, at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment, but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree holder to take any steps to keep in force an attachment of property made in the judgment-debtor's lifetime. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damaged by the sale, his remedy is by application under s. 311 of the Code. *So held by the Full Bench (MAHMOOD, J., dissenting).* Where, subsequently to the attachment of immovable property in execution of a simple money-decree, the judgment debtor died, and the property was then sold without making the legal representatives of the judgment-

## SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

debtor parties to the sale-proceedings.—*Held by the Full Bench (MAHMOOD, J., dissenting)* that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar v. Bhagirathiammal, I. L. R., 6 Mad., 180, dissented from,—Held by* MAHMOOD, J., that on the principle of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under s. 647, be applied to execution-proceedings (those proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale-proceedings was an irregularity; but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311; and that, as in the present case no such substantial injury was either alleged or proved, the sale was valid. *SHEO PRASAD v. HIRA LAL*

[I. L. R., 12 All., 440]

**263.** — Sale without legal representative of judgment-debtor being made a party—*Effect of such omission on validity of sale—Civil Procedure Code (1832), ss. 311 and 316—Right of redemption—Absence of substantial injury.*—*T* obtained a decree against one *S*, and in execution attached certain land which *S* had previously mortgaged to *K*. On the 11th June 1877 a warrant for sale was issued followed by the usual proclamation. *S* died on the 27th September 1877, and a few days afterwards, *viz.*, on the 3rd October 1877, the sale took place without any notice being given to *D*, who was the heir and legal representative of *S*, who, however, came to know of it shortly after. *T*, the decree-holder, purchased the land at the sale, and in 1883 sold it to *A*, who redeemed the mortgage from *K* and took possession. In 1889 *D*, as heir and legal representative of *S*, brought this suit claiming to redeem the mortgage. She made *K* (original mortgagee) and *A* (the purchaser) parties to the suit. She contended that the sale in execution was bad, having taken place after the death of the judgment-debtor and without his legal representative having been placed on the record. *Held that the plaintiff was not entitled to redeem. Per* JARDINE, J.—As no “substantial injury” was alleged to have resulted by reason of the plaintiff not having been brought on the record of the execution-proceedings immediately on the death of the judgment-debtor and before the sale took place, the purchaser acquired a valid title under s. 316 of the Code of Civil Procedure. *Per* KANADE, J.—The omission to join the name of the representative of the deceased judgment-debtor as a party to the record was a material irregularity and a serious defect in the title of the auction-purchaser. But this irregularity did not vitiate the sale under the special circumstances of the present case, *viz.*, that the plaintiff had taken no step to set aside the sale, although she came to know of the sale within a few days after it took place; that there was no fraud or *mala fides* on the part of the judgment-creditor; that the sale had not resulted in any substantial injury to the plaintiff; and that the auction-purchaser and his assignee had been in

## SALE IN EXECUTION OF DECREE

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## 16 INVALID SALES—continued

adverse possession for more than twelve years. *ANAND KRESANT & DHONDU DAI*

(I. L. R., 19 Bom., 276)

284. Omission to bring in representatives of deceased judgment-debtor—*Civ. Procedure Code (1852) s. 311—irregularity*  
*Assent of a guardian "ad litem" for minor—Adult judgment debtor described as minor—In a mortgage-decree if one of the judgment-debtors and the guardian ad litem of two of the other judgment-debtors viz. J her minor daughter and A another person, wrongly described as a minor. After the decree was made absolute proceedings were taken in execution but upon payment of a part of the decretal amount the sale was stayed. If then died and, although her heirs were some of the other judgment-debtors, no one was brought on the record as her representative and no one appointed guardian ad litem either for J or A. Upon a fresh application for sale in which the parties were described as in the decree the sale was held. An application under s. 311 of the Civil Procedure Code (1852) was then made on behalf of J and A to set aside the sale. Held that the omission to bring in the representatives of the deceased judgment-debtor did not vitiate the sale. *Neo Prasad v. Hira Lal, I. L. R., 12 All. 449. Also v. Divanda Bai, I. L. R., 19 Bom., 276 referred to. Arising out of *Umasa Begum, I. L. R., 15 Mad. 309* not followed. *Bomeshwari v. Durga Das Chatterjee, 7 C. L. R. 50* distinguished. *H* held also that neither the absence of a guardian ad litem for J nor the description of A as a minor affected the validity of the proceedings. *Taga Jan v. Obaidulla, I. L. R., 21 Cal., 566* referred to. *See LALL SAHOO v. KAREEM BUX* referred to. (I. L. R., 23 Cal., 688)**

285. Death of judgment-debtor after proclamation and before sale—*New mode of legal representation—Application to set aside the Civil Procedure Code (1852) s. 311. An order for the sale of a debt of Rs. 2000 (previously attached to the judgment-debtor) was made by decree, and on 4th May 1894 execution in two instalments was issued. On 6th May the judgment-debtor died leaving a wife and three children, of which *H* was one of the executors. *H* took no notice of the notice of the Court and the executors would proceed to apply for an adjournment of the sale. The sale was refused and the sale proceeded, and the decree-holder, who had previously agreed with *H* to sell the debt to them for a sum not exceeding the purchase-money purchased the debt for Rs. 1000. The Administrator General, to whom the debt was afterwards transferred, applied to be brought on the record and to have the sale set aside. Held that the sale was validly made by the legal representative of the judgment-debtor.*

## SALE IN EXECUTION OF DECREE

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## 16 INVALID SALES—continued

the record, and should be set aside on the application of the Administrator-General on separate suit being necessary for the purpose. *Sles Prasad v. Hira Lal, I. L. R., 12 All. 445* distinguished from *GROVER v. ADMINISTRATOR GENERAL OF MADRAS*

(I. L. R., 22 Mad., 119)

286. Death of judgment-debtor after decree, but before execution—*Legal representatives not made parties to proceedings—Sale in execution without notice to legal representatives under a 248 of Civil Procedure Code—Not rescinded to wrong persons—Title of purchaser—Right of redemption—Limitation—Civil Procedure Code (1877) ss. 235, 248, and 311—On the 25th March 1877 A mortgaged certain property to the defendant. On the 27th June 1877 one B obtained a money-decree against A, but before it could be executed, A died leaving all his property to his daughters, the plaintiffs. On the 2nd November 1878 B applied for execution against A, deceased, by his heir and nephew C. C appeared and stated that he was not the heir but that the heirs of A were his daughters, the plaintiffs. The plaintiffs however, were not made parties to the execution proceedings nor were notices served on them under s. 248 of the Civil Procedure Code (Act V of 1877). The execution proceedings were continued, and the mortgaged property was sold on the 6th June 1880 and was bought by the defendant (the mortgagee) subject to his mortgage. The sale was confirmed, and a certificate of sale was duly issued to the defendant who got formal possession on the 11th October 1880 he being already in possession as mortgagee. In 1889 the plaintiffs sued the defendant to redeem the mortgage. It was contended that the defendant, having purchased at a Court-sale was entitled to the property free from the claim of the plaintiffs. The case first came before *FARRAN C.J.* and *PARSONS J.*, who differed in opinion, *FARRAN C.J.*, holding that the sale proceedings were not absolutely null and void by reason of the want of notice of execution to the representative, but they were valid until set aside by a suit brought for that purpose which suit had never been brought, and that the plaintiffs had therefore lost their right to redeem and *PARSONS J.*, being of opinion that the sale was null and void, and therefore that the plaintiffs were entitled to succeed. The case was then referred to three other Judges of the Court. *Held* by *CANDY* and *JAMES J.*, that even assuming that the execution proceedings and sale had conveyed an absolute title to the purchaser, the present suit, which was brought within twelve years of the sale, did not effect challenge the sale, and that the plaintiffs were therefore entitled to redeem. *Held* by *RAMAIAH J.*, that in respect of the plaintiffs who were not parties to the sale proceedings were invalid and null and without jurisdiction; that the auction-purchaser acquired no rights under his certificate of sale as against these legal representatives, and that as against them he could only claim title by adverse possession not falling short of twelve years. As the present suit was*

# SALE IN EXECUTION OF DECREE

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## 16 INVALID SALES—continued.

admittedly brought within that period, it was maintainable. *ERAYA v. SIDRAMAPPA PASARE*

[I. L. R., 21 Bom., 424

*Held* by the Privy Council on appeal (reversing the decision of the High Court).—An execution-sale cannot be treated as a nullity if the Court which sells has jurisdiction to do so; and it cannot be set aside as irregular without an issue raised for that purpose, and investigation made with the judgment-creditor as a party thereto, nor under s. 311 of the Code of Civil Procedure and art. 12 (a) of the Limitation Act, 1877, after one year from the date thereof. An executive Court does not lose jurisdiction to sell because it serves notice on a person who does not represent the deceased judgment-debtor, and afterwards erroneously decides that who does. Such decision is valid unless set aside in due course of law. *MAJKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIDAPPA* . . . L. R., 27 I. A., 216

## (c) FRAUD.

267. — Application of ss. 256, 257, Civil Procedure Code, 1859 (1882, ss. 311, 312)—Application to set aside sale.—Ss. 256 and 257, Act VIII of 1859, did not apply to a suit in which fraud is imputed vitiating the sale in toto. *UMBKA CHURN CHUCKERBUTTY v. DWARKA NATH GHOSE* . . . 8 W. R., 506

*VIRISINGAPPA BIN BASLINGAPPA v. SADASHIVAPPA APPA GOKHANDI* . . . 7 Bom., A. C., 74

268. — Application to set aside sale—Irregularity—Failure to prove fraud—Civil Procedure Code, 1859, s. 256—Where the facts connected with an execution-sale fell far short of establishing fraud, and merely amounted to irregularity resulting in detriment to the judgment-debtor, his remedy was held to lie in an application under s. 256 of Act VIII of 1859 to set aside the sale. *GOBIND SINGH v. MUNNO RAM DOSS*

[19 W. R., 414

269. — Civil Procedure Code, 1859, ss. 256, 257—Suit to set aside sale after failure of application.—A plaintiff was not debarred by reason of the failure of an application under ss. 256 and 257, Act VIII of 1859, from suing to set aside a sale on the allegation of fraud in connection with the irregularities first complained of, such fraud forming a distinct cause of action. *NUNO LALL DOSS v. DELAWAR ALI* . . . 11 W. R., 244

*Contra*, *GOBIND SINGH v. MUNNO RAM DOSS*

[19 W. R., 414

270. — Suit to set aside sale—Sufficiency of proof—Irregularity, Proof of want of.—In a suit to set aside an execution sale on the ground of fraud, it is not sufficient for a Court to find that the mode of making the attachment and proclamation was according to law, but it is necessary to consider the surrounding circumstances. *CHOOKEE SAHOO v. MUNNOO LALL*

[14 W. R., 325

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

271. — Civil Procedure Code (1882), s. 311—Ground for setting aside sale or otherwise—Effect of fraud to which auction-purchaser is no party—A judgment-debtor cannot have a Court-sale set aside on the ground of fraud in the absence of proof that the auction purchaser was a party to the fraud, and that the fraud, came to the judgment-debtor's knowledge subsequent to the confirmation of the sale. *ABDUBAKER SAHEB v. MOHIDIN SAHEB* . . . I. L. R., 20 Mad., 10

272. — Rights of bona fide auction-purchasers.—When no fraud has been alleged, a sale in execution cannot be set aside as regards the auction-purchaser, whether the order of Court under which it took place was legal or not. Even if the decree in execution of which the sale took place were a collusive one, the rights of the auction-purchaser would not be affected if he was no party to the fraud and there would be no ground for setting aside the sale. *MAHOMED KUZLEBASH KHAN v. MAHOMED SHAH* . . . 12 W. R., 48

273. — Suit for money secured by the mortgage of immoveable property situate partly in the family domains of the Maharajah of Benares—Fraudulent representation by decree-holder—Sale of decree enforcing hypothecation of immoveable property.—A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the district of Benares, and of immoveable property situate within the limits of the family domains of the Maharajah of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property, and he was authorized to proceed with it, under the provisions of s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue. He accordingly proceeded with the suit, and on the 18th November 1874 gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the family domains of the Maharajah of Benares to sale, this decree was sent for execution to the Subordinate Judge at Koudh, within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September 1877. Subsequently the defendants in the present suit who held decrees for money against H, one of the plaintiffs in the suit above mentioned, applied to the Subordinate Judge of Benares for the attachment and sale of H's interest in the decree above mentioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September 1877 had been set aside. Such interest was accordingly put up for sale on the 29th May 1878 at Benares by the Subordinate Judge of Benares, and was purchased by the plaintiffs in the present suit, who were induced to purchase by such false representation. The plaintiffs in the present suit claimed the avoidance of the sale of the 29th May 1878 and the refund of the

## SALE IN EXECUTION OF DECREE

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## 15. INVALID SALES—continued

purchase money on the ground that they were induced to purchase by such false representation, and on the ground that the sale of the interest of *H* in the decree of the 11th November 1874, being of the nature of immovable property situate within the limits of the family domains of the Maharajah of Benares, could not legally be sold at Benares by the *Panar* *Shah*. *Held* that such false representation must be held to constitute in law such fraud as would vitiate the sale of the 9th May 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immovable property situate within the family domains of the Maharajah of Benares. **RAGHU NATH DIXIT v. KAKKAY NAL**

[I. L. R., 3 All., 568]

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*Communication made to judgment-debtor by intending mortgagee and purchaser to prevent him attending sale*—Where, in an application to set aside the sale it was alleged that the auction purchaser who held a mortgage up some of the property sold told the judgment debtor that it was not necessary for him to go to the place where the sale was held because he the auction purchaser would release the property from the mortgage. *Held* that the facts even if proved would not constitute fraud entitling the judgment debtor to have the sale set aside. **ROJOY HARY BAGCHI v. HOSSEIN UDDIN AHMED**

[4 C W N., 538]

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*Gift in fraud of creditors*—Subsequent to a judgment in execution of a subject-matter of gift—Purchase at execution sale for inadequate price by means of fraud. *Suit by donee to set aside sale for fraud*—*Rescission when granted*—In June 1875 *A*, being in pecuniary difficulties, executed a deed of gift of all his property in favour of his wife and minor sons the plaintiffs *B*, one of his then existing creditors, subsequently obtained a decree against him and in execution sold part of the said property. At the sale the first defendant by means of false representation became the purchaser at an inadequate price. In July 1879 *A* applied to have the sale set aside on the ground of the fraud of the first defendant but his application was rejected. In 1881 the plaintiffs by the next friend sought to set aside the sale, contending that at the date of *B*'s decree the property was theirs by virtue of the deed of gift of June 1875 and further that the sale was void by reason of the defendant's fraud. *Held* rejecting the plaintiff's claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by *A* when he was in pecuniary difficulties and included all *A*'s property. It was therefore void as against his then existing creditors of whom *B* was one. *B* was therefore entitled to sell the property in execution of his decree. *Held* also that the plaintiffs were not entitled to set aside the sale on the ground of fraud, and that the only remedy, if any, open to them was a suit for

## SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued.

damages. The gift by *A* in 1875 was made to his wife as well as to the plaintiffs (his sons), and it gave them the property as tenants in common. The plaintiffs were therefore only owners of their respective shares, and were not entitled to have the sale set aside *in toto*. This however was what they sued for in their plaint. *A*'s wife could not now join in rescinding the sale as she must have known in 1879 of the fraud her husband having immediately after the sale endeavoured to set aside the sale on that ground. A transaction cannot generally be rescinded unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable. **HOMTHURST v. COWASSY** I. L. R., 13 Bom., 287

## (d) EXECUTION-PROCEEDINGS STRUCK OFF.

276. — Effect on validity of sale—*Beng. Reg. XX of 1795*—*Title of purchaser*—Regulation XX of 1795 directed that, when any Court of civil judicature should have occasion to sell lands in execution of a decree, it should transmit a copy thereof to the Board of Revenue, which was with all practicable despatch to cause the lands to be disposed of at the presidency, or in the district in which the lands were situated as they might deem most advantageous to the proprietor. In 1841 a copy of a decree was transmitted for execution to the Board of Revenue in compliance with the regulation, but no sale was then effected. Afterwards two other futile attempts to sell the lands under the decree were made, and then the decree holder sold the lands to a third party upon whose application the decree was executed by the sale of the lands of the judgment-debtor under it by order of the Court, and without any further recourse to the Revenue Board. Previous to such sale, the proceedings had been taken off the file and the number of villages, owing to some inaccuracy, was differently stated in the later order, and the total sum was increased by adding the interest which had accrued due between the two orders. *Held* that the purchaser at the sale acquired a good title; for it would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure to hold that when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose were to be considered as taken in a new suit. Nor was it true in any material sense that either the properties to be sold or the sums to be recovered were different; and the principal object of the regulation being the security of public revenues, that object had been fully answered by the communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. **MONESH NARAYAN SHYAM v. HISHANAYD MISHR**

[Marsh., 582 2 Ind. Jur., O S., 1  
8 Moore's L. A., 324  
5 W. R., P. C., 7]



# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

### (e) DECREES AFTERWARDS REVERSED.

**277.** *Title of purchaser.*—If a sale takes place in execution of a decree in force and valid at the time of sale, the property in the thing sold passes to the purchaser. *Per NORMAN, J.*—If the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser. *CHUNDER KANT SURMAH v. BISSEUR SURMAH CHUCKERBUTTY* . . . . . 7 W. R., 312

*FAZOODDEEN BHOOLA v. SHUMUNNISSA BEEBEE* . . . . . 12 W. R., 508

*BEHAREE LALL v. RAJAH RAM* . . . . . [6 N. W., 291

**278.** *Reversal of portion of decree relating to costs.*—Sale in execution for costs.—A sale in execution of a decree for costs is not cancelled when that part of the decree which made the plaintiff answerable for the costs is set aside. *PEARRE MONEE DOSSER v. COLLECTOR OF BEERBHOOM* . . . . . 8 W. R., 300

**279.** *Sale made after order for postponement.*—Held that an auction-sale which was made *bonâ fide* under the authority of an order which at the time of the sale was not in force, but had been superseded by a subsequent order postponing the sale, was made without jurisdiction, and was null and void. *FOUDDAR KHAN v. BAINEE DOBBEY* . . . . . 3 Agra, 398

**280.** *Sale pending appeal.*—Decree reversed on appeal.—Right of judgment-debtor.—S, having obtained a decree against M and another, brought to sale and purchased his property pending appeal. The decree having been reversed,—Held that M was entitled to the restoration of his property, and not merely to the proceeds of the sale. *SADASIYAYAR v. MUTTU SABAPATHI CHETTI* . . . . . I. L. R., 5 Mad., 108

See *LATI KOOPER v. SOBADRA KOOPER* [I. L. R., 3 Cal., 720; 2 C. L. R., 75

*NAGINDAS DEVCHAND v. NATHA PITAMBAR* [10 Bom., 297

**281.** *Reversal of decree on appeal before confirmation of sale.*—Purchaser, Right of.—Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed on appeal subsequently to the sale before it had been confirmed. Held that the Court which had made the decree ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale was none the less without jurisdiction, and, being without jurisdiction, could confer no title. If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

purchaser, the title of the purchaser is not affected by the reversal of the decree. A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree under which the sale was ordered is still in existence. *BASAPPA v. DUNDAYA* . I. L. R., 2 Bom., 540

**282.** *Sale in execution pending appeal from decree.*—Application for confirmation of sale after reversal of decree.—Court not competent to grant confirmation.—Civil Procedure Code, s. 312.—Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Basappa bin Mariappa Aki v. Dundaya bin Shirlingaya*, I. L. R., 2 Bom., 540, referred to. *MUL CHAND v. MUKTA PRASAD* . . . . . I. L. R., 10 All., 83

**283.** *Remedy of parties aggrieved.*—Suit for reversal of sale.—When a property is sold in execution of a decree which had been in force at the time of sale, but which was eventually set aside on appeal, the remedy of the party aggrieved is by a suit for the reversal of the sale, and not by a suit for the recovery of damages for the loss sustained. *ANNUNDO CHUNDER BANERJEE v. SHUBHUL CHUNDER DEBEA* . 2 Hay, 624

**284.** *Right to recover land.*—A sale in execution of a decree, made while that decree is under review, cannot stand if the decree is subsequently reversed. The party dispossessed under the decree is entitled to recover the land with mesne profits. *BHOOLLOO v. RAMNARAIN MOOKERJEE* . . . . . W. R., 1864, 129

**285.** *Suit to recover possession.*—Return of purchase-money.—A had sued R and others for possession of two mouzils with mesne profits and obtained a joint decree against them in the absence of R. In execution A was about to put up the rights and interest of R in mouzah G when R applied for a retrial under Act VIII of 1859, s. 119. The petition was rejected and the property sold, the decree-holders becoming purchasers. R appealed, and the High Court remanded the case to the Judge, who, after investigation, set aside the *ex-parte* decree and revived the suit, holding, after retrial, that R had no interest in the mouzils in suit, and was not liable to the claim of A. The latter appealed, and the High Court decided that R had been in possession of mouzah J, and was liable for the mesne profits. R then brought a suit for possession of a share of the mouzils which had been sold in execution. Held that the plaintiff could not in justice seek to recover this property from the defendants without offering to pay them the debt which he owed them, and which formed part of the consideration money. *GOWDER BOISO NATH PERSHAD v. JODHA SINGH* . . . . . 19 W. R., 410

## SALE IN EXECUTION OF DECREE

—cont. need

## 16. INVALID SALES—cont. need

256 ———— *Suit for purchase against auction purchaser by set aside sale* — *Civil Procedure Code (Act X of 1877) s. 244* — In execution of a decree certain property was sold in pursuance of an order under a 244 of the Civil Procedure Code and purchased by a person not a party to the suit who subsequently obtained possession of the property. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction purchaser by setting aside the sale — *Held* that the order directing the sale had the force of a decree and that the plaintiff was not entitled to the relief claimed. *Jas. Ali v. Jas. Ali Choudhary* 1 B. L. R., A. C. 55, 10 W. R., 105 followed. *MURKINGTON v. PRYAG SEN* — I. L. R., 11 Cal., 382

257 ———— *Ex-parte decree the validty of which is impeached. Notice to purchasers* — In a suit by C in his own right as well as on behalf of his son or brother to cancel an execution sale held in execution of an *ex-parte* decree to cancel the said decree and two bonds entered into by members of their family during the plaintiff's minority and to recover possession of a share in the ancestral property which had been sold. It was found that the advocates of money for which the bonds were executed were made without proper inquiries as to the necessity for the loan and that the minors were not properly represented in the suit in which the *ex-parte* decree was obtained. *Held* that the mortgage-bonds under such circumstances were invalid against the plaintiffs, and that it would be carrying presumption too far to say that a decree obtained must be taken to be valid as against the minors. *Held* that the auction purchasers could not protect themselves by relying on the decree and execution-sale after having received distinct notice that the mother of the plaintiffs challenged the validity of the whole proceedings. *JUNGER LALL v. SHAM LALL MISHRA*

[20 W. R., 120

Where no such notice has been given, the sale would continue valid. *RAM JEWRY LALL v. SHAM LALL MISHRA*

20 W. R., 123

258 ———— *Effect of reversal of decree upon sale in execution* — *Sale to bona fide purchaser not a party to the decree dissolved from sale to decree-holder* — A sale having taken place in execution of a decree in force at the time cannot afterwards be set aside as against a bona fide purchaser not a party to the decree on the ground that, on further proceedings, the decree has been subsequently to the sale reversed by an Appellate Court. A suit was brought by a judgment-debtor to set aside sale of his property in execution of the decree against him in force at the time of the sale, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as finally stood, it would have been satisfied with out the sale in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy

## SALE IN EXECUTION OF DECREE

—cont. need

## 18. INVALID SALES—continued.

which the sales took place and those who were bond fide purchasers at other sales under the same decree who were not parties to it. *Held* that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers the suit must be dismissed. *ZAIN UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN*

[I. L. R., 10 All., 188

I. R., 15 I. A., 12

259 ———— *Civil Procedure Code (1882), ss. 105, 215 and 315* — *Sale in execution of an ex-parte decree and purchase by the decree-holder* — *Confirmation of the sale* — *Subsequent setting aside of the ex-parte decree* — *Application by a subsequent purchaser in execution of another decree to set aside the sale on the ground that the ex-parte decree had been set aside* — Certain immovable properties were sold in execution of an *ex-parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 105 of the Civil Procedure Code at the instance of some of the defendants in the original suit. On an application under s. 215 of the Civil Procedure Code having been made by a bona fide purchaser of the said properties in execution of another decree to set aside the sale held in execution of the *ex-parte* decree, the defence was that the application could not come under s. 215 of the Civil Procedure Code and that the sale could not be set aside as it had been confirmed. *Held* that the case was one under s. 215 of the Civil Procedure Code and that the *ex-parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. *Dogamoni Dasi v. Sarai Chander Mozumdar* I. L. R., 25 Cal., 173. *Bhai Persad Koor v. Lalji Bai* 3 C. W. N., 61. *Durga Charan Mandal v. Kafi Prasanoo Sarkar*, I. L. R., 20 Cal., 72. *Nawab Zinal-Abdin Khan v. Mohammed Asghar Ali*, I. L. R., 15 I. A., 12. *I. L. R., 10 All., 105* and *Mina Kumari Bibee v. Jagat Satiyas Bibee*, I. L. R., 10 Cal., 220 referred to. *SEE UNEDMAL v. SETHI EGY*

[I. L. R., 27 Cal., 810

4 C. W. N., 692

## (F) DECREE FOUND TO HAVE BEEN SATISFIED.

260 ———— *Purchase by one of several judgment-debtors* — *Full Bench ruling* — Where a decree was purchased by one of the judgment-debtors and afterwards executed and property of the other judgment-debtors sold in execution of the decree, and it was eventually held by a Full Bench in the case that the purchase of the decree by one of the debtors was a satisfaction of the decree — *Held*, in a suit against the execution purchaser to have the sale declared invalid, that the sale must be set aside. *DIGAMATRI DEBIA v. ESHAN CHITRER DEVI*

[15 W. R., 373.

261. ———— *Order for sale and sale in execution under a decree previously satisfied* — An order for sale and a sale under such

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made. *CHUNNI v. LALA RAM*

[I. L. R., 16 All., 5

292. — *Sale in execution of decree already satisfied—Bond fide purchaser at such sale—Right of such purchaser.*—Where a person, a stranger to the proceedings, purchases *pro parte* *bona fide* at an auction-sale held in execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of the Court at the time the sale was held. *Rewa Mahton v. Ram Kishen*, I. L. R., 14 Calc., 18; I. L. R., 13 I. A., 106, and *Mothura Mohun Ghose v. Akhoy Kumar Mitter*, I. L. R., 15 Calc., 557, followed. *YELLAPPA v. RANGCHANDRA*

[I. L. R., 21 Bom., 463

293. — *Mortgage decree, Sale in execution of—Purchase by a third party while the decree and the order for sale are valid—Effect on sale of reversal of ex-parte decree—Right of redemption of mortgagor.*—A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex-parte* mortgage-decree and confirmed whilst the *ex-parte* decree was still in force, though the said decree was set aside and subsequently re-affirmed after trial. *MUKHODA DASSI v. GOPAL CHUNDER DUTTA*

I. L. R., 26 Calc., 734

*MUKHODA DASI v. HEM CHUNDER BHATTACHARJEE*

3 C. W. N., 766

See *ZAINULABDIN KHAN v. MUHAMMAD ASHGAB AHI KHAN*

[I. L. R., 10 All., 166; I. L. R., 15 I. A., 12

294. — *Civil Procedure Code, 1877, s. 246—Execution of cross-decrees—Power of Court executing decree—Bond fide purchaser—Presumption of validity of order for sale.*—If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bona fide* and for fair value, *Held* that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

against the purchaser to set aside the sale. *REWA MAHTON v. RAM KISHEN SINGH*

[I. L. R., 14 Calc., 18  
I. R., 13 I. A., 106

295.

*Title of auction-purchaser—Purchaser whether bound to enquire into the validity of the order under which the sale takes place.*—Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, distinguished. *Rewa Mahton v. Ram Kishen Singh*, I. L. R., 14 Calc., 18, and *Mukhoda Dassi v. Gopal Chunder Dutta*, I. L. R., 26 Calc., 734, referred to. *KATUN-SILLA v. CHANDAR SEN*

I. L. R., 22 All., 377

296.

*Suit to set aside sale—Fraud—Auction-purchaser acting *bona fide*—Fraudulent execution of a decree after adjustment—Execution of decree adjusted, but of which satisfaction has not been entered, Effect of, on rights of innocent purchaser—Adjustment of decree without certifying.*—In 1881 *R* obtained a decree against *M* for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between *R* and *M*, one of the terms of which was that *R* gave up his claim to costs. Satisfaction of the decree was not entered up in Court. In 1884 *K*, purporting to be acting on behalf of *R*, but without his knowledge or sanction, applied for execution of the decrees for costs, and in the execution-proceedings which followed a share of *M* in a tank was sold and purchased by *A*. *M* thereupon brought a suit against *A*, *R*, *K*, and others to set aside the sale, alleging that the whole of the execution-proceedings had been taken without notice to him, and had been fraudulently taken by the defendants in collusion with one another in order to deprive him of his share in the tank. It was found that *A*'s purchase was an innocent one and untainted with fraud. *Held*, upon the authority of *Rewa Mahton v. Ram Kishen Singh*, I. L. R., 13 I. A., 106; I. L. R., 14 Calc., 18, that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not having been certified to the Court, the Court had jurisdiction to execute it. *Pat Dasi v. Sharup Chand Malo*, I. L. R., 14 Calc., 576, commented on. *Held* further that the execution-proceedings could not be held to be void, as, although instituted by a person who had no authority to institute them, they were instituted in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made *bona fide*

## SALE IN EXECUTION OF DECREE

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## 16 INVALID SALE—continued

on behalf of MOTHERA MOTEN GHOSH MONTELL  
c AKHOT KUMAR MITTAL L L R, 15 Cal., 557

## (g) DECREES AGAINST WRONG PERSONS

297

Right to be a

sale set aside—here decree was against wrong person as representative—Subsequent claim by proper representative—Estoppel—Quasi estoppel—One defendant admitted to the second defendant, W. O. B. with his widow T became his heir as he left neither son nor brother surviving. In 1888 T brought a suit to enforce payment of the debt due by the deceased S and he made S the mother of S defendant in the suit writing T also as T. On 20th August 1878 T obtained an *ex parte* decree and on the 20th July 1880 the house of S in the possession of B was sold in execution and the first defendant B purchased it. On 18th September 1880 the sale was confirmed and on 20th November 1883 P was put into possession. On the 10th of December 1880 one S presented a petition which, as he alleged, the plaintiff with whom S was to set aside the sale. He did not produce any authority from the court and his application was rejected on the 11th of January 1883. On the 11th October 1878 T adopted the plaintiff T under an authority as she alleged of the deceased husband S. In 1881 T filed the present suit on behalf of her adopted son B to set aside the sale and to recover the house. Held that the plaintiff was entitled to have the sale set aside and to recover possession of the house. The estate was vested in T as legal representative of her deceased husband. Had T willfully put forward B as the representative of S as to deceive and mislead M then no doubt, she might be held bound by the decree obtained by the latter against S. Her mere quiescence while M willfully sued the wrong person could not affect her legal rights or deprive her adopted son the plaintiff B of his rights. He could not be bound by a suit and sale to which he was not a party either in person or by representation.

PASWANTAPA BHIDARA c BANC  
[L L R, 9 Bom., 86]

## (A) DECREE WITHOUT POWER OF SALE

298

Sale under

decree giving no power of sale—Partial sale of tarwad—Tarwad debt—Construction of decree—Decree explained by judgment—In 1870 the managers of the plaintiff's tarwad demised certain land in suit on kanom. In 1879 they tried to redeem the kanom, and a decree was passed that the plaintiff do pay a certain sum to the kanomdar and that he do surrender the kanom. But in the judgment it was said that the 1896 the tarwad was divided, and the land above branch. In 1898 allotted to the present plaintiff's above decree brought the kanomdar in execution of the purchase by defendant the land to sale and it was not binding on the plaintiff. Held that the sale was null.

ANTARA c AIR  
[L L R, 14 Mad., 29]

## SALE IN EXECUTION OF DECREE

—continued

## 16. INVALID SALES—continued.

## (i) DECREE AMENDED AFTER EXECUTION

299

Civil Procedure

Code (Act XIV of 1852), s. 204—Amendment of decree after execution—In a suit for money against the karnavan and two anandavans of a Malabar tarwad the judgment directed a decree for the plaintiff as prayed, but the decree ordered payment by one anandavan only. Land belonging to the tarwad was attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale the decree was amended and brought into conformity with the judgment. In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment-debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value. Held that the sale was binding on the plaintiffs.

PIDEL c CHATHAPPAN  
[L L R, 14 Mad., 150]

See CHATHAPPAN c PIDEI

[L L R, 15 Mad., 403]

## (j) WANT OF SALEMAN'S INTEREST

300

Civil Procedure Code,

1877, s. 313—*Par bona know no judgment-debtor has no interest*—A person who purchases immovable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable interest therein is not entitled to the benefit of the provisions of s. 313 of Act X of 1877, which were designed for the protection of persons who innocently and lawfully purchased valuable property.

MAHARAJA PRASAD c DHUMAN DAS  
[L L R, 3 All., 527]

301

Civil Procedure Code,

1882, s. 313—*Sell my estate sale*—*Saleable interest*—The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property within the meaning of s. 313 of the Civil Procedure Code. *Nakarmal Morwari v Sadat Ali*, 8 C. L. R., 408, distinguished. *PROFAR CHUNDER CHUCKERBORTY c PANDIT*

[L L R, 9 Cal., 508—12 C. L. R., 488]

302

Application to

set aside sale—*Saleable interest*—A misrepresentation or concealment in the sale not known which induces a purchaser to buy a property for much more than it is really worth (although that misrepresentation or concealment may be fraudulent), is no ground for setting aside a sale under s. 313 of the Civil Procedure Code. The meaning of s. 313 is that when a purchaser under an execution sale buys a property which turns out to have no

# SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued.

existence at all, or to be of no saleable value whatever, the Court may then set aside the sale under s. 313. **DURGA SUNDARI DEVI v. GOVINDA CHUNDRA ADHY** . . . . . **I. L. R., 10 Calc., 368**

**303.** ————— *Decree against insolvent—Official Assignee—Purchaser at execution-sale—Setting aside sale.*—Where, in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under s. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds. **DINOBUNDHOO PAL v. SHOSHEE MOHUN PAL** . . . . . **I. L. R., 9 Calc., 217**

**S. C. DENOBUNDHOO PAL v. SHUSHI MOHUN PAL CHOWDHRY** . . . . . **12 C. L. R., 60**

**S. C. RAM SOONDUR DEY v. SHOSHI MOHUN PAL CHOWDHRY** . . . . . **11 C. L. R., 389**

**304.** ————— *Property covered by mortgage—Saleable interest.*—In execution of a rent-decree, dated 22nd May 1879, certain immovable property was sold in execution and purchased by the appellant on the 21st February 1880, no mention having been made of any incumbrances. On the 9th May 1879 a decree was obtained upon a mortgage executed by the original judgment-debtor, and in execution of that decree the property which had already been sold was attached, and on the 11th March again sold in execution of the second decree, it being alleged that the property was covered by the mortgage which was prior in date to the former decree. The appellant thereupon applied that the sale of the 21st March should be set aside under s. 313 of the Civil Procedure Code, and his purchase-money directed to be returned to him. *Held* that if, as a fact, the property sold was covered by the mortgage, there was, under the circumstances, no such saleable interest in the judgment-debtor at the time of the sale on the 21st February 1880 as would prevent the operation of s. 313 of the Civil Procedure Code, inasmuch as under that sale the purchaser would be unable to get the particular property purchased by him, and that the sale must be set aside. **NAHARMUL MARWARI v. SADUL ALI**

[**8 C. L. R., 468**

**305.** ————— *Sale under attachment during subsistence of prior attachment—Saleable interest.*—In execution of a decree obtained on the 15th August 1876, the property of the judgment-debtor was attached on the 17th August 1877. The sale of the attached property was postponed, pending a suit instituted under the direction of the Court by a claimant to the attached property. This suit having been dismissed on the 13th September 1878, the decree-holder on the 15th September applied for a sale of the property, and the 16th December was fixed for the sale. Meanwhile, on the 13th December, 1877, a decree had been obtained by another party against the judgment-debtor, and in

# SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued.

execution of this decree the same property was attached on the 13th September 1878, and under this attachment a sale took place on the 15th November following. On the 16th December, as fixed, the property was again sold under the first attachment. The auction-purchasers at that sale, on the 6th January 1879, applied under s. 313 of the Civil Procedure Code to set aside the sale, on the ground that the judgment-debtor had no saleable interest. *Held* (reversing the decision of the lower Court) on the authority of the following cases: **Gogaram v. Kartick Chunder Singh, B. L. R., Sup. Vol., 1022: 9 W. R., 514; Lalla Jogut Lal v. Bhukha Chowdhry, 9 W. R., 244; and Kartick Chunder Singh v. Gogaram, 2 W. R., Mis., 48**, which the Court felt bound to follow, while it doubted their correctness,—that the sale must be set aside. **CHUTKA PANDA v. GOBURDHONE DASS** . . . . . **6 C. L. R., 85**

**306.** ————— *Debtor having no saleable interest in portion of property.*—S. 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property. **IN THE MATTER OF THE PETITION OF RAM COOMAR DEY. RAM COOMAR DEY v. SHUSHEE BHOSHUN GHOSE** [**I. L. R., 9 Calc., 626**

**307.** ————— *Judgment-debtor—Representative—Sale of immovable property—Setting aside sale.*—In the event of the death of the judgment-debtor, notice must issue to his representative before the sale of immovable property can be set aside under s. 313 of the Code of Civil Procedure, albeit that the section makes no express provision for the appearance of the representative. **BALA KADAR v. GULAM MOHIDIN** [**I. L. R., 7 Bom., 424**

**308.** ————— *Civil Procedure Code, ss. 213, 220—Transfer of execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August.*—*Held* that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree which had been transferred for execution to the Collector in accordance with the rules prescribed by the Local Government was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880 to entertain it. **Madhu Prasad v. Hansa Kuar, I. L. R., 5 All., 314**, referred to. **NATHU MAL v. LACHMI NARAIN**

[**I. L. R., 9 All., 43**

See **KESHABDEO v. RADHE PRASAD**

[**I. L. R., 11 All., 94**

**309.** ————— *Civil Procedure Code, s. 313—Setting aside sale in execution of decree—Incumbrance.*—The fact that property sold in execution of a decree is incumbered, even when the

## SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued

incumbrance covers the probable value of the property a suit is filed to sustain a plea that the person Low property is sold had no salable interest therein. 313 of the Civil Procedure Code contains plates that either the judgment debtor had no interest at all or that the interest was not one he could sell and the fact that the property may fetch little or nothing if sold does not affect the question. *Dakrui v. Sircar Ali B C L. R. 459* distinguished. *Pratap Chunder Chuckerbutty v. Pannu I L R. 9 Cal. 506* referred to. *SANT LAL v. RAMJI DAS I L R. 9 All. 167*

## (4) SALE CONTRARY TO LAW

310. — Sale in contravention of the provision of the Transfer of Property Act (II of 1882) s. 99. Sale by mortgagee in execution of decree—Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of s. 99 of the Transfer of Property Act. Held that although the sale was contrary to the provisions of s. 99 of the Transfer of Property Act that it was not for the benefit only of a particular class of persons namely, those concerned with a right to redeem mortgaged property such a sale was not void, but voidable. *MAYAK PANTHI v. PAKURAN I L R. 23 Mad. 347*

See *MARYAND BALKRISHNA BHAT v. DROVDO DAMODAR KULKARNI I L R. 22 Bom. 824*

and *ERESAPPA MUDALIAR v. COMMERCIAL AND LAND MORTGAGE BANK I L R. 13 Mad. 377*

311. — Sale contrary to provisions of Transfer of Property Act (II of 1882), s. 99. Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of annuity payee to sue to redeem his share—Rights of Hindu debtor's son after attachment and sale—In 1948 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought in 1883 in respect of them and a decree obtained which contained a provision that the right to the annuity should be liable to be proceeded against for the amount due. Plaintiff was born in 1911. In 1913 an application was made for the issue of a proclamation of sale and a sale resumed and a certificate was given to the purchaser who was the decree holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity—Held that, inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at

## SALE IN EXECUTION OF DECREE

—continued—

## 16. INVALID SALES—continued.

the instance of the mortgagee in execution of a money decree and within the prohibition of s. 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale, and in the absence of such decree, the sale is prohibited; that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of s. 99, that the suit was not barred by s. 214 of the Code of Civil Procedure and that plaintiff was entitled to a decree for the redemption of his share. *MOHENDRAN CHETTI v. ETIAFFASAMI I L R. 22 Mad. 372*

## (5) WANT OF JURISDICTION

312. — Effect on validity of sale—Property attached in execution of decrees of Munsif and District Judge—Sale of property under order of Munsif—Civil Procedure Code, 1877 s. 253—Where certain immovable property, which had been attached in execution of two decrees, one made by a Munsif and the other by the District Court to which such Munsif was subordinate was sold under the order of the Munsif—Held, following *D. Sri Prasad v. Saran Lal, I L R. 4 All. 507*, that the sale was bad, by reason of the Munsif's want of jurisdiction to order it. *AGHORN DATH v. SHAMA SUNDARI [I L R. 5 All. 615]*

313. — Civil Procedure Code 1877, s. 255. Attachment of property in execution of decree of two Courts—Postponement of sale by Court of higher grade—Sale of property under order of Court of lower grade—When several decrees of different Courts are out against a judgment-debtor, and his immovable property has been attached in pursuance of them the Court of the highest grade where such Courts are of different grades or the Court which first effectuated the attachment where such Courts are of the same grade, is under s. 2-5 of the Civil Procedure Code the Court which has the power of deciding objections to the attachment of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds and of providing for their distribution under s. 293. Held therefore where the immovable property of a judgment-debtor was attached in execution of several decrees one a Munsif's decree and the rest a Subordinate Judge's decrees, and the Subordinate Judge postponed the sale of such property, but the Munsif refused to do so, and such property was sold in execution of the Munsif's decree, that the sale was void as having been made in pursuance of the order of a Court which had no jurisdiction to direct it. Is

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

THE MATTER OF THE PETITION OF BADRI PRASAD.  
BADRI PRASAD v. SARAN LAL

[I. L. R., 4 All., 359]

314. ———— *Civil Procedure Code (1882), s. 285—Attachment of the same property by two Courts of different grades.*—The operation of s. 285 of the Code of Civil Procedure is not affected by the fact that prior to the attachment made by the Court of higher grade, proceedings subsequent to attachment may have taken place in the Court of lower grade in execution of the decree of that Court. *Badri Prasad v. Saran Lal, I. L. R., 4 All., 359; Aghore Nath v. Shama Sundari, I. L. R., 5 All., 615; and Muttakaruppan Chetti v. Mathuramalinga Chetti, I. L. R., 7 Mad., 47, referred to. BALKISHEN v. NARAIN DAS*

[I. L. R., 18 All., 348]

315. ———— *Civil Procedure Code (Act XIV of 1882), ss. 285 and 295—Decree, Transfer of—Rateable distribution.*—S. 295 of the Civil Procedure Code does not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under s. 285. *HAR BRAGAT DAS MARWARI v. ANANDARAM MARWARI. 2 C. W. N., 128*

316. ———— *Civil Procedure Code, 1877 (1882, s. 285)—Attachment and sale in execution of decrees of several Courts.*—Certain immovable property was attached in execution of a decree made by a Subordinate Judge and also in execution of a decree made by a Munsif. These decrees were held by the same person, and the judgment-debtor was the same person. Such property was sold in execution of both decrees. On the application of the judgment-debtor, who brought into Court the amount due on the decree made by the Subordinate Judge, and with the consent of the decree-holder and the auction-purchaser, the Subordinate Judge made an illegal order setting aside such sale. Subsequently on the application of the decree-holder and the auction-purchaser, the Munsif made an order confirming such sale. *Per SPANKE, J.*—That the Subordinate Judge had not any jurisdiction under s. 285 of the Civil Procedure Code to deal with such sale as regards the decree made by the Munsif, and the Munsif was not precluded by that section from confirming such sale as regards the decree made by him, by reason that the Subordinate Judge, a Court of a higher grade, had made an order setting it aside. *Per OLDFIELD, J.*—That having regard to the provisions of that section, it was doubtful whether the Munsif was competent to confirm such sale; but, inasmuch as the Subordinate Judge only intended to set it aside as regards the decree made by him, and his order was illegal, and the Munsif's order had done substantial justice, there was no reason to interfere. *CHUNNI LAL v. DEBI PRASAD*

[I. L. R., 3 All., 356]

317. ———— *Civil Procedure Code, 1882, s. 285—Immovable property—Attachment by superior Court—Sale by inferior Court—Title of purchaser.*—The provisions of s. 285 of the

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

Code of Civil Procedure, 1882, apply to immovable property. Where a house, while under an attachment issued by a Subordinate Judge's Court in execution of a decree, was sold in execution of another decree against the same judgment-debtor by the District Munsif's Court, and was then sold by the Subordinate Judge's Court,—*Held* that the sale by the District Munsif's Court was invalid by reason of the provisions of s. 285 of the Code of Civil Procedure, 1882. *MUTTAKARUPPAN CHETTI v. MUTHURAMALINGA CHETTI. I. L. R., 7 Mad., 47*

318. ———— *Jurisdiction of Munsif—Bengal Civil Courts Act (VI of 1871), s. 18—Attachment—Civil Procedure Code (Act X of 1877), s. 295—A, who had obtained a decree in the Court of the Second Munsif of B, in September 1877 attached certain property within the jurisdiction which had been assigned to the Munsif by the District Judge under s. 18 of Act VI of 1871. In the previous month, C, who had obtained a decree in the Court of the Additional Munsif of B (to whom jurisdiction had similarly been assigned), had attached the same property. The sale in execution of A's decree took place first, and A became the purchaser. A then objected in the Court of the Additional Munsif that the property could not again be sold; but his objection was overruled, and two days subsequently the property was again put up for sale in execution of C's decree, and he became the purchaser. A brought various suits against the tenants for arrears of rent in which C intervened. Held that the jurisdictions of the Munsifs were confined to the particular limits assigned to them, and that, as the property was situate within the limits assigned to the Second Munsif, the Additional Munsif had no jurisdiction to attach or sell it, and that the attachment by C was made improperly and without jurisdiction. *Quare*—Whether s. 285 of the Civil Procedure Code applies to immovable property. *OBHOY CHURN COONDOO v. GOLAM ALI alias NOCORY MEAH**

[I. L. R., 7 Cal., 410; 9 C. L. R., 361]

319. ———— *Civil Procedure Code, 1882, ss. 285, 295—Jurisdiction—Sale by inferior Court pending an unknown attachment by a superior Court.*—At an execution sale held by an inferior Court, at the instance of the decree-holder (the Court itself, the decree-holder, and the auction-purchaser being unaware of any objection to the exercise of a jurisdiction which the Court would ordinarily be competent to exercise), A purchased certain property, and this sale was confirmed. It appeared subsequently that this same property had two years previously to the sale been attached by a superior Court. On a sale of this property being advertised by the superior Court, A objected on the ground that he had already purchased it; this objection was overruled, and sale was held by the superior Court, at which A again became the purchaser. A then brought a suit against the decree-holder and the judgment-debtor in the inferior Court to recover as damages the sum paid by him at the sale. The suit was dismissed. *Held* that, although the superior

## SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued

Court had been wrong in insisting on the second sale and in not requiring the amount received by the inferior Court to be deposited in the superior Court and then ratably distributed amongst the creditors of the judgment-debtor, yet the sale by the inferior Court was a good and valid sale, and *A's* suit was therefore rightly dismissed. *Obay Churn Coondoo v. Golam Ali*, 1 L. R., 7 Cal. 410 adopted. *BALANT NATH SHAHA v. RAJENDRO NARAIN RAI*, 11 L. R., 12 Cal. 333

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*Sale under two different decrees of different Courts of different grades—Civil Procedure Code, 1852 s. 250*—The first mortgagee of certain immovable property obtained a decree for the sale of the property caused the property to be attached and then ceased to prosecute the execution proceedings. The second mortgagee then obtained a decree for the sale of the property caused it to be attached and put up for sale and purchased it himself. The first mortgagee then applied to the sale of the property and the property was put up for sale and was purchased by him. After the order for this sale was made and before it took place, the judgment-debtor died and the sale took place without his legal representatives being made parties to the execution proceedings. The Courts which executed these decrees were of two different grades the Court which executed the first mortgagee's decree being of the lower grade. In a suit by the first mortgagee against the second mortgagee for possession of the property—*Held* that the sale to the first mortgagee was not invalid with reference to the provisions of s. 250 of the Civil Procedure Code, because it had not been ordered and held by the Court of the higher grade inasmuch as, when such sale was ordered by the Court of the lower grade the property was not under attachment in execution of the decree of the Court of the higher grade that decree having been executed by the sale of the property and therefore the provisions of that section were not applicable. *Badri Prasad v. Saran Lal*, 1 L. R., 4 All., 339 distinguished. *Per O'DWYER J.* that there was nothing in the provisions of s. 250 or 251 of the Civil Procedure Code to support the contention that the first mortgagee after allowing the property to be sold was debarred from enforcing execution of his decree against it, and was only entitled to look to the assets realized at the sale for the satisfaction of his decree. *STOWELL v. ANTONIA NATH*

[1 L. R., 6 All., 255]

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*Sale under decree by two Courts first a Revenue Court, and then a Civil Court—N.W.P. Rest Act (XII of 1861), ss. 170, 171, 172—Civil Procedure Code 1852 s. 253—Effect of action in conflict between Civil and Revenue Courts—Held* that the procedure prescribed by s. 253 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court. Hence, where the same property had been attached both by a Court of Revenue and

## SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued

by a Civil Court but was first brought to sale by the Court of Revenue, it was held that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. *Omkar Singh v. Bhup Singh*, 1 L. R., 15 All., 496, *Aulia Bibi v. Abu Jafar*, 1 L. R., 21 All., 403, and *Madho Prakash Singh v. Marli Mawohar*, 1 L. R., 5 All., 406 referred to. *RAGHU BAI DATAL v. BANKE LAL*, 1 L. R., 23 All., 183

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*Attachment of immovable property in execution of decrees of two Courts of same grade—Sale by one Court pending prior attachment by other Court—Validity of sale—Title of purchaser—Civil Procedure Code (Act XIV of 1852), s. 250*—On the 3rd November 1884 obtained a decree in the Court of the Second Munsif of Bagurhat against *A* and on the 6th August 1887 sold such decree to the plaintiff who on the 8th August 1887 applied in that Court for execution and on the 5th September 1887 attached the share of *A* in a certain jumma. The share was subsequently sold in execution of the plaintiff's decree on the 20th October 1887 and purchased by the plaintiff himself. *I*, having obtained another decree against *A* in the Court of the First Munsif of Bagurhat on the 6th May 1875, sold his decree in the month of January or February 1887 to the defendant, who on the 10th February 1887 commenced execution proceedings in the First Munsif's Court against *A*, and on the 16th July applied for attachment of *A's* share in the jumma. *A* filed an objection which was disallowed and the share was attached at the defendant's instance on the 28th July 1887 and the attachment was confirmed on appeal on the 20th November 1887. The plaintiff, on the strength of his purchase of the 20th October 1887 put in a claim in the month of April 1888 in the defendant's execution proceedings in the Court of the First Munsif which was, however disallowed. He then filed a suit to set aside the order disallowing his claim, and for a declaration that the right, title, and interest of *A* passed to him under the sale of the 20th October 1887. *Held* that, though the property had been first attached in the Court of the First Munsif that Court was not a Court of a higher grade than that of the Second Munsif within the meaning of s. 250 of the Code of Civil Procedure and that the sale to the plaintiff was valid, and that he was entitled to the decree he prayed for. *Bykant Nath Shaha v. Rajendro Narain Rai*, 1 L. R., 13 All., 339, followed, *Badri Prasad v. Saran Lal*, 1 L. R., 4 All., 339; *Aghore Nath v. Shama Sundary*, 1 L. R., 6 All., 615 distinguished from; and *Medutkaraypan Chetti v. Mutiramalinga Chetti*, 1 L. R., 7 Mad., 47, referred to. *DWARKA NATH DASS v. BANKE BHARAI BOSE*, 1 L. R., 19 Cal., 651

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*Civil Procedure Code (1852), ss. 255 and 259—Concurrent decrees—Distribution of assets among several decree-holders—Sale in execution by inferior Court of property while under an attachment issued by superior Court—On the 9th October 1891 *A* obtained a decree*



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## 16. INVALID SALES—continued.

against *B* in the Court of the First Class Subordinate Judge of Surat. On the 13th October 1891 *C* also obtained a decree against *B* in the Court of the Second Class Subordinate Judge at Surat and immediately, viz., on the 16th October 1891, applied for execution. *B*'s property was consequently attached on the 18th October 1891. On the 7th July 1892 an order for sale was made and the proclamation of sale was issued on the 19th July 1892. The 17th August was fixed as the date of the auction-sale. On the 23rd July 1892, *A* applied to the First Class Subordinate Judge for execution of his decree of the 9th October 1891, and *B*'s property (with respect to which the proclamation of sale had been already issued by the Second Class Subordinate Judge) was attached on the 14th August 1892. Three days later, however, viz., on the 17th August 1892, the property was sold under the decree of the Second Class Subordinate Judge. *A* then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under s. 285 of the Civil Procedure Code (Act XIV of 1882), having been made while the attachment levied by the First Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, *A* applied to the High Court under its extraordinary jurisdiction. Held that the sale was good. *NARANJI MORARJI v. HARIDAS NAVALRAM*

[I. L. R., 18 Bom., 458]

324. — *Civil Procedure Code (1882), s. 285—Money attached in execution in two Courts—"Court of highest grade"—Munsif's Court—Small Cause Court.*—In the North-Western Provinces the Court of a Munsif must, for the purposes of s. 285 of the Code of Civil Procedure, be regarded as of a higher grade than a Court of Small Causes. So held by *EDGE, C.J., TYRELL, BURKITT, and ALKMAN, J.J.* (*KNOX, J., dissentiente*). Per *KNOX, J.*—The respective functions of a Munsif's Court and of a Court of Small Causes in the North-Western Provinces are such that the Courts do not admit of the comparison implied by the term "grade" being instituted between them for the purposes of s. 285 of the Code of Civil Procedure. *BALLU RAM v. RAGHUBAR DIAL*

[I. L. R., 16 All., 11]

325. — *Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of first class Subordinate Judge—Civil Procedure Code (1882), s. 285—Sale by inferior Court of property while under attachment issued by superior Court.*—*G* obtained a decree against *M* in the Small Cause Court of Surat, and in execution he attached a debt due to *M* and a proclamation of sale was duly issued. Before the sale took place, however, one *K* applied to the First Class Subordinate Judge for execution of a decree which he had obtained against *M* in that Judge's Court, and the same debt was then attached. The proceedings, however, under the Small Cause Court decree were continued, and the debt was sold in execution and was

# SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued.

purchased by the applicant. Held, following *Naranji Morarji v. Haridas Navalram, I. L. R., 18 Bom., 458*, that the sale by the Small Cause Court was not rendered invalid by the subsequent proceeding in the First Class Subordinate Judge's Court. The term "grade" in s. 285 of the Civil Procedure Code (Act XIV of 1882) has the same meaning as it had in s. 6 of the Code (Act VIII of 1859)—that is, it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court is inferior in grade to the Court of the First Class Subordinate Judge. *TUMUKAL HARRISANRAI v. KALYANDAS KHUSHAL*  
[I. L. R., 19 Bom., 127]

326. — *Decrees of different Courts against same judgment-debtor—Lease given by both Courts to judgment-debtor to raise amount by private sale—Civil Procedure Code (1882), s. 305—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court.*—*P* obtained a decree against *V* in the Court of the second class Subordinate Judge at Saundatti. He applied (darkhast of 1893) for execution, but *V* on the 19th April 1893 obtained permission, under s. 305 of the Civil Procedure Code (Act XIV of 1882), to raise the amount of the decree by private sale on or before the 6th June 1893, the day fixed for the sale. She obtained a certificate of leave under s. 305. Another decree was obtained against *V* in the Court of the first Class Subordinate Judge at Belgaum by one *R*, and he attached in execution (darkhast 351 of 1892) the same lands which were already attached by the Saundatti Court. From the Belgaum Court, however, *V* also obtained a certificate under s. 305 of the Civil Procedure Code, on 22nd April 1893, authorizing a private sale. Relying on these two certificates, *V* sold the lands under attachment to the applicant *A* for Rs. 2,000 by deed dated 25th May 1893. On the 28th June 1893 *A* applied to the First Class Subordinate Judge in Belgaum, under s. 305 of the Civil Procedure Code, for confirmation of the sale, and that the purchase-money paid by him should be distributed as follows, viz., Rs. 18-14-2 in satisfaction of the decree of the Belgaum Court, Rs. 128-7-10 in satisfaction of the decree of the Saundatti Court, and the balance, Rs. 1352-10-0, to be paid to *V*. The Court of Belgaum granted the application, and directed that the above sum of Rs. 128-7-10 should be paid into the Court of Saundatti. On the 17th July 1893 *A* applied to the Court at Saundatti to confirm the sale already confirmed by the Belgaum Court, and he brought into Court the said sum of Rs. 128-7-10. On the 19th June 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied to the Second Class Subordinate Judge at Saundatti for execution of his decree. He objected to the confirmation of the sale applied for by the applicant. The Subordinate Judge allowed the objection and refused confirmation of the sale. The applicant then applied to the High Court under

## SALE IN EXECUTION OF DECREE

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## 16. INVALID SALES—continued

its extraordinary jurisdiction. *Held* that the Judge of the Principal Court had concurrent jurisdiction to sell and to first appeal in notwithstanding the execution of a sale made by the Subordinate Court. The application of the Subordinate Court by A was therefore rejected and ought to have been rejected, inasmuch as the sale had already been confirmed by a competent Court (viz the Court of Belgium) and nothing further remained to be done in regard to it.

ANDANAPA v BHIMBAO ANNAJI

(I. L. R., 19 Bom., 539)

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## 16. INVALID SALES—continued.

jurisdiction of a Court cannot depend upon its knowledge of facts. If an attachment in a higher Court deprives a Court of lower grade of jurisdiction to sell, the sale must be apprehended, invalid, whether the Court of lower grade knows of it or not. If the sale is held to be in such cases only irregular, the purchaser will take an indefeasible or defeasible title according to whether he knows or does not know of the irregularity. If he buys bona fide and without notice, his title would be perfect, and he will not be affected by the irregularity of the proceedings in the sale. *Revs Martin v Ram Krishna, L. 1, 13 I. A. 111*. If he purchases with notice, he runs the risk of his purchase being set aside. *ABDEL KAMIR v THAKURDAS TRIBHOBAN DAS*

(I. L. R., 23 Bom., 68)

327 — Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers at such sales—Civil Procedure Code (Act XIV of 1882), s. 255.—A and B obtained decrees against C. A's decree was obtained in the Court of the Subordinate Judge at Surat. B's decree was obtained in the Small Cause Court at Surat. In execution of their respective decrees, both A and B obtained orders of attachment on the same day of a certain debt due to C by the Municipality of Surat. Notice of the attachment was given by the Subordinate Judge to the Small Cause Court under a 255 of the Civil Procedure Code (Act XIV of 1882). On the 16th November 1893 the Subordinate Judge issued an order for sale of the attached debt and on the 18th December the Small Cause Court issued a similar order. Both Courts sold the debt on the 6th January 1894 the Small Cause Court selling first in point of time. At the sale by the Subordinate Judge the plaintiff bought the debt and the defendant was the purchaser at the sale by the Small Cause Court. The defendant after his purchase sued the Municipality for the debt making the plaintiff a party defendant, and he obtained a decree against the Municipality. The plaintiff also sued the Municipality making the defendant a party and he also obtained a decree which was confirmed by the District Court. Against this decree the defendant appealed to the High Court. *Held* that the plaintiff had the better title. The defendant had bought at the sale held by the Small Cause Court. The sale by that Court after it had received notice of the attachment proceeded in the Court of the Subordinate Judge was in direct contravention of the provisions of s. 255 of the Civil Procedure Code (Act XIV of 1882). The Small Cause Court had full notice of the proceedings in the Subordinate Judge's Court and there was no reason to suppose that the defendant himself had not similar knowledge. The defendant did not set up the plea that he was a bona fide purchaser without notice. *Revs S. 255, C.S.*—The sale by the Small Cause Court was an act done in the irregular exercise of admitted jurisdiction. But when property is attached by more Courts than one at a place each has jurisdiction to sell that jurisdiction should be exercised by the Court of the higher grade (s. 255). If by a mistake of law or in ignorance of an earlier attachment in a Court of a higher grade a Court of lower grade proceeds to sell, it is not deprived of jurisdiction to do so by s. 255. The

328 — Civil Procedure Code (Act XIV of 1882), s. 15, 255—Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction of Munsif—Preferential right of purchasers in execution sale—Concurrent decrees, Execution of.—A obtained a decree against B in the Court of the Munsif of Jamui, and in execution thereof attached B's property on the 16th March 1891, the property was sold on the 20th April 1891 and purchased by C, who obtained possession of it on the 3rd of August 1891 and then sold his interest to the plaintiff. At the same time the defendant B had a decree for costs against B and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, about four months after the sale of the property by the Munsif. The plaintiff sued for possession on the ground that, having purchased the property of B before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was wholly void, and the Munsif had no jurisdiction to sell the property under s. 255 of the Civil Procedure Code. *Held* that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title; the property s. 255 of the Civil Procedure Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. *Revs Nath Sahib v Rajendra Narain Rai, I. L. R., 12 Cal., 333, Dewar Nath Das v Bank Behari Bose I. L. R., 19 Cal., 651, and Patel Narayan Morari v. Haridas Navalsah, I. L. R., 8 Bom., 408, referred to. RAM NARAIN SINGH v MINA KORI*

(I. L. R., 25 Cal., 46)

329 — Civil Procedure Code (Act XIV of 1882) s. 255—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers—Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one s. 255 of the Code of Civil Procedure does not take away

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## 16. INVALID SALES—continued.

the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court. *KUNHAYAN v. ITHUKUTTI*

[I. L. R., 22 Mad., 295]

330. ———— *Mortgage-decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XII of 1882), ss. 19, 223 (c), sch. II, form 12S.*—A decree obtained in a suit, brought under the provisions of s. 19 of the Code of Civil Procedure, in the Court of the Subordinate Judge of Rajshahye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshahye and Nyadumka, directed that the properties mentioned in the mortgage should be sold, and the proceeds applied in payment of the mortgage-debt, and the properties were sold by the Court of Rajshahye. *Held* that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshahye Court was within its jurisdiction in directing and carrying out the sale. *Quare*—Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure. *MASSEY v. STEEL & Co.* I. L. R., 14 Calc., 661

331. ———— *Property outside jurisdiction of Court executing decree—Code of Civil Procedure (Act XII of 1882), ss. 16, 233, 649.*—A Court has no jurisdiction, in execution of a decree, to sell property over which it has no territorial jurisdiction at the time it passed the order of sale. The decree-holder at a sale under a mortgage-decree purchased the mortgaged property with leave of the Court. Before the order of sale was passed, the mortgaged property had been transferred by an order of Government to the jurisdiction of another Court. *Held* by the Full Bench that the sale must be set aside as being without jurisdiction. *Karni Soondari Chowdhry v. Kali Prosonno Ghose, L. R., 12 I. A., 215 v. I. L. R., 12 Calc., 225*, followed. *PREM CHAND DIT v. MOKHODA DEBI*

[I. L. R., 17 Calc., 699]

See *DAKHINA CHURN CHATTOPADHYA v. BILASH CHUNDER ROY* . . . I. L. R., 18 Cal., 526

332. ———— *Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), s. 13, cl. 3—Civil Procedure Code (1882), s. 25—Transfer of civil case.*—A suit on a mortgage-bond, praying for the decree for sale, was transferred under s. 25 of the Civil Procedure Code from the Court of the Second Subordinate Judge to that of the Third Subordinate Judge in the district for trial in that Court. The suit was decreed, and an order for sale was passed by the Third Subordinate Judge. After the sale, an application was made to set it

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## 16. INVALID SALES—continued.

aside on the ground, *inter alia*, that the Court of the Third Subordinate Judge had no jurisdiction to sell the property, it being within the local jurisdiction of the Second Subordinate Judge's Court. The jurisdiction of the Third Subordinate Judge to try the suit was not questioned. *Held* that s. 13, cl. 3, of the Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887) dealt with matters of this description, and the Court which passed the decree and the order for sale had jurisdiction to hold the sale. *Prem Chand Day v. Makhoda Debi, I. L. R., 17 Calc., 699*, distinguished. *Gopi Mohan Roy v. Doybaki Nundun Sen, I. L. R., 19 Calc., 3*, and *Tincouri Debya v. Shih Chandra Pal Chowdhury, I. L. R., 21 Calc., 639*, referred to. *JAJERNATH SAHAI v. DIT RANI KOER* . . . I. L. R., 22 Calc., 871

*TINCOURI DEBYA v. SHIH CHANDRA PAL CHOWDHURY* . . . I. L. R., 21 Calc., 639

333. ———— *Decree set aside as made without jurisdiction.*—When, on a rehearing, a Deputy Collector set aside his former judgment as passed without jurisdiction, it was held that his proceedings under that judgment were of themselves null and void, and that it did not require any order in words to set aside the sale which they involved. *ONUNGO MOONJUREE DOSSIA v. PUNCHANAN BOSE* . . . 12 W. R., 72

334. ———— *Decree afterwards set aside as having been passed without jurisdiction—Invalidity of sale.*—Under a decree passed by a Court which had no jurisdiction to try the suit, the right, title, and interest of the judgment-debtor, A, in a certain property was sold, and purchased by B. The decree was, after the sale, set aside as having been passed without jurisdiction. In a suit by A against B for confirmation of possession, on the ground that B was about to take possession of the property under the purchase,—*Held* that the sale in execution was a nullity, as the decree had been passed without jurisdiction. *Jan Ali v. Jan Ali Chowdhry, 1 B. L. R., A. C., 56 v. 10 W. R., 154*, and *Peareemonee Dossee v. Collector of Beerbhoom, 8 W. R., 300*, distinguished. *JADU NATH KUNDU CHOWDHY v. BRAJA NATH KUNDU*

[6 B. L. R., Ap., 90]

335. ———— *Sale by Sheriff ultra vires—Right of purchaser.*—Where the Sheriff sells under a *fi. fa.* property which could not legally be sold,—e.g., an equity of redemption,—*Held* the sale was null and void, and the purchaser took nothing by his purchase. When therefore the purchaser was also a mortgagee who was in right of his purchase put into possession,—*Held* that, notwithstanding his possession, the right of redemption still existed, and he must be taken to have been in possession as mortgagee only. *HURRO PERSHAD GHOSAL v. HURRO MONEE DEBEE* . . . 8 W. R., 210

336. ———— *Sale of ancestral land by order of the Court—Act X of 1877*

# SALE IN EXECUTION OF DECREE

—continued—

## 16. INVALID SALES—continued

(Civil Procedure Code) s 311 320—*Rules prescribed by Local Government under s 320—Invalidity of sale* A second date Judge made an order for the sale in execution of a decree of certain immovable property which was ancestral with the members of the next generation by the Local Government. No 61 dated the 30th August 1880 under which execution of such decree should have been transferred to the Collector and such property was sold accordingly. Held that the order for the sale of such property having been made without jurisdiction, the sale was void and should be set aside. **KERBOO RAI v SHEO GHUAM** I. L. R. 4 All. 332

337. — *Effect of decree of sale of property in the mortgage will pass a good title to the purchaser notwithstanding that at the time of such sale the mortgagee was in possession of the property and was not a party to the sale* *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

338. — *Effect of decree of sale of property in the mortgage will pass a good title to the purchaser notwithstanding that at the time of such sale the mortgagee was in possession of the property and was not a party to the sale* *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

This decision was afterwards reversed on review so far as it decided that the High Court prior to 1880 had no power to execute a decree in a partition suit between Hindu mahant and shof Madras by selling immovable property situated in Chingleput District. **JANTYA BHAI ANMAL v SADRAGOPA EDINTARA** I. L. R. 7 Mad. 56

339. — *Effect of decree of sale of property in the mortgage will pass a good title to the purchaser notwithstanding that at the time of such sale the mortgagee was in possession of the property and was not a party to the sale* *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

# SALE IN EXECUTION OF DECREE

—continued—

## 16. INVALID SALES—continued

A suit to recover property alleged to have been sold in execution by a Court which had no jurisdiction was not barred by Act VIII of 1850 s 25. **KANHAY SINGH v GOVINDRAO BHATT** 21 W. R. 231

340. — *Effect of decree of sale of property in the mortgage will pass a good title to the purchaser notwithstanding that at the time of such sale the mortgagee was in possession of the property and was not a party to the sale* *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

## m) DECREES BARRED BY LIMITATION

341. — *Suit to recover purchased property* *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

*See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332. *See also Kerboo Rai v Sheo Ghulam* I. L. R. 4 All. 332.

342. — *Objection to validity of sale—Civil Procedure Code s 230—Decree of sale of property after twelve years—After a decree of sale in execution of a decree and before its confirmation, the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred by the provisions of s. 230 of the Code of Civil Procedure 1857* **GANAGATHA PANDITHAR v RATHANAI ANMAL** I. L. R. 6 Mad. 237

343. — *Subsisting decree—Meaning of—Sale certificate of—Act VIII of 1850 s 244 316—Costs—The words "subsisting decree" in the proviso to s. 31 of the Code of Civil Procedure refer to a decree which is unrevoked and in full force and not merely to a decree the execution of which is not barred by limitation. Where a decree under which a sale takes place remains unrevoked, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold in the execution of the decree, and the sale has actual force at the time when executed on of the decree is barred by limitation.* **SADRAGOPA EDINTARA v JANTYA BHAI ANMAL** I. L. R. 11 Cal. 376

344. — *Effect on validity of sale—Execution of decree barred at time of sale—Purchase of decree-holder—G A obtained a decree against M. Afterwards L V who had obtained a decree against G A, attached the decree which he (G A) had obtained against M and upon sale in execution became himself the purchaser of the decree. It afterwards appeared that the decree held by L V against G A was barred by limitation. Held that the execution of L V's decree against G A being*

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

barred by lapse of time at the time of sale, the sale was invalid. **GOLAM ASGAR v. LAKHIMANI DEBI**  
[5 B. L. R., 68 : 13 W. R., 273]

345. — Separate suit for declaration that decree was barred by limitation at time of sale—*Right of suit*.—A sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseeinama (will), and which B had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a decree the execution of which was barred by lapse of time. B had become the purchaser at such sale. Held that a suit would not lie for the purpose of having it determined that the execution of B's decree was barred. **NOJABUT ALI CHOWDURY v. MOHA BUSSEEROOLAH CHOWDURY**  
[11 B. L. R., 42 : 20 W. R., 5]

346. — Suit to recover property sold—*Sale set aside, execution of decree being found to be barred by limitation*—*Suit to recover the property from purchaser*.—A creditor obtained a decree against his debtor, and applied for and obtained an order for execution. This application was unsuccessfully opposed by the judgment-debtor on the ground that execution was barred by limitation. Certain properties of the judgment-debtor were attached and sold in execution of this decree, the judgment-creditor himself becoming the purchaser. In due course the sale was confirmed, and a certificate granted to the purchaser. Subsequently to this, the order granting execution came up before the High Court on appeal, and that Court decided that execution was barred. The person who had been the judgment-debtor then brought a regular suit against the purchaser to recover the properties sold in execution. Held that he was entitled to have the sale set aside by regular suit. **Jan Ali v. Jan Ali Chowdhry**, 1 B. L. R., A. C., 56 : 10 W. R., 154, distinguished.  
**MINA KUMARI BIBEE v. JAGAT SATTANI BIBEE**  
[I. L. R., 10 Cal., 220]

347. — Right to deposit by judgment-debtor in execution-proceedings after execution of decree is barred—*Limitation*—*Money of moveable property deposited in Court to stay sale*—*Order for sale confirmed*—*No execution taken out within the three years after deposit*.—When money or moveable property has been deposited in Court on behalf of a judgment-debtor in lieu of security, for the purpose of staying a sale in execution of a decree pending an appeal against an order directing the sale, which is afterwards confirmed on appeal, neither the depositor nor the judgment-debtor can afterwards claim to have such deposit refunded or restored to him, notwithstanding that the decree-holder has omitted to draw it out of Court for more than three years, and that more than three years have elapsed since any proceedings have been taken in execution of the decree, and that the decree for that reason is incapable of execution. *Semble*.—When money or immovable property is deposited in Court in such a case as the above, the Court, upon confirmation of the order for a sale, holds the deposit in

# SALE IN EXECUTION OF DECREE

—continued.

## 16. INVALID SALES—continued.

trust for the decree-holder, and is, at liberty to realize it and pay the proceeds over to him to the extent of his decree. **SHEO GHOLAM SAHOO v. RAHUT HOSSEIN**  
I. L. R., 4 Cal., 6

**S. C. SHEO GHOLAM SAHU v. KHUB LALL**  
[2 C. L. R., 206]

348. — Order setting aside sale after confirmation—*Certificate and confirmation of sale*—*Execution barred at time of sale*—*Position of auction-purchaser*—*Civil Procedure Code (Act X of 1877), s. 316—Act XII of 1879—Limitation Act (XI of 1877), sch. ii, art. 165*.—A person purchased certain property at a sale in execution of a decree in November 1878; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May 1879, from which date he remained in possession. The judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on appeal. He had applied, before the sale took place, to stay the sale, on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceedings, or that he was cognizant of the application. Two years from the date of the sale, and one and a half years from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale and putting the auction-purchaser out of possession. Held that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order. The words "subsisting decree," in s. 316 of Act X of 1877, as amended by Act XII of 1879, mean a decree unreversed and in full force, and not merely one upon which execution cannot be issued. *IN THE MATTER OF THE PETITION OF MAHOMED HOSSEIN v. KOKIL SINGH*  
[I. L. R., 7 Cal., 91 : 9 C. L. R., 53]

## (n) SALE PENDING APPEAL.

349. — Sale of property released from attachment pending appeal from decree declaring property liable—*Civil Procedure Code, 1877, ss. 260, 283, and 545*.—S. 283 of the Code of Civil Procedure, 1877, does not constitute an exception to the procedure laid down by s. 545. When property has been released from attachment under s. 280 and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal by virtue of the provisions of s. 283. **FATHULA v. MUNIYAPPA**  
[I. L. R., 6 Mad., 98]

350. — Decree setting aside sale—*Second sale pending appeal to which decree-holder not made party*—*Confirmation of first sale in appeal*—*Purchasers of the same property in execution of decree, Priority between*—*Laches of appellant in not obtaining stay of execution*.—

# SALE IN EXECUTION OF DECREE

—continued

## 16 INVALID SALES—concluded

A sale in execution of a mortgage-decree was set aside and the auction-purchaser appealed to the High Court without making the decree-holder a party to the appeal. The decree-holder applied for a fresh sale and at a second sale held pending the appeal purchased the property and obtained possession. On appeal to the High Court the first sale was upheld and an order passed confirming the sale. In a suit by the decree-holder purchaser at the second sale—*Held* that the effect of plaintiff's not being made a party to the appeal is practically the same as if he had not been a party to the suit. *Held* also that the plaintiff was not a party to the subsequent proceedings and could not be said to have bid at the sale with the effect of those proceedings hanging over his head. *Jon Ali v. Jon Ali Chowdhary* 1 B. L. I., A. C. 56, 30 B. L. 154 referred to. *Held* that the defendant could have applied to the High Court for a stay of execution and if the execution had been stayed, the present litigation would not have arisen. **GOWDHAN PERSHAD v. FAZIL AHAM KHAN**

[I. L. R., 23 Calc., 857]

## 17 SETTING ASIDE SALE

### (a) GENERAL CASES

351. Right of judgment-debtor to set aside sale on deposit of the amount of debt.—*Civil Procedure Code (1882) s. 301A (a)*.—*Poundage money—Costs*.—A judgment-debtor whose land had been sold in execution is entitled to have the sale set aside under the Civil Procedure Code s. 310A (a), if he deposits 5 per cent. of the purchase-money, including that deducted by the Court for poundage, and fulfils the requirements of cl. (b), even though something more on account of the poundage was recoverable from him under the head of costs. **MITHU ATYAR v. RAMASAMI SASTRI**

[I. L. R., 20 Mad., 158]

352. — Setting aside sale by deposit of the debt due to the decree holder at whose instance the property is sold.—*Code of Civil Procedure (Act XIX of 1882) s. 295, 310A—Application for rateable distribution*.—When property has been sold in execution of a decree and there are other decree-holders who prior to the sale have applied under s. 295 Civil Procedure Code for rateable distribution on the person whose property has been sold is competent to have the sale set aside under s. 310A by depositing only the amount of the decree, for the satisfaction of which the sale was proclaimed and took place. **HARI SUNDARI DASTA v. SHAKTI BALA DASTA** 1 C. W. N., 195

S. 295 does not apply to a deposit made under s. 310A by the judgment-debtor. **BHARI LAL PAL v. GOPAL LAL SARKI** 1 C. W. N., 695

353. — Sale under mortgage-decree—Sale in execution of a money-decree, Effect of setting aside the sale in execution of mortgage-decree confirmed.—*Code of Civil Procedure (1882),*

# SALE IN EXECUTION OF DECREE

—continued

## 17 SETTING ASIDE SALE—continued

ss. 310A, 311, and 312—Effect of sale not being set aside either under s. 310A or 311 of the Code.—A certain property was sold on the 16th August 1895 in execution of a mortgage-decree, dated the 9th December 1892 and was purchased by A. In the meantime an eight-anna share of the said property was sold in execution of a money-decree and was purchased by P on the 22nd May 1903. On the 10th September 1905 the judgment-debtor applied to set aside the mortgage sale under s. 311 of the Code of Civil Procedure, and on the 14th September 1905 a similar application was made by R. On the 26th March 1906 both these applications came on for hearing before the Subordinate Judge who passed no order, and on the same date R presented a petition asking the Court to set aside the sale held in execution of the mortgage-decree upon payment by him of the mortgage-money with interest and costs and also to declare that he was entitled to redeem the property. On the 9th March 1906 the Subordinate Judge allowed the petition and ordered the sale to be set aside upon the aforesaid terms. *Held* that, inasmuch as under s. 312 of the Code of Civil Procedure A was entitled to have an order confirming the sale of the 16th August 1895, unless the sale were set aside under s. 310A or s. 311 of the Code of Civil Procedure and as the sale was not set aside under either of those sections, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage-money with interest and costs. **BIRI MOHAMMAD THAKUR v. LAMA NATH CHOWDHARY** 1 L. F., 20 Calc., 8, referred to. **KRISHNA NATH DEWAS v. PARTABDIN ALI**

[I. L. R., 24 Calc., 682]

354. — Amount payable incorrectly calculated by an officer of the Court.—*Civil Procedure Code (Act XIX of 1882), s. 310A—Civil Procedure Code Amendment Act (V of 1894)*.—The judgment-debtor within thirty days from the date of sale deposited in Court, under s. 310A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with s. 310A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited a sum equal to 5 per cent. of the purchase-money, *Held* that when the amount payable by the judgment-debtor under s. 310A of the Code of Civil Procedure has been calculated by an officer of the Court and has been deposited, an order setting aside the sale must be made by the Court as a matter of right; the Munsif therefore was justified in setting aside the sale. **UDRAJ LALL v. RADHA PERALAD SINGH**, 1 L. R., 18 Calc., 235 referred to. **MAKMOOL AHMED CHOWDHURY v. BAKIR SABAN CHOWDHURY** 1 L. R., 25 Calc., 809

See **ABDOOL LATIF MOONSHI v. JADUB CHANDRA MITTER** 1 L. R., 25 Calc., 218

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

**355.** ——— *Civil Procedure Code (1882), s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Power of a Court to set aside a sale if the deposit provided for in s. 310A be not paid within thirty days.—Held (by the Full Bench).—Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside.* *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry, I. L. R., 25 Cal., 609, distinguished.* *CHUNDI CHARAN MANDAL v. BANKE BEHARY LAL MANDAL. I. L. R., 26 Cal., 449 [3 C. W. N., 283]*

**356.** ——— *Application to set aside sale of mortgaged property—Civil Procedure Code (1882), s. 310A—Execution of decrees—Transfer of Property Act (IV of 1882), s. 85.—S. 310A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage-decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside. Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to 5 per cent. on the purchase-money, for payment to the purchaser, even where the land has been purchased by the decree-holder.* *TIRUMAL RAO v. DASTAGHIBI MIYAH*

[I. L. R., 22 Mad., 286]

**357.** ——— *Actual receipt of sale-proceeds by decree-holder necessary to set aside a sale—Civil Procedure Code (1882), s. 310A, as amended by Act V of 1894.—The words in cl. (b) of s. 310A of the Code of Civil Procedure as amended by Act V of 1894—"less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder"—contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale-proceeds into Court does not satisfy the requirements of the section. A proclamation of sale ordered that for the recovery of RS43-9-9 certain immoveable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for R420, and on the next day lot B was sold for R584. The judgment-debtor afterwards paid into Court R452-13-0, and applied to have the sale of lot B set aside, alleging that he had purchased lot A through a third party, and that the sale-proceeds had been paid into Court. Held that the mere payment of*

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

the sale-proceeds into Court was not a sufficient compliance with the requirements of s. 310A of the Code of Civil Procedure, and as it had not been shown that the sale-proceeds had been received by the decree-holder, the sale could not be set aside. *TRINBAK NARAYAN v. RAMCHANDRA NARSINGRAC*

[I. L. R., 23 Bom., 723]

**358.** ——— *Property sold in lots—Civil Procedure Code (Act XIV of 1882), s. 310A—Deposit—Deposit sufficient to cause sale of one lot.—When at a sale in execution of a decree the properties attached were sold separately in nine lots, and the judgment-debtor prayed to have the sale of one of the properties set aside under s. 310A, Civil Procedure Code, by tendering the balance (together with the percentage required under the law) due under the decree, after deducting the amounts bid by the decree-holder for some of the properties and the amounts deposited by the other purchasers,—Held that s. 310A did not apply to this case, and that there was no deposit within the terms of that section.* *KRIPA NATH PAL v. RAM LAKSHMI DASIA*

[I. C. W. N., 703]

**359.** ——— *Application to set aside a sale on the ground of fraud and material irregularity in conducting sale-proceedings—Code of Civil Procedure (Act XIV of 1882), ss. 244, 311, 312, 588—Zur-i-peshgi lease—Thica right and zur-i-peshgi money, Attachment of—Bengal Tenancy Act (VIII of 1855), ss. 162, 163—Sale of the defaulting tenure—Sale of the zur-i-peshgi claim whether valid.—A advanced some money to B upon a zur-i-peshgi of certain property and sub-let the same property to B, on a certain rent reserved; subsequently A brought a suit for the rent so reserved, and a decree upon a compromise entered into between the parties was awarded in favour of A for realization of a sum of money; A applied for execution and attached and proclaimed for sale not only the thica right held by B under him (A), but also the zur-i-peshgi claim which B had against him, and the property was sold and purchased by A, the decree-holder himself; an application for setting aside the sale was made by the judgment-debtor B to the Court which sold the property, upon the ground that the sale proceedings were vitiated by fraud on the part of the decree-holder in the conduct of the sale. The Subordinate Judge found that there was fraud, and set aside the sale as bad in law. On appeal this order was confirmed by the District Judge, who, however, expressed no opinion on the question of fraud. On second appeal it was contended that the sale could not be set aside under s. 312 unless it was found that there was fraud. Held that, if the application of the judgment-debtor be regarded as one under s. 311 of the Code of Civil Procedure, it would be necessary to come to some conclusion or other upon the question of fraud, and unless it is found that the fraud came to the knowledge of the judgment-debtor within thirty days before the date of his application, the sale could not be set aside under s. 312 of the Code. That having regard to the provisions of ss. 162 and 163 of the*

## SALE IN EXECUTION OF DECREE

—cont. and

1<sup>st</sup> SETTING ASIDE SALE—continued

Bengal Tenancy Act nothing but the tenure in default could have been sold, and that the sale of the claim which the judgment-debtor had against the decree-holder was altogether bad. **LECHHIPAT v. MANDEL KOPR** 3 C W N, 333

380 — Ground for setting aside sale—*Civil Procedure Code 1859 s. 206 25<sup>th</sup>*

*Su t to cancel order setting aside sale Act XXIII of 1861 s. 11*—A Munsif having cancelled an order on sale of landed property on the sole object on of the judgment debtor that the property realized a low price, and the Judge having dismissed the auction purchaser's appeal from the said order on the ground that the Munsif had no authority to cancel the sale under the terms of s. 25<sup>th</sup> of Act VIII of 1859 without some irregularity in conducting or publishing the sale being proved and that the said order must therefore be taken to have been passed under s. 11 Act XXIII of 1861 which admits of no appeal by the auction purchaser who was no party to the execution proceedings—*Held* that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861 but an order passed *ultra vires* under s. 25<sup>th</sup> of Act VIII of 1859 and that a suit would lie for its cancellation—the finality of an order under ss. 206 and 207 of Act VIII of 1859 dependent on its compliance with the terms of those sections. **SURESH v. DANTAI** L. L. R., 1 All, 374

381 — *Civil Procedure Code 1859 ss. 311 312 313 644 Act XII of 1860 sch IV form 149—Su t to set aside sale*

Under cl XII of 1859 form 149 of sch IV of the Code of Civil Procedure provided that sixty days should elapse between a sale in execution of a decree and its confirmation. A sale having been confirmed before the expiry of sixty days—*Held* that the sale was not rendered inoperative and that its effect was not postponed by reason of the provision in form No 149 **Haji v. ATHANAMAYAN MUSA v. ATHANAMAYAN** L. L. R., 7 Mad., 512

382 — *Order confirming sale after order setting it aside*—A sale in execution of a decree was set aside by a subsequent decree of 9th March 1861 but was afterwards allowed to stand by an order of 7th May 1862. As no suit was brought to set aside the latter order it was held to be a final judicial proceeding and the sale declared to be good and valid. **MUNNOO LALL v. CHOORAY SHABOO** 7 W. R., 118

383 — *Object on for irregularity disallowed—Sale set aside on other grounds*—On application by the judgment-debtor to the District Judge to set aside the sale by auction of a house in execution of a decree on the grounds of material irregularities in publishing and conducting the sale from which the applicant sustained substantial injury the objections were disallowed as untenable, and the sale confirmed. But the District Judge on appeal set aside the sale on a ground on which he had no authority to interfere. On petition to the High Court by the purchaser of

## SALE IN EXECUTION OF DECREE

—cont. and

## 17 SETTING ASIDE SALE—continued

the house—*Held* that the order of the Judge must be set aside as illegal, and the original order confirming the sale allowed to stand. **KOSHTI v. NARAYAN DUTLAFFA** 3 Bom., A. C., 110

384 — *Security by manager of lunatic—Second attachment and sale before security given—Attachment without sale Valid to of*—The plaintiff as manager of the estate of her husband, a lunatic obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed but several months elapsed before she found security and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor and possession was given to them. *Held* (reversing the decision of the High Court) the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager. It was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed. Under the Code of Civil Procedure property may be attached without view to immediate sale. **MARODA PROSAD MULLICK v. LITCHESSETT SING DOOGEE** 10 B. L. R., 214  
17 W. R., 289 14 Moore's I. A., 529

385 — *Second sale before confirmation—Separate suit—Effect of sale before confirmation*—The plaintiff and the defendants C and D were the co-owners of a portion of a shikm taluk in the 10 annas share of a zamindari belonging to the defendant A. A having succeeded in enhancing the rent of the tenure, obtained a decree for arrears of rent at the enhanced rate which he proceeded to execute in 1880. In 1881 she obtained another decree for arrears of rent of a subsequent period in execution of which the tenure was put up to auction and sold for Rs. 15,000 on 20th July 1881. A herself being the purchaser. Before the sale was confirmed the tenure was, on 20th September 1881, again put up for sale in execution of the first decree and was purchased by A for Rs. 10. The plaintiff and C and D applied to have both sales set aside on the ground of irregularity. The application as regarded the sale of 20th September 1881 was rejected on 30th December 1881, and this order was confirmed by the High Court on 14th August 1882 and (on review) 21st March 1883. Meanwhile the sale of the 20th July 1881 was set aside by the order of the Subordinate Judge on 19th June 1882. In a suit against A B (the agent of A) C and D brought on the 20th March 1884 in which the plaintiff prayed that the sale of 10th September 1881 "be declared ineffectual and be set aside and that the plaintiff do recover possession of the property"—*Held* that the suit being not one to set aside the sale on the ground of fraud or anything connected with the sale itself but on account of the setting aside of the first sale, which



## SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

took place long after the second sale had been confirmed, and when no execution-proceedings were pending in which it was possible for the plaintiff to raise the question, the suit would lie. *Saroda Churn Chuckerbutty v. Mahomed Isuf Meah*, 11 L. R., 11 Cal., 376, distinguished. Held also that the first sale, not having been set aside at the time of the sale, was at that time, although it had not been confirmed, a good and effectual sale to pass the property as against the plaintiff and C and D, so that there was nothing left to pass under the second sale. In the interval between the sale and the confirmation of sale there is not merely a contract for sale, but an inchoate transfer of title which only requires confirmation to protect it; a sale actually takes place which, if not made absolute, must be set aside. *Sharoda Prosad Mullick v. Luchmepnt Singh Doogur*, 14 Moore's L. A., 529; 10 B. L. R., 214, cited. PRANGOUR MAZOOMDAR v. HIMANTA KUMARI DEBIA

[I. L. R., 12 Cal., 597]

## 366.

*Civil Procedure Code, ss. 311, 312—Objection to sale—Legal disability—Limitation Act (XV of 1877), s. 7—Order confirming sale before time for filing objections has expired—Appeal from order.*—Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute. An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor, who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed. Held, that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would therefore lie. Held, that, assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized guardian, and with regard to s. 7 of the Limitation Act (XV of 1877) was not barred by limitation; the judgment-debtor had therefore a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale certificate. The order disallowing the application and the order confirming the sale were set aside, and the case remanded for dis-

## SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

posal of the appellant's objections. *Phoolbas Koonour v. Jogeshur Sahoy*, 1 L. R., 1 Cal., 226, referred to. BALDEO SINGH v. KISHAN LAL [I. L. R., 9 All., 411]

## (b) IRREGULARITY.

367. ——— Objections to sale for irregularity—*Duty of Court—Procedure.*—Where a judgment-debtor objects to the sale of attached property, it is the duty of the Court executing the decree to try the validity of the objections. *GUNESH LALL TEWARÉE v. BINDOO BASHINEE*

[24 W. R., 85]

368. ——— Application to set aside sale—*Civil Procedure Code, 1859, s. 256—Procedure.*—The issue which arises when a petition is preferred under Act VIII of 1859, s. 256, is a judicial proceeding and ought to be carried out with regularity, the Court fixing a day for the hearing of the matter of the petition and giving reasonable notice to all parties,—i.e., such as would afford to each party fair and reasonable opportunity of bringing the necessary evidence on or before that day. IN THE MATTER OF THE PETITION OF BROJO MOHUN THAKOOR. BROJO MOHUN THAKOOR v. AMEENOODDEEN

[20 W. R., 424]

369. ——— Discretion of Judge—*Presentation of application.*—A Judge has discretion to receive an application to set aside a sale in execution of a decree when made to him after the lapse of thirty days, but before the confirmation of the sale. *POULSON v. DUNN*

18 W. R., 11

IN THE MATTER OF UMIETO LALL BOSE

[18 W. R., 11 note]

*Contra*, *RAJ COOMAR SINGH alias NANHO LALL v. LALLJEE SAHOO*

18 W. R., 333

where the Court, however, held that the applicant was bound to show some valid excuse for not making the application in proper time.

As to what the term "applicant" included, there were under Act VIII of 1859 diverse rulings, some holding that it was not confined to the parties to the suit, but included any person who had sustained substantial injury by reason of any material irregularity in publishing or conducting the sale. *KRISHNARAY VENKATESH v. VASUDEV ANANT*

11 Bom., 15

and others that judgment-debtors and not third parties were meant. *LUCHMEEPUT SINGH DOOGUR v. MOOKTAKASHEE DEBIA*

9 W. R., 388

S. C. upheld on review. *MOOKTAKESHEE DEBIA v. LUCHMEERUT SINGH DOOGUR*

10 W. R., 137

*JOGE NARAIN SINGH v. BHUGDANO*

[2 W. R., Mis., 13]

*PURSHOTTAM VITHAL v. PURSHOTTAM ISWAR*

[I. L. R., 8 Bom., 532]

*LUCHMEEPUT SINGH v. ADORITO CHURN MULICK*

24 W. R., 452

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## 17 SETTING ASIDE SALE—continued

HARADHON SHAMUNTO v. GOLUCK CHUNDER SHAMUNTO 25 W. R. 79

MAINA KOER v. LUTCHMEN BHUGGOTI [I. C. L. R., 250

MAN KVAR v. TARA SINGH [I. L. R., 7 All., 583

370 ——— By whom application may be made—*Objection to sale by third person—Civil Procedure Code, 1852, s. 311*—Held that persons other than the decree-holder or the persons whose property was sold in execution of decree were not competent to apply to the Court under s. 311 of the Civil Procedure Code to set aside the sale. *MAN KVAR v. TARA SINGH* I. L. R., 7 All., 583

371. ——— *Code of Civil Procedure (Act V of 1877), s. 311*—The words "any person whose immovable property has been sold in s. 311 of the Code of Civil Procedure do not include a person who has purchased the same property at a prior execution sale such prior sale not having been confirmed. IN THE MATTER OF THE PETITION OF BHAGABATI CHURN BHATTACHARJEE CHOWDHRY BHAGABATI CHURN BHATTACHARJEE CHOWDHRY v. BISNEHSWAR SEN

[I. L. R., 8 Cal., 387

C. BHAGABATI CHURN BHATTACHARJEE v. KALI KUMAR CHUTTAH 10 C. L. R., 441

372 ——— *Civil Procedure Code, 1852, s. 311*—Any person whose immovable property has been sold—*Interpretation of*—The words "any person whose immovable property has been sold," in s. 311 are sufficiently wide to include a person who is neither the decree-holder nor the judgment-debtor nor the auction purchaser, but who alleges that the property sold in execution is his. *ABDUL HUSSAIN MOZOOMDAR v. MOHINI MOHUN SHARA* [I. L. R., 14 Cal., 240

373 ——— *Civil Procedure Code, s. 311, 2<sup>nd</sup>*—Person entitled to apply to set aside sale—"Decree-holders" entitled to rateable distribution—Where one decree-holder had attached certain land, and another decree holder against the same debtor had entitled himself to rateable distribution of the assets under s. 295 of the Code of Civil Procedure—Held that the latter was entitled to apply, under s. 311 of the Code, to set aside the sale on the ground of material irregularity. *LAKSHMI v. KUTUBUNNI* I. L. R., 10 Mad., 67

ATHAPPA CHETTI v. RAMA KRISHNA NAYAKHAR [I. L. R., 21 Mad., 51

374. ——— *Civil Procedure Code, s. 311*—Objection to sale by wife of judgment debtor—A person who claims to be a purchaser from a judgment-debtor prior to an attachment is not entitled to come in under s. 311 of the Civil Procedure Code and object to the sale of the judgment-debtor's property. *ABDUL HUSSAIN MOZOOMDAR v. MOHINI MOHUN SHARA*, I. L. R., 14 Cal., 240, overruled. Rule that a person applying to set aside a sale for

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## 17. SETTING ASIDE SALE—continued

irregularity must be one who has sustained substantial injury arising therefrom, as laid down in *Jogee Narain Singh v. Bhugbano*, 2 W. R., 13, and explained by *Krishnaswar Venkatesh v. Pasumadu Anant*, 11 Bom., H. C., 15, approved. *ASMITA VISSA BEGUM v. ASHUTTA ALI*

[I. L. R., 15 Cal., 488

375 ——— *Person claiming by title paramount to, or independently of, judgment-debtor—Civil Procedure Code s. 311*—Held by *MAHMOOD J.*, that a person claiming by title paramount to, or independent of, the judgment-debtor is within the meaning of s. 311 of the Code. *ARMUSTA BEGUM v. ASHRUFF ALI* I. L. R., 15 Cal., 488, distinguished from. *ABDUL HUSSAIN MOZOOMDAR v. MOHINI MOHUN SHARA* I. L. R., 14 Cal., 240, followed. *SUREO PRASAD v. HIRA LAL* I. L. R., 12 All., 440

376 ——— *Civil Procedure Code, s. 311*—Application to set aside execution sale—*Remedy of one claiming adversely to the judgment debtor*—A person alleging himself to be the undivided brother and as such, the legal representative of a deceased judgment-debtor applied to have set aside a sale of certain property alleged by him to be joint family property, which had taken place in execution of the decree. Held that the proper remedy of the applicant was a regular suit, and not a proceeding, under Civil Procedure Code, s. 311. *SUBBARAYUDU v. PEDDA SUBBARAYUDU* [I. L. R., 16 Mad., 478

377 ——— *Civil Procedure Code, s. 311, 2<sup>nd</sup>*—"Decree-holder"—The term "decree-holder" in s. 311 of the Code of Civil Procedure is not limited to the decree holder who instituted the execution proceedings but may include a decree-holder who is entitled to come in and share in the proceeds under s. 295 of the Code. *LAKSHMI v. KUTUBUNNI*, I. L. R. 10 Mad., 67, approved. *ABDUL PRASAD v. NAND LAL SINGH* [I. L. R., 15 All., 318

378 ——— *Civil Procedure Code, s. 311*—Application to set aside sale in execution—*Decree-holder—Parties*—The decree-holder is a necessary party to an application under s. 311 of the Code of Civil Procedure. Hence where a judgment-debtor applied under the above-mentioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired,—Held that the application must be dismissed. *KARAMAT KHAN v. MIRJIDS AHMED*, Weekly Notes (All.) 1891, p. 121, referred to. *ALI GAURAH KHAN v. BANSHIDHAR* I. L. R., 15 All., 407

379 ——— *Civil Procedure Code (Act XIV of 1852), s. 311, 312, 313, 622*—Application by auction purchaser to set aside sale on ground of his having been deceived as to extent of estate sold—*Remedy of auction purchaser—Superintendence of High Court*—A purchaser at a Court sale alleging that he had been

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## 17. SETTING ASIDE SALE—continued.

misled by a misrepresentation as to the extent of the estate which he had believed to be put up for sale, obtained, on his petition before confirmation, a summary order setting aside the sale. *Held* that the High Court had rightly cancelled this order, exercising its authority under s. 622 of the Code of Civil Procedure; that the purchaser, though he would have his remedy, on his taking the appropriate one, if he had been induced by fraud to pay a larger price than he otherwise would have offered, had no right to apply under either s. 311 or 313 of the Code of Civil Procedure (as they provided only for the particular cases to which they referred); and that s. 312, in the absence of cases falling within those sections, required that the sale should be confirmed. *BRJ. MOHUN THAKUR v. RAI UMA NATH CHOWDHRY*. I. L. R., 20 Calc., 8 [L. R., 19 I. A., 154]

380. ——— Civil Procedure Code, s. 311—Objection to sale by person claiming to be the real owner—*Benamidar*, Decree against—*Per PETHERAM, C.J., and GHOSH, J. (BEVERLEY, J., dissenting)*, where immovable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale. *Asmutunnissa Begum v. Ashruff Ali*, I. L. R., 15 Calc., 488, followed. *ABDUL GANI v. DUNNE*. I. L. R., 20 Calc., 418

381. ——— Civil Procedure Code, ss. 295, 311—Rateable distribution of sale-proceeds—"Decree-holder."—A person who is not entitled to come in under s. 295 of the Civil Procedure Code and share in the distribution of the sale-proceeds is not included within the term "decree-holder" in s. 311, nor is he entitled to apply under that section to set aside the sale. *Deboki Nundon Sen v. Hart*, I. L. R., 12 Calc., 294, and *Lakshmi v. Kuttunni*, I. L. R., 10 Mad., 57, referred to. *CHATTRAPAT SINGH v. JADUKUL PRASAD MUKERJEE* [I. L. R., 20 Calc., 673]

382. ——— Civil Procedure Code (1882), s. 311—Application to set aside a sale of a tenure by a purchaser from the judgment-debtor prior to attachment.—A person who claims to be a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent is entitled to apply, under s. 311 of the Code of Civil Procedure, to set aside the sale. *Asmutunnissa Begum v. Ashruff Ali*, I. L. R., 15 Calc., 488, distinguished. *AUDHOYA DASSI v. PUNMO LOCHUN MONDOL* [I. L. R., 22 Calc., 802]

383. ——— Civil Procedure Code, s. 311—"Decree-holder"—Attaching credit of application to set aside sale.—An attaching creditor is not a "person whose immovable property is sold" within the meaning of s. 311, nor does he come within the words "the decree-holder" which

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## 17. SETTING ASIDE SALE—continued.

appear at the commencement of that section. The term "decree-holder" in s. 311 means the decree-holder who brings the property to sale and not any decree-holder. *Asmutunnissa Begum v. Ashruff Ali*, I. L. R., 15 Calc., 488, referred to. *Lakshmi v. Kuttunni*, I. L. R., 10 Mad., 57; *Ajudhia Prasad v. Nand Lal Singh*, I. L. R., 15 All., 318; and *Sorabji Edalji v. Gobind Ranji*, I. L. R., 16 Bom., 91, dissented from. *Chatrapat Singh v. Jadukul Prasad Mukerjee*, I. L. R., 20 Calc., 673; *Clark v. Alexander*, I. L. R., 21 Calc., 200; and *Har Bhajal Das Marwari v. Ananda Ram Marwari*, 2 C. W. N., 126, distinguished. *MATUNGINI DASSI v. MONMOTHANATH BOSE*. 4 C. W. N., 542

384. ——— Civil Procedure Code (1882, as amended by Act V of 1894), s. 310A—Judgment-debtor under decree on mortgage passed under Transfer of Property Act, s. 88—Effect of former application by other judgment-debtor under s. 311 of the Civil Procedure Code.—The judgment-debtor in a mortgage-decree passed under s. 88 of the Transfer of Property Act (IV of 1882) may apply to set aside a sale under the provisions of s. 310A of the Civil Procedure Code (XIV of 1882, as amended by Act V of 1894). After the rejection by the lower Court of an application under s. 310A, judgment-debtors other than the applicant made an application under s. 311 of the Code. *Held* that the present application under s. 310A was not barred by reason of the proviso to that section. *ASHRUF ALI CHOWDHRY v. NET LAL SAHU*. I. L. R., 23 Calc., 682

385. ——— Code of Civil Procedure (1882), ss. 310A and 311—Meaning of the words, "he shall not be entitled to make an application under this section" in the proviso of s. 310A—Civil Procedure Code Amendment Act (V of 1894).—The words "he shall not be entitled to make an application under this section" in the proviso of s. 310A do not mean merely "he shall not be able to present an application" under the section, but the word "make" means "carry on" or "prosecute." In a case where, after an application under s. 310A of the Code of Civil Procedure, another application was made under s. 311 of the Code, the applicant was not entitled to have the benefit of the former section. *RAJENDRA NATH HALDAR v. NILRATAN MITTER*. I. L. R., 23 Calc., 958

386. ——— Civil Procedure Code (Act XIV of 1882), s. 310A—Right of a mortgagee to the benefit of s. 310A.—A mortgagee, being a party to a suit, objected that the mortgage premises had been attached and sold in execution of the decree, and applied to have the sale set aside on payment being made by him under Civil Procedure Code, s. 310A. The purchaser was the decree-holder. The application having been refused by the Courts of first instance and first appeal, the applicant appealed to the High Court. *Held* that the appeal was maintainable, and the appellant

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## 17 SETTING ASIDE SALE—continued

was entitled to the relief sought. **SRINIVASA AYYANAR v AYYATHOORI PILLAI**

[I. L. R., 31 Mad., 418]

387.

Civil Procedure

Code (Act XIV of 1852), s 310A—Sale in execution of mortgage-decree—Application by mortgagee under s 310A, Civil Procedure Code—Transfer of Property Act (IV of 1882), s 104, Rules framed under—Civil Procedure Code Amendment Act (V of 1894)—Held by the Full Bench: S 310A of the Civil Procedure Code (Act XIV of 1882, as amended by Act V of 1894) does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882). The rules framed by the High Court (Circular order No. 13 dated 27th April 1892) under the provision of s 104 of the Transfer of Property Act do not make s 310A applicable to such sales. **Astraf Ali Chowdry v Net Lal Sahu**, I. L. R., 23 Cal. 652 overruled. **Raja Ram Nandy v Channu Lal**, I. L. R. 19 All. 205, disented from. *Quere*—Whether a rule by the High Court under s 104 of the Transfer of Property Act making s 310A of the Civil Procedure Code applicable to sales of mortgaged property under the said Act would not be *ultra vires*. **KEDAR NATH RAUT v KALI CHURN RAM**

[I. L. R., 25 Cal., 703]

2 C. W. N., 353

<sup>1</sup> See **DAKSHINA MOHUN LOY v BASUMATI DEBI** [4 C. W. N., 474]

where this case is explained and where it was held that s 104 of Transfer of Property Act is an enabling section and the rules made by the High Court (Circular order No. 13, dated 27th April 1892) under the provision of s 104 do not limit the applicability of the Code of Civil Procedure as regards sales held in execution of mortgage decrees.

388.

Civil Procedure

Code (Act XIV of 1852), s 310A—Right to apply under the section—Person who has contracted to purchase land—A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner in equity of such land or such interest (s. 64 of the Transfer of Property Act, IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract; but he has no direct right over the land. *Held* accordingly that a person who had contracted to purchase certain land which was subject to mortgage and was sold in execution by the mortgagee was not the owner of the land, and was therefore not entitled to apply to set aside the sale under s 310A of the Civil Procedure Code. **MAHABHO CHRISTIAN WADKAR v JASUDY J. KIRTIKAR**

I. L. R., 23 Bom., 181

389

Civil Procedure

Code, 1852 s 310A—Civil Procedure Code Amendment Act (V of 1894)—Execution-sale—Person whose immovable property has been sold—

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

private purchaser of property sold in execution—A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor is not entitled under s 310A of the Civil Procedure Code to have the execution sale set aside. **KAMCHANDRA DHONDO v KATIMANAI**

[I. L. R., 23 Bom., 450]

390.

Civil Procedure

Code, 1852, s 310A—Right of tenant to apply to set aside sale—A tenant of a person whose immovable property is sold has a right to apply to have the sale set aside under s 310A of the Code of Civil Procedure. **HARI PODDAR v. RAM KRISHNA PODDAR**

1 C. W. N., 135

391.

Civil Procedure

Code (Act XIV of 1852), s 310A—Application to set aside sale by purchaser from judgment-debtor after execution sale. A purchaser of a private sale from the judgment-debtor after sale in execution has no locus standi to make an application under s 310A of the Civil Procedure Code. **HASANI RAM v. BAKRI RAM**

1 C. W. N., 278

392.

Civil Procedure

Code (1852), s 311—Application by person not party to decree—Land having been sold in execution of decree, one claiming that it had been held by the judgment debtor benami for him applied that the sale be cancelled under s 311. He was not a party to the decree, and on that ground his petition was dismissed. *Held* that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under s 311. **TIMMANA HANTA v. MAHABALA BHATT**

[I. L. R., 18 Mad., 167]

393.

Civil Procedure

Code (1852), s 311—Application to set aside sale in execution—Plea to jurisdiction of Court to sell—Civil Procedure Code s. 320—Held that in an application under s 311 of the Code of Civil Procedure to set aside a sale in execution of a decree, it is not competent to the applicant to raise, or to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of s. 320 of the Code. **SHAIK BEGAM v. AGRA ALI KHAN**

[I. L. R., 18 All., 141]

394.

Application to

set aside sale—Grounds which alone may be taken—A Court to which an application under s 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale together with consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. **Tassaddat Rasul Khan v. Ahmad**

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*Husain, I. L. R.*, 21 Cal., 66 · *L. R.*, 20 I. A., 176, and *Shirin Begam v. Agha Ali Khan, I. L. R.*, 18 All., 141, referred to. *HARBANS LAL v. KUNDAY LAL* . . . *I. L. R.*, 21 All., 140

395. ——— *Civil Procedure Code, s. 311*—*Person whose property has been sold—Mortgagee—Transfer of Property Act (IV of 1882), s. 86* 87—The mortgagees of a certain tenure obtained, on 11th September 1881, under s. 8 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held* that, under s. 80 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application. *RAKHAL CHUNDER BOSE v. DWARKA NATH MISSEK* . . . *I. L. R.*, 13 Cal., 346

398. ——— *Right to have sale set aside as against bonâ fide purchaser—Question of right how to be determined*—It cannot be laid down as a general proposition of law that under no circumstances can a sale in execution of a decree be set aside as against a *bonâ fide* purchaser for valuable consideration and without notice. In a suit brought to set aside such a sale, it is for the Court to determine whether it will be in accordance with the principles of justice, equity, and good conscience that the sale ought to be set aside or not. *ABDUL HYE v. NAWAB RAJ* . . . *B. L. R.*, Sup. Vol., 911

*S. C. ABDUL HYE v. NAWAB RAJ* 9 W. R., 196

397. ——— *Evidence of irregularity—Objections to sale-proceedings*—Where objections to sale proceedings are presented by judgment-debtors, the Court ought to make a careful investigation into the circumstances attending such sale, and not rely on the mere report of a nazir. *SOORH RAJ SINGH v. TUFFAZZOL HOSSEIN*

[2 N. W., 142]

398. ——— *Finding as to irregularity—Civil Procedure Code, 1859, s. 256—Material injury*—On an application to set aside a sale of immoveable property in execution of a decree under s. 256, Act VIII of 1859, before ascertaining whether any substantial injury has accrued to the debtor, it was held that the Court must come to a distinct finding that there has been an irregularity in publishing or conducting the sale. *PARBUTTY v. GIRDAREE LAL* . . . 6 W. R., Mis., 125

399. ——— *Objections to sale being made absolute—Civil Procedure Code, 1859,*

# SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued.

ss. 256, 257.—Objections by the judgment-debtor to sale in execution of decree being made absolute could be raised and disposed of only under ss. 256 and 257 of the Code of Civil Procedure, under which a sale could be set aside on the ground of material irregularity in publishing or conducting it. *NM KOMUL CHUCKERBUTTY v. SHAMA SOONDUREE* [6 W. R., Mis., 46]

*VIRISINGAPPA BIN BASLINGAPPA v. SADASHIVAPPA APPA GOKHANDI* . . . 7 Bom., A. C., 74

400. ——— *Ground for setting aside sale—Allegation of having no interest to sell—Sale by representative of debtor*—An allegation by a representative that he took nothing from the judgment-debtor, and that therefore the sale conveyed nothing, is an objection which must be raised before the sale in execution, and is not a ground for setting aside the sale for irregularity. *CHOWDHRY WAHID ALI v. JUMAYE* . . . 6 W. R., Mis., 116

401. ——— *Civil Procedure Code (1859), ss. 311 and 224—Omission to transmit certificate to Court executing decree*—The omission to transmit to the Court executing the decree the certificate required by s. 224, Civil Procedure Code, is a mere irregularity which would not vitiate the sale. *ABBUBAKER SAHEB v. MOHIDIN SAHEB* . . . *I. L. R.*, 20 Mad., 10

402. ——— *Insanity of judgment-debtor intervening before sale—Necessity to prove substantial injury—Civil Procedure Code, s. 311*—A suit was brought by T to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he had been declared insane under Act XXXV of 1858. The second defendant was the auction-purchaser. *Held* by BESY, J., that objection could be taken under s. 311, Civil Procedure Code, on the above ground before the sale had been confirmed and certificate granted. *Held* by SUBRAMANYA AYYAR, J., that these facts only amounted to a material irregularity within s. 311, Civil Procedure Code, and that the plaintiff must prove substantial injury. *NARAYANA KOTHAN v. KALIANASUNDARAM PILLAI* . . . *I. L. R.*, 19 Mad., 219

403. ——— *Omission to make attachment*—It was doubted at one time whether a sale could be set aside by reason of an omission to attach the property. *JOWHROOZ ZUAGIA KHAN v. BANEE MADHAB NUNDUN* 11 W. R., 226

404. ——— *Civil Procedure Code, 1859, s. 201—Sale without attachment—Irregularity*—No sale in execution of a decree can take place, either of moveable or immoveable property, under the provisions of Act VIII of 1859, without previous attachment, and a sale without prior attachment is illegal. The words "attachment and sale" in s. 201 must be taken together, and not distributively. *LUCHNEEPUT v. LEKRAJ ROY* . . . 8 W. R., 416

405. ——— *Sale of property without attachment—Decree for money—Invalidity*

# SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued

of sale—*Civil Procedure Code, Ch XIX and s 205*—A regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money and where there has been no such attachment any sale that may have taken place is not simply voidable, but *de facto* void. *MAHADEO DUBEY v BHOLA NATH DICKIT*

[I L R, 5 All, 86]

400 — *Effect on sale when confirmed of the absence of attachment*—After a sale has been confirmed and a sale-certificate granted to the purchaser the sale is not to be considered as annulled merely by reason of the absence of any attachment. *Sharada Mohee Burmonee v Wooma Mohee Burmonee 5 W R 9*, followed. *Mahadeo Dubey v Bhola Nath Dickit, I L R, 5 All 86*, disented from. *KISHORY MOHUN ROY v MAHAMED MOJIB FAR HOSSAIN* I L R, 18 Cal, 189

407 — *Omission to attach property second time*—Sale without attachment—Property already under attachment at the suit of the creditor to enforce part of a debt accrued due in a mortgage transaction at an earlier period was sold in satisfaction of his decree for instalments subsequently due by the same debtor. A second attachment would have been a mere formality, and was no material to the validity of the sale. *DODDABAI v ISHWARDAAS JAGJIVANDAS*

[I L R, 15 Bom, 222  
I L R, 18 I A, 23]

408 — *Attachment before judgment—Termination of attachment—Sale in execution—Material irregularity in publishing or conducting sale without attachment*—*It occurs—Civil Procedure Code ss 311 453*—The plaintiff instituted a suit against defendants for recovery of money and previous to judgment that is, on the 8th of January 1887, applied for, and on the 11th obtained an order for attachment of several houses and premises belonging to defendant, and such attachment was made. The suit was dismissed, but even tually on appeal it was decreed but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be noised for sale on the 1st February 1897, and accordingly on the 21st December 1890 a sale notification was issued. The judgment-debtor twice applied for postponement of sale but his applications were refused, and the sale took place on the date fixed. The judgment debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree and the attachment previous to judgment was infructuous, because afterwards the claim was dismissed by the Court of first instance; that there had been several other irregularities in publishing and conducting the sale, and that owing to the irregularities, the property had been sold at a grossly inadequate price, causing substantial injury. The Subordinate Judge overruling the objection confirmed the sale. On appeal by the judgment-debtor,—

# SALE IN EXECUTION OF DECREE

—continued

## 17 SETTING ASIDE SALE—continued

Held following *Mahadeo Dubey v Bhola Nath Dickit, I L R, 5 All, 86*, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money, and where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void and may be set aside without any injury as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment like a temporary injunction becomes *functus officio*, as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s 311 of the Code of Civil Procedure should be liberally construed and that absence of attachment of property at the time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money-decree has to take to assert its authority to bring property to compulsory sale. *I AM CHAND v PITAM MAL*

[I L R, 10 All, 506]

409 — *Omission to attach property—Decree on mortgage*—The omission to cause an attachment to be made in execution of a decree for the realisation of a mortgage-debt does not affect the validity of a sale of the mortgaged property in execution of such decree. *TINCOTRI DEBBA v SHRI CHANDRA PAL CHOWDHURY*

[I L R, 21 Cal, 639]

*MUNIAPPA NAIE v SUBRAMANIA AYYAN*

[I L R, 18 Mysd, 437]

410 — *Sale in execution held in pursuance of an attachment made under a wrong section of Civil Procedure Code—Civil Procedure Code ss 205 and 214—Irregularity in a sale*—Held that a sale of the mortgagor's rights under a mortgage duly held and confirmed was effectual to pass the mortgagor's rights to the auction-purchaser, even though the attachment subsequent to which such sale was held might have been made under a wrong section of the Code of Civil Procedure. *Balkrishna v Masama Bibi, I L R, 5 All, 133*  
*I L R, 9 I A, 192*, *Mahadeo Dubey v Bhola Nath Dickit, I L R, 5 All, 86*, *Ram Chand v Pitam Mal, I L R, 10 All, 506*, and *Karim v Karim v Pahal Chand, I L R, 15 All, 131*, referred to. *SHRO CHARAN LAL v SHRO SEWAK LAL*

[I L R, 18 All, 469]

411 — *Sale without previous attachment—Material irregularity*—Held that the absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. *Ram Chand v Pitam Mal, I L R, 10 All, 506*, *Ganga Prasad v Jag Lal Bai, I L R, 11 All, 333*, *Harbans Lal v Kuntan Lal, Weekly Notes, All, 1998, 312*, and *Tessendek Ravel Khan v Ahmad Hussain, I L R, 21 Cal, 66*, referred to. *Mahadeo Dubey v Bhola Nath*

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

*Dichit, I. L. R., 5 All., 86, distinguished.* SHEO-DHYAN v. BHOJANATH . . . I. L. R., 21 All., 311

412. — *Irregular attachment—Civil Procedure Code, 1859, s. 285.*—The attachment of immovable property by a Court other than that which passed the decree, before the decree had been sent to it for execution, vitiates the sale subsequently made of that property as not being made in strict observance of the procedure prescribed by s. 285, Act VIII of 1859. SHURTOOLLAH MERDHA v. GOOROO CHURN DASS . . . 8 W. R., 310

MOOKTA KESHEE DEBEE v. KUNICK MONEE DEBEE . . . 7 W. R., 267

See MOOKTAKESHEE DEBIA v. LUCHMEET SINGH DOOGUR . . . 10 W. R., 137

Upholding on review LUCHMEET SINGH v. MOOKTAKASHEE DEBIA . . . 9 W. R., 388

413. — *Process issued simultaneously and not successively.*—In the case of movable property, process of attachment and sale may be issued successively or simultaneously; but in regard to immovable property, process of attachment and sale should be issued successively; but if issued simultaneously, and the attachment has been made *bona fide*, and the sale proclamation issued as required by law, with an interval of thirty days between it and the sale, such irregularity is not a sufficient ground for setting aside the sale, as no material injury could accrue to the debtor thereby. HURO SOONDUREE DEBIA v. BROJO GOBIND SHAHA [4 W. R., Mis., 12

414. — *Irregularity in attachment—Civil Procedure Code, 1859, ss. 235, 259, 256.*—On an application made to a Principal Sudder Ameen for execution of a decree against a judgment-debtor's estate situate in a different district, that functionary caused a prohibitory order under s. 235, Act VIII of 1859, to be issued through the Judge of the other district, after which, without further procedure, under s. 285 and the sections following, or further attachment, the property was put for sale and purchased, no certificate under s. 259 being given to purchaser. *Held* that the sale was illegal, and that there had been no valid transfer of right, title, and interest in the property. LUCHMEET SINGH DOOGUR v. MOOKTAKASHEE DEBIA [9 W. R., 388

S. C. upheld on review MOOKTAKASHEE DEBIA v. LUCHMEET SINGH DOOGUR . . . 10 W. R., 137

415. — *Irregularity in attachment—Attachment of debt—Civil Procedure Code, 1877, ss. 268, 278, and 287—Proclamation of sale.*—A decree-holder, by a prohibitory order issued under s. 268 of the Civil Procedure Code, attached a debt due to his judgment debtor. The person served with the order applied, under s. 278, to have the attachment removed. *Held* that the application could not be entertained under s. 278, that section having no application to the case; but that,

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

before issuing a proclamation of sale, in execution of a decree, of the debt so attached, it is the duty of the Court, under s. 287 of the Code, to ascertain all that the Court considers it material for the intending purchaser to know in order to judge of the nature and value of the property proclaimed for sale. If the property of which sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to sale. HARILAL v. ABHESING MERU . . . I. L. R., 4 Bom., 323

416. — *Irregularity in issue of notification of sale and attachment—Misconduct of decree-holder.*—Before a sale is confirmed, a party objecting to the irregularity of the sale proceedings, on the ground that the notification of sale and attachment has not been properly issued, should be allowed proof of non-service or of insufficient service. The misconduct of a decree-holder may be a good cause of action, but cannot be a ground for setting aside a sale. This can only be done summarily if irregularity in the sale-proceedings resulting in material injury to the debtor be proved. RETHBUNJUN SINGH v. MITTUNJEET SINGH [4 W. R., Mis., 9

417. — *Irregularity in service of prohibitory order—Act VIII of 1859, ss. 236 and 243—Purchase of property by decree-holder—Practice of English Courts.*—In execution of a decree, the defendant caused a decree of the plaintiff awarding him Rs 925 to be attached, and, under s. 236, Act VIII of 1859, caused the prohibitory order to be fixed in a conspicuous part of the Court-house, and copies thereof to be delivered to the judgment-debtors. The decree was subsequently sold by auction, and the defendant purchased it for Rs 20. On special appeal by the plaintiff, upon the ground that the sale was irregular, as the prohibitory order had not been served upon him, *Held* that the prohibitory order having been served in accordance with the provisions of s. 236, Act VIII of 1859, was legal and regular. *Held* also that the Court executing the defendant's decree ought not to have sold the plaintiff's decree, but should have, under s. 243, appointed a manager to enforce plaintiff's decree. That a decree-holder ought not to be allowed to bid and purchase at a sale in execution of his decree, without an order of Court previously obtained upon notice to the judgment-debtor. Practice of English Courts regarding sale in execution of decrees discussed. BANDHU ROY v. HANFMAN SINGH [3 B. L. R., A. C., 320; 14 W. R., 408 note

418. — *Irregularity in applying for execution of decree—Act VIII of 1859, s. 257.*—G and M obtained a money-decree against K in the Court of the Principal Sudder Ameen on the 12th December 1864. This decree was reversed by the District Judge, but on the 5th March 1866 the Sudder Court set aside the Judge's decree

## SALE IN EXECUTION OF DECREE

—cont *next*17 SITTING ASIDE SALE—*continued*

and ordered a new trial. On the 5th May 1866 the District Judge affirmed the decree of the Court of first instance. On the 3rd December 1866 the High Court again set aside the Judge's decree and ordered a new trial. On the 11th January 1867 the District Judge again affirmed the decree of the Court of first instance and no appeal being preferred the decree became final. The decree holders had in the meantime taken proceedings to execute the decree dated the 5th May 1866 and from time to time and finally on the 7th November 1870 they renewed these proceedings in each instance referring to the decree dated the 5th May 1866 even after it was set aside, and the decree dated the 14th January 1867 passed. On the last application a sale of certain moveable property belonging to K was ordered and took place on the 10th February 1871. A objection to the confirmation of the sale on the ground of the irregularity in the application but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction purchaser on the ground that the sale was a nullity. *Held per STUART C.J. and PARSONS JENYER, and STANLEY J.J.* that the sale on that point to be set aside as the mortgagee's application for execution of the decree dated the 5th May 1866 was an irregularity which did not prejudice the judgment-debtor. *Per OLDFIELD J.* That with reference to s 257 Act VIII of 1864 the suit was not maintainable. **GHAI R KHAN BAKSH** I L R., 1 All., 212

419 — *Irregularity in attachment Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code 1852 ss 276 311 312.*—*Held* that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety that he was no party to the decree and his property was not liable to be attached and sold and therefore the sale was invalid was not an objection entertainable under s 311 of the Civil Procedure Code and was consequently no ground for setting aside the sale under that section especially as it was referred for the first time on appeal and no recovery might have been taken under s 278 at the time of attachment when the objector would have had his remedy as therein provided. **HIS LAL & KANTHA LAL** I L R., 7 All., 365

420 — *Sale of property other than that hypothecated—A decree-holder is not precluded from taking any of his judgment-debtor's property in execution of his decree merely because he had a lien on particular property. A sale therefore is not liable to be set aside because the property sold was other than that hypothecated in the bond.* **MAJEE & SADDI HOSSAIN** [4 N W., 89

421.

*Property of third person—Procedure Code 1859 s 278—Decree transfers to the*

*sale of suit—Civil Procedure Code—A sale in execution of nothing more than*

## SALE IN EXECUTION OF DECREE

—*continued*17 SITTING ASIDE SALE—*continued*

the rights and interests of the judgment-debtor at the time of attachment and sale; and s 252 of Act VIII of 1864 did not prohibit an enquiry into the extent of those rights or declare the owner of the property attached in execution of a decree passed against a third party, incompetent to assert his claim by suit. The sale of moveable property, belonging to a third party in execution of a decree, was not a mere irregularity within the meaning of s 252 and the owner of the property so sold was entitled to sue for its restoration, or for damages thereon. **SHAM SUNDAR DASS & RAHEEM DUKHAN**

[6 N W., 253

MOHAMMUD HOLLAR &amp; ABIAL MEHALDAR

[9 W R., 118

422

*Sale of portion*

*of tenure under decree for rent—Sale of other portion under mortgage decree—Where decrees for arrears of rent had been obtained by fractional shareholders in a tenure and in execution thereof a moiety of the tenure had been sold, it appeared that the other moiety had been sold at the same time in execution of a mortgage-decree against some of the judgment debtors in the rent suits on an objection being taken to the confirmation of such sale on the ground that the whole tenure should have been sold in execution of the rent-decrees. Held that all that the decree-holders were entitled to have sold was the right title and interest of their judgment debtors, and that they were in the position of ordinary creditors having no lien on the tenure and that consequently the mortgagee being entitled to enforce his lien against the moiety covered by his mortgage the sale of the remaining moiety in satisfaction of the rent-decrees was a pool sale and could not be set aside. **MOHAMED COOMAR DUTT & HERRA MOHAMED COOMAR ISHAHESWART DASS & GOPAL DAS DUTT***

[L L R., 7 Cal., 723

423

*Sale of who's*

*estate where a portion would suffice—A Subordinate Judge on the application of a judgment-creditor, ordered the attachment and sale of an in-lieu concern consisting of several factories and fixed the 4th March for the sale. Shortly before the date so fixed, he issued a direction to the District Judge to order that the sale should be effected in portions to be sold in successive proceedings to his own Court, and issued a *revoke* declaring the Subordinate Judge's order null and void, and ordering the property to be sold on the day fixed in one lot. This was accordingly done. Held that it was entirely within the Subordinate Judge's discretion to direct that the property should be sold in portions even though it had been attached or proclaimed as an entirety. Held that, as it is damage to a person to have his whole property sold, against his will to satisfy the claims of a creditor when the sale of a portion would suffice, the irregularity committed by the District Judge caused material injury to the judgment debtors. **ABDOOL HEE & MAJID***

[23 W R., 1



# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

Confirmed on review, MORGAN v. ABDOL HYE  
[23 W. R., 393]

424. ————— *Material irregularity in publishing or conducting sale in execution—Objection that property sold was not legally saleable—Civil Procedure Code, 1882, ss. 244, 311, 312.*—An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s. 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal v. Khalu Ram, I. L. R., 6 All., 448, and Janki Singh v. Abulali Singh, I. L. R., 6 All., 393, distinguished.* *Per MAHMOOD, J.*—The expression “conducting the sale,” as used in s. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts v. Mahabir Pershad, L. R., 10 I. L., 25, referred to, RAMCHHAIBAR MISR v. BECHU BHAGAT [I. L. R., 7 All., 641]*

425. ————— *Device for sale of mortgaged property and for costs—Attachment and sale of other property for whole amount of decree—Suit to set aside execution sale—Civil Procedure Code, 1882, ss. 311, 312—Finality of order in execution proceedings.*—In execution of a decree on a mortgage-bond, for the sale of the mortgaged property and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached on the 30th September 1881, which were not part of the mortgaged property. On an objection raised by the judgment debtors that the decree was by its terms executable only against the mortgaged property, the High Court on appeal decided, on the 6th September 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June 1882, the houses had been put up for sale and purchased for Rs. 500, and the sale had been confirmed on the 16th August 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree. *Held* that the decree, in regard to costs, was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment debtor. *Per OLDFIELD, J. (MAHMOOD, J., doubting), that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed. Per MAHMOOD, J., that the suit was maintainable, and was not barred by any plea in limine Abdul Hye v. Nawab Raj, B. L. R., Sup. Vol., 911, referred to. Also per MAHMOOD, J., that inasmuch as the adjudication of*

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

the 6th September 1882 was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale, but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser. Also *per MAHMOOD, J.*, that it was doubtful whether, the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself were valid; but that everything that was said against these proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale, and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of “material irregularity in publishing or conducting” the sale, within the meaning of s. 311, a suit like the present, upon that ground alone, was prohibited by the last part of s. 312. *RAGHUBAR DIAL v. ILAH BUKSH . . . I. L. R., 7 All., 450*

426. ————— *Omission to give due notice of sale—Material injury.*—Where, in an execution sale, there had been some irregularity which left it doubtful whether the judgment-debtor had been duly apprized of the sale of his dwelling-house, —*Held* that the irregularity had caused material injury to the judgment-debtor, and that the sale must be set aside. *JOYNARAIN GIRI v. GOLUCK CHUNDER MYTEE . . . 25 W. R., 183*

427. ————— *Omission to give notice of execution—Civil Procedure Code, 1877, s. 248.*—An omission to give notice to the party against whom execution is proceeding, as provided by s. 248 of the Civil Procedure Code, invalidates a sale in execution of the decree. *IN THE MATTER OF THE PETITION OF RAMLASSURI DASSEE, RAMLASSURI DASSEE v. DOORGADASS CHATTERJEE [I. L. R., 6 Cal., 103; 7 C. L. R., 85*

*Contra, MUTASA v. MAHOMED AKBAR GAZRE [2 W. R., 74]*

428. ————— *Omission to give notice of application for execution.*—The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the regularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution proceedings. *Ramessuri Dass v. Doorgadass Chatterjee, I. L. R., 6 Cal., 103, followed.* *Held* therefore where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877 was not given to such legal representative, and certain immovable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission. *Quare—*

## SALE IN EXECUTION OF DECREE

—continued

## 17 SETTING ASIDE SALE—continued

sufficient to satisfy the requirements of just re. GOVIND CHANDER MOOKERJEE v. RAM KUMAR CHATTERJEE 25 W. R., 864

446 — *Irregularity in publication of sale—Beng. Reg. XLV of 1793, s. 12* — *Delay* — A suit was brought in 1852 to set aside an execution sale made in 1841 on the ground of irregularity in not complying with the provisions of Bengal Regulation XLV, s. 12 of 1833, for the due publication of the sale. A summary suit under Bengal Regulation VII of 1856 s. 6, had been brought shortly after the date of the sale by the judgment-debtor, to set it aside on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852 that the notice of sale was affixed at the dwelling house of the judgment-debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852 that there was a town or village where the notification could be fixed as required by s. 12 Bengal Regulation XLV of 1793. The Sudder Court held that there had been an irregularity in the publication of the notice of sale, as it was not made within the ambit of the estate sold, and set the sale aside on that ground. On appeal, — *Held* by the Judicial Committee reversing such decree, first, that as it did not appear that there was any town or village within the pergunnah at which the notification required by the provisions of Bengal Regulation XLV of 1793, s. 12, could be affixed, there had been no irregularity in posting the notice at the house of the judgment-debtor, so as to vitiate the sale, and secondly, that even if there had been an informality in that respect it ought to have been objected to in the summary suit brought in 1841 and could not be opened eleven years afterwards. LAMB v. BHOJ HISHAR DASS 8 Moore's L. A., 427

447 — *Irregularity in publication of sale—Execution-sale of groups of property under one decree—Irregularity and damage, their necessary relation. Code of Civil Procedure (Act XIV of 1859), ss. 289 and 311* — The words "on the spot where the property is attached" in s. 289 of the Civil Procedure Code refer to each property attached, and not to a group of separate properties attached under one proceeding or order in one execution case, and therefore when distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation to each of such properties amounts to an irregularity in the publication of the sale. *Held* also that, where there is no evidence to connect the two elements of irregularity and injury under s. 311, it must appear before a Court can set aside an execution-sale that the injury complained of is the reasonable and natural consequence of the irregularity, and attributable to it alone. TRIPURA SUNDARI v. DURGACHAND PAL [I. L. R., 11 Cal., 74]

448. — *Irregularity in publication of sale—Material irregularity—Civil*

## SALE IN EXECUTION OF DECREE

—continued.

## 17 SETTING ASIDE SALE—continued.

*Procedure Code (Act X of 1877), ss. 274, 290, 311* — Under ss. 289 and 274 of the Civil Procedure Code, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place on the property attached, and the omission to do so is a material irregularity within the meaning of s. 311 of the Code of Civil Procedure. KALYTARA CHOWDHURY v. RAM GOOMAR GOOPTA [I. L. R., 7 Cal., 486; 9 C. L. R., 114]

449 — *Irregularity in publication of sale—Material irregularity—Civil Procedure Code (Act X of 1877), ss. 287, 293* — Upon an application to set aside a sale in execution of a decree, on the ground of material irregularities in publishing and conducting it, it appeared that the sale-notification had not been fixed up in the Collector's office as required by s. 289 of Act X of 1877; that no affidavit as to search having been made in the Registry office with regard to incumbrances as required by s. 287 of the Act had been filed; and that the sale took place on, and not after, the thirtieth day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities. *Held* that there was no ground for setting aside the sale. DANDY ALL v. MADHUR CHANDER NAG [I. L. R., 8 Cal., 832]

450 — *Proclamation of sale—Civil Procedure Code (Act XIV of 1882), ss. 289, 311—Substantial injury—A sale of revenue-paying land is not, pro facto void by reason of a copy of the sale-proclamation not having been fixed up in the Collector's office as required by s. 289 of the Code of Civil Procedure. An omission so to fix up such notice is an irregularity, the remedy for which can only be by an application under s. 311. NANA KUMAR ROY v. GOLAN CHANDER DEY [I. L. R., 18 Cal., 423]*

451. — *Irregularities in publication of sale—Evidence of such irregularities—Affixing proclamation of sale—Nana's report—Civil Procedure Code (Act X of 1877), ss. 274, 290, 291, and 295—Sale to satisfy judgment-creditor who has not attached.—The proclamation of sale required by s. 274 of the Civil Procedure Code, to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court house as required by s. 290. Three months were attached in execution of decrees obtained by A and B. Prior to the sale, C, who had also obtained a decree against the owner of the land applied for leave to execute his decree, in order that he might participate in the sale-proceeds under s. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the months were sold,*

## SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

and realized more than enough to satisfy the decrees of A and B. The third was then sold in satisfaction of C's decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars, was given, and the mortgagee was allowed to purchase; and that the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its insufficiency. *Held* that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities. *Held* also that the Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was bound to hear the evidence tendered by the judgment-debtor, though he was justified, under s. 291, in postponing the sale as he had done. *Held* further that the third judgment-creditor, who had not attached the property, was still entitled to have the sale proceeded with and his decree satisfied under the provisions of s. 295.

MEGH LALL POOREE v. SHIB PERSHAD MADI  
[I. L. R., 7 Calc., 34]

S. C. MEGH LALL POOREE v. MOHAMMED DUTT JHA  
[8 C. L. R., 369]

452. — *Irregularity in publication of sale—Civil Procedure Code, ss. 274 and 289—Omission to beat drum—Material irregularity.*—Omission to have a drum beaten as required by ss. 289 and 274 of the Civil Procedure Code (Act XIV of 1882) *held* to be a material irregularity so as to render a sale held in execution of a decree liable to be set aside. TRINBAK RAYJI v. NANA . . . I. L. R., 10 Bom., 504

453. — *Irregularity in publishing and conducting a sale—Waiver of irregularity by the judgment-debtor.*—Previous to the date fixed for the sale of certain property in execution of a decree, the judgment-debtors presented a petition, praying for a month's further time to be allowed them in order that they might complete the arrangements they were making for the purpose of paying off the debt, and stating that the decree-holders had attached and advertised the property for sale. That petition being refused, the sale took place; and subsequently the judgment-debtors came in and objected to the sale, and asked to have it set aside, on the ground that there had been material irregularity in the publication of the attachment and sale-proclamation, and that consequently they had

## SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

suffered substantial injury. The Subordinate Judge refused to hear evidence on this point, holding that the petition was an admission that the proceedings were in order. *Held* that the petition presented prior to the sale did not amount to an admission by the judgment-debtors that the publication and proclamation of the sale had been duly made; and that consequently the Court was bound to hear the evidence tendered by the judgment-debtors on that point, and to find whether there had been such irregularities in publishing and conducting the sale as to occasion substantial injury to the judgment-debtors. *Girdhari Singh v. Hurdeo Narain Singh, L. R., 3 I. A., 230, distinguished.* THAKOOR MAHATAR DEO v. LEELANUND SINGH

[I. L. R., 7 Calc., 613; 9 C. L. R., 398]

454. — *Irregular publication of proclamation of sale—Sale held too soon after proclamation.*—It is a material irregularity for the proclamation to be published less than thirty days prior to a sale in execution of a decree, and where damage has resulted, the sale may be set aside. *Megh Lal Pooree v. Mohammed Dutt Jha, 8 C. L. R., 369; I. L. R., 7 Calc., 34, followed.* ABDUL NOSSIA v. DOOLAL DOSS . . . 11 C. L. R., 303

*Contra, RAMCHANDAR BAHADUR v. KAMTA PRASAD . . . I. L. R., 4 All., 300*

455. — *Sale held too soon after proclamation—Sale of immovable property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, 1882, ss. 290, 311.*—An infringement of the rule contained in s. 290 of the Civil Procedure Code is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers. *BAKHSI NAND KISHORE v. MALAK CHAND*  
[I. L. R., 7 All., 289]

456. — *Civil Procedure Code, s. 306—Delay in making deposit—Adjournment of sale—Absence of substantial injury.*—The commencement of a Court-sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by s. 306, or the adjournment of the sale from time to time without sufficient ground, is not more than a mere irregularity and does not vitiate the sale. *VENKATA v. SAMA*

[I. L. R., 14 Mad., 227]

457. — *Civil Procedure Code, 1882, ss. 290, 311—Material irregularity—Proof of substantial injury.*—The non-compliance with the requirement of s. 290 of the Civil Procedure Code that before sales of immovables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of s. 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this, the

## SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued

latter section requires affirmative evidence. **TARAD-DUX BASUL KHAN v. AHMAD HUSAIN**

[I. L. R., 21 Calc., 88

I. R., 20 I. A., 178

458

*Civil Procedure Code s. 311—Material irregularity in publishing or conducting sale—Substantial injury—Notification omitting to state place of sale—Sale held after date advertised—Civil Procedure Code, ss. 287 & 290—Where a proclamation of sale of immovable property in execution of a decree omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty days required by s. 29 of the Civil Procedure Code—Held that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than mere irregularity, that it must have caused substantial injury, and that the order confirming the sale must be set aside. **Bakshi Nand Kishore v. Malak Chand, I L. R., 7 All., 289** referred to. **Per MAHMOOD, J.**—Quere whether material irregularities such as the above were not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale, without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph. **JASODA v. MATHURA DAS I L. R., 9 All., 611***

459.

*Civil Procedure Code, 1882, s. 290—Ground for setting aside sale—The infringement of the provisions of s. 290 of the Civil Procedure Code is not a mere irregularity but it vitiates the sale. **Bakshi Nand Kishore v. Malak Chand, I L. R., 7 All., 289** **SADHUSARAN SINGH v. PANCHDEO LAL I L. R., 14 Calc., 1***

460 —

*Civil Procedure Code, ss. 290, 311—Sale of immovable property in execution of decree—Sale held before expiration of thirty days from the proclamation—Application by judgment-debtor to set aside sale—“Illegality”—Material irregularity—Proof of substantial injury whether necessary—Where a sale of immovable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor—Held by **EDGAR, C.J.** (**BRODURST, J.** dissenting), that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury. **Held by BRODURST, J.** contra, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a “material irregularity” within the meaning of s. 311, that expression being wide enough to include illegality, and that, before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury*

## SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued.

by reason of such irregularity. **Olphert v. Mahabir Pershad Singh L. R., 10 I. A., 25, Megh Lal Poores v. Shih Pershad Madi, I. L. R., 7 Calc., 84, Kalyana Choudhury v. Ramcomar Gopla, I L. R., 7 Calc., 466; Tripura Sundari v. Durga Churn Pal, I L. R., 11 Calc., 74; Bonomali Mozumdar v. Womesh Chunder Bandopadhyay, I L. R., 7 Calc., 730; Bandy Ali v. Madhab Chunder Nag, I L. R., 8 Calc., 932; Nottin v. Harbany, Weekly Notes, All., 1885, p. 394, Jasoda v. Mathura Das, I L. R., 9 All., 611, and Bakshi Nand Kishore v. Malak Chand, I L. R., 7 All., 289, referred to. **GANGA PRASAD v. JAG LAL RAI [I L. R., 11 All., 333****

461.

*Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale—A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation. **Held** that there had been no sale within the meaning of the Code, proclamation of the time and place of sale and the holding of the sale at such time and place being conditions precedent to the sale being a sale under the Code. **BASHANTULLA v. UMA CHURN DUTT [I L. R., 16 Calc., 794***

462.

*Property sold before advertised time—Sale invalid—A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code. The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where property which was advertised for sale by public auction in execution of a decree at 11 A.M. was sold at 7 A.M.—**Held** that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid. **CARDANI LAL v. AMR BHA I L. R., 7 All., 678***

463

*Property sold before advertised time—Where the fact of an execution-sale having taken place about two hours earlier than the hour announced was alleged to be a material irregularity seriously prejudicial to the interests of the judgment-debtor, it was held to be the bounden duty of the Court to take evidence and determine whether bidders had been prevented from attending, and whether an irregularity of a material kind had occurred. **KHOJURA BEBER v. RAM NARAIN DAS [13 W. R., 511***

464

*Property not sold at advertised time—Alteration in sale order—Where property is advertised to be sold in execution, a change in the specified order of sale or other sudden*

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## 17. SETTING ASIDE SALE—continued.

alteration of programme, without notice to, intending bidders, or the express consent of the judgment-debtor, was an irregularity under s. 256, Code of Civil Procedure, 1859, vitiating the sale. **POKHRAJ SINGH v. GOSSAIN MUNBAJ POOREE** [12 W. R., 281]

**465.** ———— *Property not sold at advertised time—Purchase by decree-holder at inadequate price.*—Where a judgment-debtor's property has been sold without further notice on a date subsequent to that originally fixed, and especially when the execution-creditor is the purchaser for a very inadequate value, there is an irregularity which may cause material injury to the debtor. **KISHEN PROSSUNNO MOJOMDAR v. NUDUMA DOSSEE** [17 W. R., 339]

**466.** ———— *Alteration in particulars of property after advertising for sale—Material irregularity.*—The property of a judgment-debtor was proclaimed and advertised for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day originally fixed. *Held* that the omission to issue a fresh proclamation was a material irregularity, inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published thirty days before the sale. **SHIB PROKASH SINGH v. SARDAR DOYAL SINGH** . I. L. R., 3 Calc., 544; 2 C. L. R., 260

**467.** ———— *Civil Procedure Code, ss. 247 and 289—Proclamation—Property broken up into lots—Separate proclamations.*—Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided. A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done. **DE PENIA v. JALBHOY ARDESHIR SET** . I. L. R., 12 Bom., 368

**468.** ———— *Adjournment of sale—Notice—Discretion of person selling.*—An auctioneer who sells under a decree has power to adjourn the sale from time to time (upon giving proper notice), but whether he does so or not is a matter in his own discretion. **GOVIND HARI VALEKHAR v. BANK OF INDIA. BANK OF INDIA v. RAGHO NARAYAN** . . . 4 Bom., A. C., 164

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

**469.** ———— *Adjournment of sale—Notice.*—An execution-sale properly notified may be adjourned with the consent of the parties. **GOBIND CHUNDER AOOCH v. RAMUN DOSS MOOKERJEE** . . . 22 W. R., 481

**470.** ———— *Postponement of sale—Postponement without valid reason.*—*Held* that the judgment-debtor could not complain of the order of the Subordinate Judge postponing a sale in execution of decree from the 25th to the 26th, unless he could show that he had suffered substantially by the postponement. But the attention of the Court was called to the importance of abiding by the date fixed in the proclamations of sale as far as possible, and not postponing sales without good reason. **AS-MUTOONNISSA BIBEE v. KHUDEMOONNISSA BIBEE** [17 W. R., 278]

**471.** ———— *Postponement of sale—Civil Procedure Code, 1859, s. 343.*—When property has been put up for sale at auction in execution of a decree, and bids have been *bonâ fide* made for it, the Court is not competent to postpone the sale, or to decline to conclude it, and order another auction, merely on the representation of the judgment-debtor that he can obtain a higher price by private transfer, there being shown no ground to believe that the amount of the judgment-debt would have been thus realized. **LUGHMEE NARAIN v. BHAYROO PERSHAD** . . . 1 Agra, Mis., 11

**472.** ———— *Sale, postponement of, for benefit of debtor.*—Certain properties were to be sold in execution of decree. As to some, the sale took place as far as possible on the day fixed, but was publicly put off to the next day, when, no higher price being obtainable, it was concluded at the price bid on the first day. *Held* that there was no irregularity in the conduct of the sale which could prejudice the judgment-debtor. **NUDDHA KISHORE DOSS v. BUNGSHEE MOHUN DOSS** [17 W. R., 210]

**473.** ———— *Postponement of sale—Civil Procedure Code, 1859, s. 249—Ground for postponing sale.*—A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer. An application by a Collector under s. 249 of the Civil Procedure Code for the postponement of a sale in the execution of a decree of land paying revenue to Government should not be granted where it is not alleged that satisfaction of the decree might be made within a reasonable period by a temporary alienation of the land. **JAISHER RAM v. BIJAI KOOR** [5 N. W., 177]

**474.** ———— *Equitable grounds for setting aside sale—Sale contrary to order for postponement—Mistake.*—Where a sale in execution took place under an order obtained notwithstanding a consent on the part of the decree-holder's pleader to a petition by the judgment-debtor for a postponement, the petition so consented to

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

having been by mistake afterwards presented to and filed by the judgment-debtor in the wrong Court. —Held that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby. **GANGA PERSHAD SART v GOPAL SINGH**

[I. L. R., 11 Cal., 138 I. R., 11 I. A., 234]

475

Postponement

of sale—Sale after order postponing sale where order arrives too late to stay sale.—When a Court executing a decree passes an order postponing a sale, and the sale takes place notwithstanding, in consequence of the order arriving too late, the Court is justified in setting aside the sale on the ground of irregularity, and its order doing so is not appealable. **MAITRA SINGH v JAGMO LAL** 6 N. W., 354

476

Order for post

ponement made before but arriving at Collector's office after sale.—The High Court passed an order postponing a sale in execution of a decree which order arrived at the Collector's office the day after the sale. Held that the publication of the sale was irregular, as the order of postponement invalidated the notification of sale. **NOORH SINGH v SOHNY KOOER**

[4 N. W., 135]

477

Order for post

ponement arriving after sale had been held.—Civil Procedure Code 1877 ss 311, 312.—On the day fixed for the sale of certain immovable property in the execution of a decree the Court made an order postponing the sale but the sale had been effected before such order reached the officer conducting it. The Court, on application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. Held that the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid, and in reviewing its first order and in setting aside the sale as illegal, the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal. **MAN JAY v MAN SINGH**

[I. L. R., 2 All., 688]

478

Sale held after

postponement by Court.—Order for postponement not reaching the conducting officer.—Material irregularity in conducting sale.—Civil Procedure Code, s 311.—The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void. Held that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed; but his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued.

of s. 311 of the Civil Procedure Code; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor; and that the Court could not confirm the illegal sale, but must hold it to be void. **Sakdeo Rai v Sico Ghulam I L. R., 4 All., 332; Ram Dyal v Jhankar Singh, I L. R., 3 All., 701, and Ganga Prasad v Jay Lal Rai, I L. R., 11 All., 333, referred to. SART LAL v UMRAO-CH MISHA**

[I. L. R., 12 All., 96]

479.

Code of Civil

Procedure (Act XIV of 1852), s 615—Order passed by Appellate Court for stay of execution—Sale held before communication of such an order.—An order of an Appellate Court under s. 545, Civil Procedure Code, to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order, and as such would only take effect when communicated. If a property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity. **Faujdar Khan v Baiter Doobey, 8 Agr., 399, Maitya Singh v Jhoo Lal, 6 N. W., 354, and Man Jan v Man Singh, I. L. R., 2 All., 686, distinguished. BISSWAR CHOWDHURY v HIRBO SUNDAR MONTDAR**

[I. C. W. N., 228]

480

Postponement

of sale.—Proclamation of adjourned sale.—A proclamation of thirty days is necessary when the property is first advertised for sale, not when the sale is postponed for the convenience of the debtor. S 225 of the Civil Procedure Code, 1853, related to a resale, and not to a postponed sale. **BIDDER NATH SHETTY v CHUNDER SHETTY MAN SINGH**

[I. W. R., Mis., 3]

NOORUL HOSSAIN v. OMATUL FATIMA

[25 W. R., 34]

481.

Postponement

of sale.—Necessity for fresh proclamation.—Where a sale is postponed, a fresh notice and proclamation ought to issue. **SROFEE MOOKHTY HIRMOYTA v DWARKANATH BISWAS** 6 W. R., Mis., 84

482.

Postponement of

sale.—Notice.—Necessity for fresh proclamation.—Act VIII of 1859, s 249.—Where a sale in execution of a decree is postponed, whether indefinitely or to a fixed date, it is necessary, in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed. It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury most probably have arisen to the judgment debtor. **GOPIKANTH DOREY v ROT LUCHMEET SINGH** I. L. R., 3 Cal., 542; 1 C. L. R., 349

OMROT CHUNDER DUTT v. EASINE

[3 W. R., Mis., 11]

## SALE IN EXECUTION OF DECREE —continued.

### 17. SETTING ASIDE SALE—continued.

**483.** *Postponement of sale—Sufficient notice of sale—Necessity for fresh notification.*—Where a sale was notified to take place on the 8th, and on that day the order for the postponement of the sale to the 9th was made in open Court,—*Held* that that was a sufficient notification of the sale being held on the 9th, and that a fresh notice was not necessary. **GOWREE NATH SAHOY v. FUKKEER CHAND** . . . **18 W. R., 347**

**484.** *Postponement of sale—Necessity for fresh proclamation.*—Where a sale was fixed for the 21st November, but delayed until the 22nd, without any order of postponement, or any fresh proclamation of the day of sale, there is a *prima facie* case of injury to the party whose property was sold. Such a postponement was in contravention of the provisions of s. 249 of Act VIII of 1859, as, when a sale is postponed, there must be fresh proclamation of the sale and date when it is to take place. **SANTWUL SINGH v. MAKHUN PANDEY** [2 N. W., 143]

**485.** *Omission to issue fresh proclamation—Material injury.*—A decree having been obtained against *A* and *B* upon a mortgage, the latter appealed to the High Court, and subsequently, on the mortgaged properties being attached and advertised for sale, while the appeal was pending, applied for and obtained an order for stay of the sale as far as she was concerned. The sale, however, took place on the day originally fixed, but no fresh proclamation was issued, although it was announced previous to the sale that only *A*'s rights and interests would be sold. *Held* that the sale was irregular, as a fresh proclamation ought to have been issued, and an inquiry instituted as to *A*'s share in the property; and it having appeared that *A* was materially injured by such irregularity, the sale was set aside. **MOHINY MOHUN DASS CHOWDHRY v. BHOOBUN JOY SHAHA** . . . **6 C. L. R., 237**

**486.** *Indefinite postponement—Fresh notice, Omission of—Material injury.*—Where a sale in execution does not take place on the date fixed in the original notice, an indefinite postponement cannot be regarded as an adjournment from day to day, and a fresh notice should fix another date for the sale; and where, in consequence of an indefinite postponement, an estate has been purchased for an inadequate price, and especially by the judgment creditor, the irregularity is one that has occasioned substantial injury and justifies a setting aside of the sale. **JHOONUCK CHOWDHRY v. RADHA PERSHAD SINGH** . . . **25 W. R., 328**

**487.** *Civil Procedure Code, 1877, s. 290—"Consent"—Lapse of time between proclamation and actual sale—Postponement of sale.*—An application made on the day of sale by the judgment-debtor that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent" as, by virtue of s. 290 of Act X of 1877, would do away with the necessity of a proclamation for sale being issued

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### 17. SETTING ASIDE SALE—continued.

thirty days before the day fixed for sale. Where successive postponements of the day of sale have been made, but the last of these is made by the Court on its own motion without any application for postponement of sale being made on the part of the judgment-debtor (although such postponement might be for his benefit), a strict compliance with the rule that thirty days must elapse between the proclamation and the actual day of sale is requisite. **HURBUNS SAHAI v. BHAIRO PERSHAD SINGH**

[**L. L. R., 5 Calc., 259**

**S. C. HURBUNS SAHAI v. BHAIRO PERSHAD**

[**4 C. L. R., 23**

See also **BHEERAJ KOORI v. GENDH LALL TEWARI** . . . **I. L. R., 5 Calc., 878**

**488.** *Civil Procedure Code (Act XII of 1852), s. 291—Omission by consent to issue fresh production of sale after adjournment.*—Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation of sale, and the interests of both were sold,—*Held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale under s. 291 of the Civil Procedure Code amounted only to an irregularity, and did not vitiate the sale. **Rameshwar Singh v. Sheodin Singh, I. L. R., 12 All., 510, and Satish Chunder Rai Choudhuri v. Thomas, I. L. R., 11 Calc., 658**, followed in principle. **BAGAL CHUNDER MOOKERJEE v. RAMESHWAR MUNDUL** . . . **I. L. R., 18 Calc., 496**

**489.** *Agreement as to proclamation on postponement of sale—Civil Procedure Code, 1859, s. 249.*—An execution-sale, which had been fixed for a certain date, was put off to the corresponding date in the following month on the application of the judgment-debtor, who consented that he would not object to any irregularities affecting the sale if it took place on any date in the following month. An istahar was also issued, and it was proclaimed only in a public place. After the sale took place as agreed upon, the judgment-debtor contended that he was entitled, under Act VIII of 1859, s. 249, to have a fresh proclamation issued on the spot where the properties were situated. *Held* that, as at the time of his application for postponement he did not contemplate any such proclamation, he could not now object to it not having been issued. **HET NARAIN SINGH v. GOSSAIN LUCHMEE NARAIN POOREE** [**23 W. R., 256**

**490.** *Sale on a holiday when Court is closed.*—A sale in execution of a decree is illegal if made on a holiday, whether it is a fixed holiday or only a day which the Courts are closed by order of the High Court. **HARO JEMADAR v. JADUB CHUNDER HOLDAR** . . . **3 W. R., Mis., 24**

**491.** *Sale on close holiday—Irregularity in publication or conduct of sale.*—The sale of immoveable property by an Ameen

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

on a close holiday is not illegal nor is it an irregularity in publishing or conducting the sale. **RISHRAM MANTON v. SAKHIB-UD-DIN** I. L. R., 3 All., 333

402.

*Sale under two separate decrees—Separate sales*—Where the Court executing two decrees made separate orders directing the sale on the same date of certain immovable property in execution of such decrees the officer conducting the sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales. **COURT v. WARD v. GAYA PRASAD** I. L. R., 2 All., 107

403

*Purchase by decree holder without permission of Court*—A sale at which the decree-holder himself or some other person for him, without the permission of the Court first obtained becomes the purchaser, is not *ipso facto* void—it is a good sale unless and until acted as by the Court under the provisions of s. 294 of the Civil Procedure Code 1877. **JATHEBAL v. HAREHAI** [I. L. R., 5 Bom., 575]

IN THE MATTER OF VETRAPAH CHETTY

[6 B. L. R., Ap., 37 14 W. R., 405]

404.

*Purchase by decree-holder without permission of Court—Civil Procedure Code (Act XIV of 1859) s. 294 311—Substantal injury*—Under the terms of s. 294 of the Civil Procedure Code, it is discretionary with the High Court to set aside an execution sale at which the decree-holder has bid and purchased without first obtaining permission from the Court so to do; and in dealing with such a case the Court although considering the matter as an irregularity in the conduct of the sale will not interfere with the sale unless it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity. **MATHEBA DAS v. NATHU LALL MANTA** [I. L. R., 11 Cal., 731]

405.

*Civil Procedure Code 1852 s. 294—Validity or otherwise of sale*—In a suit in which it was contended that a purchaser at a sale in execution of a decree had, under s. 294 of the Civil Procedure Code taken nothing by the purchase because he was the holder of the decree in execution of which the property was sold, it was held following **Jaskerbo v. Haribai**, I. L. R., 5 Bom., 675 that the purchase was not void *ab initio*, but only voidable "on the application of the judgment-debtor or other person interested in the sale." **CHITRAMANRAY v. VITHALAI** [I. L. R., 11 Bom., 588]

406

*Civil Procedure Code (Act X of 1877) s. 294 amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court*—Under the Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court. That

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

is also the law under Act XIV of 1882, but such a purchase may be set aside by the Court on application under s. 294 as being irregular. **PARAMASIVA v. KAISHNA** I. L. R., 14 Mad., 498

407

*Purchase by judgment-creditor without leave of Court—Remedy of judgment-debtor—Civil Procedure Code (Act 1852) s. 294*—Where a judgment-debtor without leave of the Court buys the property of his judgment-debtor at a Court-sale, the remedy of the latter is by application under s. 294 of the Civil Procedure Code (Act XIV of 1882) and not by separate suit. **GESU v. SAKHARAM** I. L. R., 23 Bom., 271

408

*Civil Procedure Code (Act XIV of 1882), s. 294 311—Application to set aside sale—Leave to bid—Assent of decree holder*—Where the auction-purchaser at a sale in execution of a decree had before the sale merely entered into an agreement with the decree-holder to purchase the decree for a certain sum of money which, however, was not paid till after the sale and no instrument of assignment of the decree had been executed—*Held* that the auction-purchaser was not a decree-holder within the meaning of s. 294, Civil Procedure Code. An assignee of a decree under an oral assignment has no locus standi at all to apply for the execution of a decree, and it is not necessary for such an assignee to obtain leave to bid at the sale held in execution of a decree. **DARSHINA MOHAN ROY v. BASUMATI DEBI** [4 C. W. N., 474]

409

*Purchase by decree-holder—Refusal of application by judgment-creditor to be permitted to bid at sale—Invalidity of sale—Civil Procedure Code (Act XIV of 1882) s. 294*—A mortgagee, having obtained a decree declaring his lien on certain property put up for sale in execution of this decree the mortgaged property. The decree-holder asked for, but was refused, leave to bid at the sale, but, notwithstanding such refusal purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession of the property. The defendants contended that, inasmuch as the plaintiff (decree-holder) had been refused leave to bid at the sale his purchase could not be enforced. *Held* that the plaintiff had been guilty of an abuse of the process of the Court in bidding at the sale and buying the property thereon, and that the sale therefore ought not to be enforced. **MAHOMED GAZER CHOWDERY v. RAM LALL SEN** [I. L. R., 10 Cal., 757]

500

*Purchase by decree holder—Material irregularity—Dissuading purchaser from bidding—Civil Procedure Code (Act X of 1877), s. 311—Leave to bid—Decree-holder related to manager of defendant*—When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others



## SALE IN EXECUTION OF DECREE —continued.

### 17. SETTING ASIDE SALE—continued.

from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside. Where a decree-holder was joint in family with the manager of an infant defendant, and the defendant's property was to be sold in execution of the decree,—*Held* that the decree-holder ought not to be granted leave to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant was one of the members; and it would in fact be a purchase by an agent of the property of his principal. *Woopendro Nath Sircar v Brojendronath Mundul* [I. L. R., 7 Calc., 346; 9 C. L. R., 263]

501. ————— *Purchase by decree-holder—“Material irregularity”—Liberty to bid—Conduct calculated to deter bidders—Civil Procedure Code (Act X of 1877), ss. 294, 311.*—The holder of a decree, in execution of which property is sold, is absolutely bound, under s. 294 of Act X of 1877, to have express permission from the Court before he can purchase the property; and whether this objection is taken and pressed or otherwise, a sale to him is invalid unless he has got explicit permission. The use at a sale of language by an intending bidder in disparagement of the property for the purpose of influencing bystanders, and deterring them from bidding for the property, is a “material irregularity” sufficient to render the sale invalid under s. 311 of the same Act. *Rukhnee Bullu v. Brojendro Nath Sircar*. I. L. R., 5 Calc., 308

502. ————— *Disparaging remarks by bystanders or purchasers other than the decree-holder—Notice of sale—Practice regarding sales in execution of decrees—Adjournment of sale—Civil Procedure Code (Act XIV of 1882), ss. 311, 291.*—Disparaging remarks made by bystanders or by purchasers at an execution-sale other than the decree-holder do not constitute such an irregularity as is contemplated by s. 311 of the Code of Civil Procedure. *Gunga Narain Gupta v. Annunda Moyee Burroanee*, 12 C. L. R., 404, followed. *Woopendro Nath Sircar v. Brojendro Nath Mundul*, I. L. R., 7 Calc., 346; 9 C. L. R., 263, and *Rukhnee Bullu v. Brojendro Nath Sircar*, I. L. R., 5 Calc., 308, distinguished. It is the practice of the Courts under the Rules of the High Court, which have the force of law, to place all properties intended for sale in execution of decrees on a list, and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of s. 291 of the Civil Procedure Code; and it cannot be said in such a case that there was an irregularity in the sale not having been held on the appointed day. *Lal Mohun Chowdhuri v. Nunu Mohamed Talukdar* [I. L. R., 17 Calc., 152]

503. ————— *Civil Procedure Code (1882), s. 311—Position of decree-holder who has obtained leave to bid—Dissuading persons*

## SALE IN EXECUTION OF DECREE —continued.

### 17. SETTING ASIDE SALE—continued.

*from bidding—Non-disclosure amounting to fraud.*—A creditor had obtained a decree on the footing of a mortgage, and in execution brought the property of his judgment-debtor to sale. At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with P to the effect that, if P would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for RS3,000 and convey it on certain terms to P. P thereupon exerted his influence and succeeded in persuading would-be purchasers from bidding, and in consequence the property was sold on the 11th April 1891 for RS3,000, which was a little more than half its actual value. The sale was confirmed on the 29th June 1891, and the judgment-debtor, who at the time of the sale was a minor under the Court of Wards, attained his majority on the 21st April 1894, and filed this petition praying to set aside the sale on the 15th May 1894. *Held* that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that in point of law no leave to bid was granted, and that the withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside. *Jayyabaddin Ravuttan v. Vijja Ragunadha Ayyarappa Naitan Gopalab*. I. L. R., 19 Mad., 315

*Held* on appeal to the Privy Council.—A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser. A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. The judgment of the High Court in *Woopendro Nath Sircar v. Brojendronath Mundul* (1881), I. L. R., 7 Calc., 346, though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting aside the sale. The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under s. 311 of the Code of Civil Procedure, neither the fact of the above agreement nor the dissuasion of bidders afforded sufficient ground for making the order. But the High Court had decided, in favour of the petitioner, another point—that there had been material irregularity, within that section, in an omission on the part of the decree-holding purchaser when he had applied for leave to bid. This had been that he had withheld information of the agreement from the Court, which had granted the leave to bid not having been made aware of this arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

been granted *Held* by the Judicial Committee that this ground had not been established by evidence on an issue between the parties having been taken for the first time in the Court of Appeal with a change of the matter in controversy; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved. **MANOMED MIRA RAYUTHAR v SAVYASI VIJAYA RAGHUVADHA GOPALAN** I L R, 23 Mad, 227

IL R, 27 I A, 17  
4 C W N, 227

504

Purchase by

son of decree holder—Code of Civil Procedure (Act X of 1877) s 294—A purchase by the son of a decree holder undivided in interest from his father is a purchase by the decree holder within the meaning of s 294 of Act X of 1877 as it stood previously to its amendment by Act XII of 1879 and is absolutely void if the purchase were made with funds which were joint property of the father and son. **NARAYAN DESHPANDE v ANAJI DESHPANDE**

[I L R, 5 Bom, 130

Since the amendment of the Civil Procedure Code by Act XII of 1879 the sale would not be treated as absolutely void but as liable to be set aside by the Court on application by the judgment-debtor or other party interested in the sale.

505

Rejection of

highest bid—Abortive sale caused by act of judgment debtor—Highest bidder declared not the purchaser—Validity of sale—Three attempts to sell land taken in execution under a decree had been rendered abortive by the acts of the judgment-debtor and a delay of seven years occasioned during which by his conduct he defeated the execution of the decree. When the property was put up for sale for the fourth time the Collector rejected the two highest bids on the ground that neither of the bidders could produce a mukhtarnamah from the persons for whom respectively they professed to act as agents, nor produce the required deposit and he declared the third highest bidder the purchaser of the land. *Held* that under the circumstances the conduct of the Collector was justifiable and the sale valid. **MOHSEN NARAIN SINGH v KISHANEND MISRA** Marsh, 592

[2 Ind. Jur., O S, 15 W R, P C, 7  
9 Moore s I A, 324

506

Deposit by pur-

chaser—Purchase by decree holder—At a sale in execution of a decree when the sale of any lot is completed the purchaser should then and there be required to make the deposit prescribed by the Civil Procedure Code failing which the lot should at once be put up to sale at the risk of the first purchaser. The decree-holder if the lot is knocked down to him, is as much bound to make the prescribed deposit as any other agent or purchaser. **CHUDKOO DUTT JHA v LALAHEND SINGH** W. R., 1864, Mls, 30

507

Purchase by

decree holder—Payment not in cash, but by giving

## SALE IN EXECUTION OF DECREE

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## 17 SETTING ASIDE SALE—continued

receipts for amount due to him—Where the decree-holder is himself the purchaser at a sale in execution, there is no reason why he should not, instead of paying the price in cash, give receipts for the amount due to him under his decree supposing their value is sufficient to cover the amount for which the property is sold. The fact that he does so is not a valid objection to the sale. **KHILLAT CHUNDER GHOSH v KESHUB CHUNDER PAUL CHOWDRY**

[16 W. R., 46

508

Payment of pur-

chase-money—Civil Procedure Code 1859 s 254 256, 257—Default in making deposit—Directions as to the payment of the purchase-money at sales in execution of decree arising under s 254, Act VIII of 1859 were to be dealt with as provided by that section, and did not fall under ss 256 and 257. A default under s 254 was not an 'irregularity in conducting the sale' under s 256. **BRINDA DEBEE DOSSEE v GOPAL SOONDAREE DOSSIA**

[6 W. R., Mls, 82

509

Payment of pur-

chase money—Civil Procedure Code 1877, s 294 and ss 306 313—Set off of purchase money—Omission to make deposit—The requirements of s 306 of the Civil Procedure Code applying to all cases of sale of immovable property under Ch. XIX, a decree-holder buying with permission given under s 294 and desiring to set off his purchase money against the amount of the decree is not exempt from the necessity of making at the time of sale a deposit of 25 per cent on the amount of such purchase-money; and such deposit must be made in cash. The option so to set off the purchase money cannot be exercised by the purchaser until the confirmation and payment of expenses of the sale. Where however all parties interested in the amount to be deposited have waived their right to have that amount deposited in cash, the sale ought not to be set aside on the ground that a cash deposit has not been made. **GOPAL SINGH v ROY BUNWANEE LALL SAHOO** 5 O L R, 181

510

Payment of

purchase money—Civil Procedure Code 1877, s 306—Failure to pay deposit of purchase money required by that section—The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by s 303 of the Civil Procedure Code pay a deposit of 25 per cent on the amount of his purchase immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. *Held* that there was no sale at all of the property. **INTIZAM ALI KHAN v NARAIN SINGH** I L R, 5 All, 318

511

Failure by pur-

chaser to make the deposit required by s 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1859), ss 244 306, 309, 311 and 312—Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

part of the officer conducting the sale to receive, the deposit of 25 per cent. on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure, constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie. *Intizam Ali Khan v. Narain Singh, I. L. R., 5 All., 816*, dissented from. *BHIM SINGH v. SARWAN SINGH*. I. L. R., 16 Calc., 38

512. ————— *Inability of purchaser to make deposit—Re-sale—Substantial injury—Civil Procedure Code (Act X of 1877), s. 293.*—At a sale in execution of a decree the property was knocked down to a bidder at Rs 200. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs 50. *Held* that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s. 293 of the Civil Procedure Code, have recovered the difference between the original bid and the price at which the property was sold. *BEEPIN CHUNDER SHICKDAR v. PURNESHNATH BISWAS*. I. L. R., 9 Calc., 98

*S. C. BEPIN CHUNDER SHICKDAR v. MOHOO SUDUN CHOWDHURI*. 13 C. L. R., 316

513. ————— *Omission to make deposit—Default of purchaser after sale of portion of property sufficient to satisfy decree.*—Where a portion of the property of a judgment-debtor has been sold in execution for a sum sufficient to satisfy the decree, the Court is not justified, on default being made by the purchaser, in directing the sale of any further portion of the debtor's property, it being open either to the judgment-creditor or the judgment-debtor to apply that the balance due upon the decree, after re-sale of the portion already sold, should be realized from the defaulter. *JOY CHUNDER BISWAS v. KALI KISHORE DEY SIRCAR*. [8 C. L. R., 41

514. ————— *Failure to make deposit—Re-sale without notice—Irregular procedure.*—At a Court-sale in execution of a decree, T bid Rs 3,550 for the judgment-debtor's land on the 24th March 1882, but the Ameen re-sold the property the next day for Rs 2,500 on the ground that the deposit was not duly made. T objected on the 26th March and a fresh sale was ordered by the Court without giving notice to the judgment-debtor, and the land was sold for Rs 2,700 on the 13th June. On the 13th July the judgment-debtor applied to have this sale set aside and the sale to T confirmed. *Held* that the judgment-debtor was entitled to have the sale of the 13th June and the order which led to it set aside, and that the Court was bound to decide whether the deposit had been duly made by T, or, if not, whether T was liable for any deficiency in the price which might be realized on a re-sale. *KUTUPAYAN v. RAMASAMI AYYAN*. I. L. R., 6 Mad., 197

# SALE IN EXECUTION OF DECREE

—continued.

## 17. SETTING ASIDE SALE—continued.

515. ————— *Failure to pay purchase-money—Re-sale.*—At a sale in execution of decree, certain property was knocked down to a bidder, who made default in payment of the purchase-money. Subsequently the Judge again put the property up for sale, and re-sold it at a lower price. The decree not being satisfied, the Judge put up other property which had been advertised for sale with the property above mentioned, without getting from the defaulter the difference between the price obtained at the second sale and that obtained at the first. On an application by the judgment debtor to have the sale of the second property set aside, —*Held* that no sufficient cause was shown for setting aside the sale. *Joy Chunder Biswas v. Kali Kishore Dey Sircar, 8 C. L. R., 41*, distinguished. *Khiroda Mayi Dassi v. Golam Abardari, 13 B. L. R., 114*, followed. *GOUR CHUNDER BISWAS v. CHUNDER COOMAR ROY* [I. L. R., 8 Calc., 291; 10 C. L. R., 236

516. ————— *Failure to pay deposit—Re-sale on default in deposit—Civil Procedure Code, 1859, s. 253.*—In a re-sale for default under s. 253, Act VIII of 1859, the officer conducting the sale was not bound to commence from the next highest bid below that made by the defaulter, instead of commencing the sale *de novo*. *GOUR MOOHN SINGH v. LALLA GOUR SUNKUR* [1 W. R., Mis., 11

517. ————— *Inadequacy of price.*—Smallness of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings. *REET BHUNJUN SINGH v. MITTURJEET SINGH*. 6 W. R., Mis., 31

*NUDDA KISHORE DOSS v. BUNGSHER MOHUN DOSS*. 17 W. R., 210

*HUBBEOOL DOSS v. ALLENDER. HUBBEOOLA HOSSAIN v. LAND MORTGAGE BANK* [14 W. R., 44

*ALIMOODY CHOWDHRY v. CHUNDER NATH SEN* [24 W. R., 227

518. ————— *Inadequacy of price—Inadequate price produced by mistake—Misstatement in notification.*—Where an irregularity in an execution-sale (e.g., misstatement in the notification) produces a mistake, and the property is consequently sold at an inadequate price, the judgment-debtor is entitled to have the sale reversed. *KHODEJA BIBEE v. JOHAD ROHNEEN* [14 W. R., 320

519. ————— *Civil Procedure Code (1882), s. 297—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within the meaning of s. 311.*—The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-s. (c) of s. 287 of the Code of Civil Procedure. An under-statement of the value of the property having been made in such a proclamation,

## SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued

which was circulated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all, and the sale having resulted in a price altogether inadequate—*Held* that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation; and that the special remedy provided in s. 311 was applicable as substantial injury had resulted. *SIA DATMAY KHAU v. PUT KHAU*

[I. L. R., 20 All. 412  
L. R., 25 I. A. 148  
3 C. W. N., 550]

520

—On a sale of property in execution of a decree the value stated in the sale proclamation is a material fact within sub-s. (e) of s. 257 of the Code of Civil Procedure. Under valuation of such property is a material irregularity in publishing or conducting the sale. *SITA SAKI NAICKER v. RAJNARAY NAICKER*

[I. L. R., 23 Mad., 568]

521

—*Inadequacy of price—Material irregularity—Confirmation of sale—Code of Civil Procedure (Act III of 1859), ss. 305, 311, and 314.*—The sale of immovable property to the highest bidder for a price which subsequently appears to be too low is not a material irregularity in publishing or conducting the sale. A decree-holder or a judgment-debtor cannot apply to set aside a sale on the ground of the price realized being too low. Under s. 314 of the Code of Civil Procedure, 1859, the Civil Court cannot, upon or without application, refuse to confirm a sale on the ground that the price bid is too low. *LAKSHMI v. KRISHNAIAH*

[I. L. R., 8 Bom., 424]

522

—*Inadequacy of price*—The circumstance that property was sold in execution of a decree below its proper value and that few persons attended the sale, is not sufficient to vitiate the sale. *RICHOO NAIR v. SHER v. TOORAY SINGH*

5 N. W., 19

523

—*Inadequacy of price—Error in notification—Civil Procedure Code, 1859, ss. 206, 257.*—At a sale held on the 9th September 1872, in execution of a decree, the respondent purchased an estate for Rs. 500. The notification of sale had stated the Government revenue to be Rs. 1365 instead of Rs. 146, the sale being fixed for the 5th August 1872. The sale was postponed without the issue of a second notification on an application by the judgment-debtor praying for such postponement, "the attachment and the notification of sale being maintained." On the 1st October 1872 the judgment-debtor objected under s. 256 of Act VIII of 1859 to the sale on the ground of material error in the above-mentioned notification in regard to the amount of Government revenue. The Subordinate Judge overruled such objection, but omitted to pass an order under s. 257, confirming the sale. Thereupon the judgment-debtor paid into Court the amount of the decree, and then obtained from the Judge an order

## SALE IN EXECUTION OF DECREE

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## 17. SETTING ASIDE SALE—continued

purporting to have been made on review under s. 276, but without notice to the respondent, a thing aside the sale on the ground of inadequacy of price and the above-mentioned material error. Subsequently the Judge refused to confirm the sale and to issue a certificate to the respondent. The High Court, on application by the respondent under ss. 21 & 25 Viet., c. 104, s. 15, held that the objections made were insufficient, and directed the Judge to confirm the sale. *Held* by the Privy Council that, although the alleged inadequacy of price was no ground for refusing to confirm the sale, yet that the above error in specifying the amount of Government revenue was an irregularity (see s. 243) for which, on proof of substantial injury to the judgment-debtor therefrom, the sale might have been set aside; but that the above petition for postponement amounted to an admission by the judgment-debtor that the notification was correct, or that there was no such irregularity as would be likely to mislead. *CHANDRA SINGH v. HIRSHO NARAIN SINGH*

[L. R., 3 I. A., 230 28 W. R., 44]

Affirming the decision of the High Court in *HIRSHO NARAIN SINGH v. CHANDRA SINGH*

[19 W. R., 227]

524

—*Inadequacy of price—Error in notice of sale*—Mere inadequacy of price is not a sufficient ground for setting aside a sale in execution if no substantial injury has been caused to judgment-debtor by any material irregularity in publishing and conducting the sale; and the mention of the name of a wrong person in the notice of sale is not such an irregularity, when the notice has been served in the right month and the estate has been identified. *NOORAL HOSSAIN v. RAO COOMAR SAHAI*

25 W. R., 333

525

—*Inadequacy of price—Irregularity in publishing or conducting sale*—If it is proved that the price obtained for property sold at an execution sale is grossly inadequate, and if it is also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary. *Gopernath Dever v. Beg Lucknoot Singh, I. L. R., 3 Cal., 542*, approved. *KALYANA CHOWDHURY v. RAMCOOMAR GOPTA*

[I. L. R., 7 Cal., 468. 9 C. L. R., 114]

526

—*Material irregularity—Code of Civil Procedure (1859), ss. 21 and 311—Sale at inadequate price owing to error of sale not being fixed.*—Where a debtor's property under attachment had been ordered to be sold at a fixed date, after the disposal of a certain claim thereto made under s. 278 of the Code of Civil Procedure, but no hour had been fixed for the sale as required by s. 291, and the property was sold at a very inadequate price by reason of the paucity of bidders, *Held*, affirming the decision of the Subordinate Judge, that there had been material irregularity causing substantial injury to the debtor; and that it

## SALE IN EXECUTION OF DECREE

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### 17. SETTING ASIDE SALE—continued.

is sufficient under s. 311 of the Code, if the evidence, though not "direct evidence," shows that the injury was a necessary result of the irregularity complained of. *Tassaduk Rasul Khan v. Ahmed Husain, I. L. R., 21 Calc., 66; L. R., 20 I. A., 176*, explained. *SURNO MOYEE DEBI v. DAKINA RANJAN SANYAL*

[I. L. R., 24 Calc., 291

527. ———— *Civil Procedure Code (1882), s. 291 and 311—Material irregularity—Substantial loss—Inadequacy of price.*—Where a material irregularity is proved to have occurred in the conduct of a Court-sale, and it is shown that the price realized is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out. When a sale is adjourned under s. 291, the provisions of that section must be followed with exactitude. *VENKATA SUBBARAYA CHETTI v. ZAMUNDAR of KARYETINAGAR* . . . I. L. R., 20 Mad., 159

528. ———— *Sale at an inadequate price, through irregularity in sale-proceedings.*—Where six tenures with separate recorded jummas were lumped together and sold in execution of decree as one lot, whereby the plaintiff and his co-sharers were precluded from buying up any one or more of the six tenures, and no description of the properties to be sold was given either in the sale proclamation or lufbundi, in consequence of which the defendant was apparently the only bidder, and he purchased six tenures at an inadequate price, the sale was reversed as fraudulent and illegal. *SURENDRA DOSS v. RAMJEEBUN ROY* . 18 W. R., 342

529. ———— *Inadequacy of price—Irregularities indicating suspicions of fraud.*—Where immoveable property of considerable value had been sold for Rs 11 in a sale in execution of a decree for Rs 17-11-0, and purchased benami by the execution-creditor in the name of a relative, and it was found that the judgment-debtor had not been informed of the sale,—*Held* that all these circumstances taken together justified a suspicion of fraudulent dealing, and that the judgment-debtor was entitled to recover his property on payment of the original due. *GOBIND CHUNDER MOOKERJEE v. RAM KOMUL CHATTERJEE* . . 25 W. R., 364

530. ———— *Inadequacy of price of property.*—The market value of a property is not the value which ought to be taken as the standard at an auction-sale in execution of a decree where the purchaser ordinarily gets neither a title nor the title-deeds as in a private sale, but only the right, title, and interest of the judgment-debtor at the time of sale. *MEAH KHAN v. NARAIN CHUNDER CHOWDHRY* . . . 18 W. R., 197

531. ———— *Inadequacy of price—Substantial injury—Civil Procedure Code (Act XIV of 1882), s. 311.*—The relative cause and effect between a proved material irregularity and inadequacy of price may either be established by

## SALE IN EXECUTION OF DECREE

—continued.

### 17. SETTING ASIDE SALE—continued.

direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. Where, upon an application to set aside a sale in execution of a decree, the material irregularity in the publication and conduct of the sale complained of was the notifying of an incumbrance which did not really exist, and which must, in the ordinary course of things, lower the value of the property,—*Held* that it might fairly be inferred that the irregularity in the conduct of the sale was the cause of the inadequacy of the price. *Macnaghten v. Mahabir Pershad Singh, I. L. R., 9 Calc., 656*, and *Lala Mobaruk Lal v. Secretary of State for India, I. L. R., 11 Calc., 200*, referred to. *GUR BUKSH LALL v. JAWAHIR SINGH* . . . I. L. R., 20 Calc., 599

### (c) SUBSTANTIAL INJURY.

532. ———— *Proof of substantial injury—Civil Procedure Code, 1859, s. 256.*—Even where material irregularity had occurred, as from non-issue of proclamation of sale, the party applying to set aside the sale on that ground was bound, under s. 256, Act VIII of 1859, to prove that he had sustained substantial injury thereby. *JOY LARA DOSSEE v. MAHOMED HOSSEIN*

[2 W. R., Mis., 2

*NILMOONEE SHAHA v. RAM CHURN DEB*  
[6 W. R., Mis., 45

*ABOOL MAHOMED v. SHIH DOOLAREE TEWARREE*  
[11 W. R., 114

*LAKH RAM v. MOHESH DOSS* . 12 W. R., 488

*NUJMOODDEEN AHMED v. ABDOL AZEEZ*  
[15 W. R., 95

*CHUNDER SEKHUE DEB v. JADUB CHUNDER SETT*  
[19 W. R., 78

*SANWUL SINGH v. MAKHUN PANDEY*  
[2 N. W., 143

*SHEO PROKASH MISSEK v. HURDAI NARAIN*  
[22 W. R., 550

This now forms an express enactment in the Code.

533. ———— *Presumption as to irregularity and injury—Civil Procedure Code (Act XIV of 1882), s. 311.*—Where an application is made to set aside a sale in execution of a decree on the ground of irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former, in the absence of evidence to show that the injury is the result of the irregularity. *Macnaghten v. Mahabir Pershad Singh, I. L. R., 9 Calc., 656*, and *Lala Mobaruk Lal v. Secretary of State for India in Council, I. L. R., 11 Calc., 200*, discussed. *SATISH CHUNDER RAI CHOWDHURI v. THOMAS*  
[I. L. R., 11 Calc., 658

## SALE IN EXECUTION OF DECREE

—cont. need

## 17 SETTING ASIDE SALE—cont. need

534.

*Presumption as to irregularity and a very Civil Procedure Code (Act X of 1877) s 311. It is stated in the case of an application under s 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale it appeared that there had been a material irregularity in publishing the sale; but no witness came forward to prove that substantial injury had been caused thereby. It also appeared that seven days after the applicant had applied for proclamation to be issued to his witnesses he deposited the requisite fees and that subsequently there was a delay of seven days in the office in issuing such proclamations which were ultimately issued only three days prior to the day fixed for the sale. On the applicant alleging that in consequence of such delay he had not been able to call a fair proportion of his witnesses—Held that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale but when both a material irregularity and substantial injury have been proved the Court may reasonably presume that the substantial injury is due to such irregularity. It is also stated that the applicant having been guilty of laches himself could not be allowed to set up the delay in the office as a ground for the non production of his witnesses. *Gopesh Nath Doss v. Roy Lakshminarayana I L R 3 Cal., 542* considered. *BONOMALI MOHENDAS v. WOODHUSH CHANDER BHENDOPADHYA**

[I L R 7 Cal., 730 9 C L R., 341]

535.

*Civil Procedure Code s 311—Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting. A judgment-debtor has allowed the execution sale of immovables to be completed without objection on the ground afterwards alleged by him to be insignificant of description within the requirements of s 237 he has given throughout aware of what the description was the sale is not invalid on this ground alone without more. No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity the alleged misdescription—Held that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s 311. *Macanaghten v. Mahal v. Irahad Singh I L R 9 Cal., 636* considered and followed. *ARUNACHALLAM v. ARUNACHALLAM**

I L R., 12 Mad., 19

536

*Civil Procedure Code (1852) ss 290 and 311—Material irregularity—Proof of substantial injury. The non compliance with the requirement of s 290 of the Civil Procedure Code that before sale of immovables in execution of decree thirty days should intervene between proclamation and sale is a material irregularity within the meaning of s 311. But its effect is not to make the sale a nullity without proof*

## SALE IN EXECUTION OF DECREE

—continued

## 17 SETTING ASIDE SALE—concluded

of substantial injury thereby to the judgment-debtor. As to the latter section requires affirmative evidence. *TASADDUK RAUF KHAN v. AHMAD HUSAIN* I L R., 21 Cal., 66 [I L R., 20 I A., 178]

537

*Civil Procedure Code (1852) s 311—Application to set aside sale in execution—Proof of substantial injury. It is not sufficient for an applicant under s 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale and that a price below the market value has been realized; but he must go on to connect the one with the other. This is the loss which the irregularity has effected and can be proved by direct evidence. *Tasadduk Rauf Khan v. Ahmad Husain, I L R 21 Cal., 66* referred to. *JAGAT NATH v. MAHENDU PRASAD* [I L R., 18 All., 37]*

538.

*Civil Procedure Code (1852) s 311—Application to set aside sale in execution—Proof of substantial injury. Held that in an application under s 311 of the Code of Civil Procedure to set aside a sale in execution of a decree it is necessary for the applicant to show not only that there has been a material irregularity in publishing or conducting the sale but also that substantial injury had been sustained in consequence of such material irregularity. *Arumachellam v. Arumachellam, I L R., 12 Mad., 19* and *Tasadduk Rauf Khan v. Ahmad Husain I L R., 21 Cal., 66* referred to. *SHIRIN LEGAM v. AGHA ALI KHAN* I L R., 18 All., 141*

*See also* *SKHOMOTER DEBI v. DAKSHIN BANJAN SANKAL* I L R., 24 Cal., 201 and *VENKATA SANKARANATHA CHETTI v. VEDINIDAR OF KAROTTINAGAR* I L R., 23 Mad., 159

## (d) EXPENSES OF SALE

539 ———— *Liability for expenses of sale—Sale set aside for irregularity. Where an execution sale was set aside on the ground of irregularity on the part of the Auctioneer and other officials—Held that the judgment-debtor was not chargeable with the expenses of such sale. *JUGER v. LUCHETU DAS* 1 Agra, Mils., 1*

## 18 SETTING ASIDE SALE—RIGHTS OF PURCHASERS

## (a) COMPENSATION

540 ———— *Right to compensation for improvements on a settlement—Act XI of 1855 s 2—A purchaser at a Sheriff's sale was not entitled to compensation under Act XI of 1855 s 2 for improvements to the land during his occupation if he had relied solely on the bill of sale. *BROTHWORTH KRETTY v. DOYALCHUNDER LAHA**

[Bourke, O C., 159]

# SALE IN EXECUTION OF DECREE

—continued.

## 18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—continued.

541. ————— *Bonâ fide purchaser—Inquiry as to title—Act XI of 1855.*—A person did not become a *bonâ fide* purchaser within the meaning of Act XI of 1855, unless he had made all reasonable enquiries as to the title. Enquiries from neighbours were not sufficient. When therefore a purchaser who had bought property on no further information than he could obtain from neighbours was ejected by one who showed a better title,—*Held* that he was not entitled to compensation under Act XI of 1855. *GOUB GOPAL DUTT v. BISSONATH GHOSE* . . . . . Cor., 41

## (b) RECOVERY OF PURCHASE-MONEY.

542. ————— *Right to refund of purchase-money—Mode of recovery—Civil Procedure Code, 1859, s. 258.*—Under s. 258, Act VIII of 1859, when a sale of immovable property is set aside, the purchaser is entitled to recover back his purchase-money. If the Court, reversing the sale, omit to make such order, the purchaser can sue to recover the money from the person who has received it. *GREESH CHUNDER POTTAR v. LOOKHOODA MOYEE DABEE* . . . . . 1 W. R., 55

*DOOLHIN HUR NATH KOONWEREE v. BAIJOO OOHJA* . . . . . 2 Agra, 50

543. ————— *Civil Procedure Code, 1859, s. 258.*—When a sale of immovable property in execution of a decree was set aside by a competent Court, the right of the purchaser to recover back his purchase-money, under s. 258, Act VIII of 1859, was absolute, even though he himself caused the property to be put up for sale, provided he was not guilty of any fraud or misrepresentation, or did not guarantee the validity of the sale under the decree. *BHOJENDUR ROY CHOWDHRY v. JUGUNATH ROY* . . . . . 6 W. R., 147

544. ————— *Subsequent reversal of decree on appeal.*—The plaintiff purchased certain property at a sale under an execution upon a decree and paid the purchase-money. The purchase-money was applied partly in satisfying the decree-holder and partly in satisfying other persons admitted by the decree to participate. The decree was afterwards reversed upon appeal, and the execution-debtor reinstated in his rights. *Held* that the plaintiff was not entitled to recover the purchase-money from the execution debtor. *CHOOLOON SINGH v. ROY MOHUN-LALL MITTER* . . . . . Marsh., 183

*S. C. ROY MOHUN LALL MITTER v. CHOOLOON SINGH* . . . . . 1 Hay, 438

545. ————— *Civil Procedure Code (Act XIV of 1882), ss. 310A, 315—Application by a purchaser for refund of purchase-money—Madras City Civil Court, Jurisdiction of.*—A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought

# SALE IN EXECUTION OF DECREE

—continued.

## 18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—continued.

to sale, and the purchase-money was paid into the Madras City Civil Court. The sale was set aside under Civil Procedure Code, s. 310A. Part of the purchase money was attached in execution of subsequent decree passed against the same defendant by the Small Cause Court, and was remitted to that Court under the attachment. On an application by the purchaser for the refund of the purchase-money by the various persons who had received portions thereof,—*Held* that the City Civil Court had jurisdiction to entertain the application. *VIRASAMI CHETTI v. LILADHARA VIASS*

[I. L. R., 21 Mad., 398]

546. ————— *Sale set aside for want of interest of debtor in the property.*—When a sale is set aside by reason of the execution-debtor having no interest in the property sold, the purchaser of such property is entitled to receive back his purchase-money as on a consideration that has failed. *BANK OF HINDUSTAN, CHINA, AND JAPAN v. PREMCHAND RAICHAND. AHMEDBHAI HABIBBHAI v. PREMCHAND RAICHAND* . . . . . 5 Bom., O. C., 83

*Contra, KRISHNAPA VALAD SANTU v. PANCHAPA VALAD GURUPADAPA* . . . . . 6 Bom., A. C., 258

*KALU BIN VISAJI v. DAMODHAR GOBIND*  
[9 Bom., 92]

*MAHOMED BASIRULLA v. ABDULLA*  
[4 B. L. R., Ap., 35; 15 W. R., 198 note]

547. ————— *Proportionate share of purchase-money on portion of sale being set aside.*—Where the plaintiff purchased at an auction-sale under a decree the rights and interests of a person and his minor brother in certain property, and the decree was subsequently set aside as far as it concerned the minor brother's share,—*Held* that the purchaser was entitled to a refund of a proportionate share of the purchase-money, and that a decree for the same against the wrong-doers, the decree holder and the judgment-debtor jointly, was a proper decree. *NEEL KUNTH SAHEE v. ASHUN MATHO*

[3 N. W., 87]

*DOOLHIN HUR NATH KOONWEREE v. BAIJOO OOHJA* . . . . . 2 Agra, 50

548. ————— *Want of interest of debtor—Right, title, and interest.*—S. 258, Act VIII of 1859, only applied to cases where a sale of immovable property had been set aside under circumstances which would, under Act VIII of 1859, authorize such a proceeding. The fact that the party whose right, title, and interest were sold had no interest at all or less than was supposed, was no ground for setting aside the sale or refunding the purchase-money. *RAJIB LOOHUN v. BIMALAMONY DASI* . . . . . 2 B. L. R., A. C., 82

*S. C. RAJEEB LOOHUN SAWUNT v. MOHESUREE DOSSEE* . . . . . 10 W. R., 385

## SALE IN EXECUTION OF DECREE

—continued—

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS *continued*

recover back his purchase-money when he finds that the judgment debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court sales except so far as such extension is justified by the procedural law in India *viz.*, by s 315 of the Civil Procedure Code *Israr Ally Khan v Abdol Aziz* L R, 5 I A 115 followed. **SUNDARA GOPALAN v VENKATA VARADA AYYANGAR**

[I. L. R., 17 Mad., 228]

**501.** — *Rele a of purchase-money when judgment debtor found to have no saleable interest in property sold.—Procedure for finding the fact of his having no interest.—Notice to judgment creditor.—Parties.—Civil Procedure Code ss 313 315 and 622.—Superintendent of High Court.* One F obtained a decree against A and in execution on said certain land which was purchased by F who got a certificate of sale and obtained possession. Subsequently the land was claimed by one B who sued A the judgment debtor and E the auction purchaser to set aside the sale and establish his title to the land. He succeeded in his suit and in execution got possession of the land. Thereupon F (the auction purchaser) applied, under s. 315 of the Civil Procedure Code (XIV of 1852) for a refund of his purchase money, and the Subordinate Judge made an order directing F the decree-holder to repay it. F contended that he ought not to have been ordered to refund the money without having an opportunity of proving that the property had been properly sold in execution of his decree against A and that as he had not been made a party to B's suit, he had had no opportunity of doing this. On appeal on to the High Court, —*Held* that the order of the Subordinate Judge for the restitution of the purchase-money was wrong. S 315 provides that the purchase-money paid at an execution sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313 as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party, or at any rate of which he had notice. In the present case there was no finding on which the subordinate Judge could base his order for the restitution of the purchase-money. **VITHOBA v EBAR**

[I. L. R., 18 Bom., 594]

**502.** — *Sale set aside.—Sue by auction purchaser to recover purchase-money.—Civil Procedure Code (Act VIII of 1859), ss 256, 257, 258 (A. of 1877), ss 312, 315.—Warranty.—Contract implied.—Certain immovable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, H, as the property of his judgment debtor. H objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor but was endowed property. His objections were disallowed, and the property was*

## SALE IN EXECUTION OF DECREE

—continued—

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*continued*

put up for sale on the 20th July 1875 under the provisions of Act VIII of 1859 and was purchased by A. W subsequently sued K to establish his claim to the property and to have the sale set aside, and on the 18th August 1876 obtained a decree setting it aside. Thereupon A sued H to recover the purchase-money, alleging a failure of consideration. *Held* that the sale not having been set aside in favour of the judgment debtor on the ground of want of jurisdiction or other illegal or irregularity affecting the sale, but having been set aside in favour of a third party who had established his title to the property and there being no question of fraud or misrepresentation on the part of the decree holder, the suit was not maintainable. **Rajib Lochan v Himalayani Das**, 2 B L R., A C., 82; and **Sowdamin Choudhary v Krishna Kishor Poddar**, 4 B L R., F B 11 followed. **Malwadi Lal v Kauria, I L R., 1 All., 86.** **Nralkunth Sahas v Arum Matho** 3 N W 67, and **Doolin Hur Nath Kooner v Ba 100 Oryla**, 2 Agra, 60 distinguished. *Held* also that the auction purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Miso I L R., 2 All., 292*, dissented from. **Per STRAIGHT, J.**—That had the provisions of that section been applicable instead of instituting a suit, the auction purchaser should have applied for the return of her purchase-money in the execution of the decree. **HIRA LAL v KARIM OF HIRA**

[I. L. R., 2 All., 780]

**503.** — *Sale by Sheriff under writ of fieri facias.—Sale subsequently declared void.—Suit to recover purchase-money.—Liability of execution creditor.—Civil Procedure Code 1859, ss 201, 242.—The plaintiff in a suit by A against B stated that, in a suit in which B had recovered judgment against C, a writ of fieri facias was, on 18th June 1866, issued on the application of B, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary by sale, of the property of C in Bengal, Behar, and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal, that the writ did not authorize the execution on thereof against immovable property in Oudh, that under the writ the Sheriff, acting on instructions from B, seized and put up for sale the right, title, and interest of C in a taluk in Oudh, which was purchased by D, to whom the Sheriff executed a bill of sale and on receipt of the purchase-money paid a portion thereof to B and the balance to C, and put D into possession of the property, and he remained for some time in possession and in receipt of the rents and profits that eventually in proceedings in Oudh instituted by D for partition of the property purchased by him, the sale was pronounced to be null and void and was set aside, and D was removed from*



# SALE IN EXECUTION OF DECREE —continued.

## 18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—continued.

possession; and that the plaintiff sued as the executor of *D* to recover the whole of the purchase-money from *B*. *Held* on appeal, affirming the decision of *PHEAR, J.*, that the plaintiff disclosed no cause of action, first, because a purchaser who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend, cannot recover the purchase-money from his vendors; second, because the Sheriff was not the agent of *B* for the sale of the property, and therefore no privity of contract existed between *B* and *D*; third, because *D* having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, viz., for money had and received. The judgment of the High Court in *Bissessur Lall Sahoo v. Ramtuhul Singh*, 11 B. L. R., 121, explained by *PHEAR, J.*, and ss. 201 and 212 of Act VIII of 1859 observed upon. *DORAB ALLY KHAN v. MOHEEODDEEN*

[L. R., 1 Cal., 55: 24 W. R., 372]

In the same case on appeal to the Privy Council it was held as follows: A writ of *fiery facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good. But if the Sheriff acts *ultra vires*,—e.g., if he seizes and sells property not within his jurisdiction,—he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell. Since there is not in India the difference between real and personal estate which obtains in England, and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fiery facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate. A Sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When, from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions. *DORAB ALLY KHAN v. EXECUTORS OF MOHEEODDEEN*

I. L. R., 3 Cal., 806

S. C. *DORAB ALLY KHAN v. ABDOL AZEED*

[L. R., 5 I. A., 116: 2 C. L. R., 529]

564. ————— *Payments of purchase-money on an agreement as to possession between purchaser and execution creditor—Sale subsequently set aside—Suit for purchase-money—Accord and satisfaction.*—On the 9th of October 1866 the Sheriff of Calcutta executed a bill of sale to *A* of

# SALE IN EXECUTION OF DECREE —continued.

## 18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—continued.

a certain talukh situated in Oudh, of which *A* afterwards obtained possession. In consequence of an impression that the sale was illegal, *A* directed the Sheriff not to pay the money to *B*, the execution-creditor, and the money remained in the hands of the Sheriff until the 24th of October 1867, when *A* directed the payment of the money to *B* in consequence of an arrangement then come to between *A* and *B* to the effect that, if *A* should be ousted from the possession of the property within a year, *B* should take measures to reinstate him at his (*B*'s) expense. *A* died without heirs in July 1868, and the Government of Oudh, not being aware that *A* had left a will, took possession of the talukh partly as on an escheat and partly because there were arrears of revenue due on the property. On the 2nd of October 1868 an order was passed by the Collector of the district in which the talukh was situate declaring the sale by the Sheriff illegal and directing the return of the talukh to its former owners, which was done in April 1869. In a suit brought by *A*'s executors against *B* in September 1872 to recover the purchase-money as money had and received, as upon a total failure of consideration,—*Held* that the agreement of the 24th of October 1867 operated as an accord and satisfaction of all rights which *A* might have had to a return of the purchase-money or to damages, and that the only remedy which *A* had was an action on the agreement. *Held* also that no breach of the agreement of 24th of October 1867 had in fact occurred, and that, even if the agreement had been broken, the suit was barred by limitation. *DORAB ALLY KHAN v. ABDOL AZEED*. *ABDOL AZEED v. DORAB ALLY KHAN*

[L. R., 6 Cal., 356]

565. ————— *Purchase of surplus proceeds of revenue sale afterwards set aside—Suit to recover purchase-money—Voluntary payment.*—An estate of which *R* was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. *S*, the holder of a decree against *R*, notwithstanding objections made by *R*, caused the interest of *R* in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution-sale *R*'s interest was bought by *B* and from the money paid by him the judgment-debt of *S* and the debts of other judgment-creditors of *R* were satisfied. In the meanwhile *R* brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favour in the High Court. *B* then applied to the Collector for *R*'s share of the surplus proceeds, but his application was refused. In a suit by *B* against *R* to recover the price he had paid at the execution sale,—*Held*, reversing the judgment of the High Court, that such a suit could not be maintained. *RAM TULSI SINGH v. BISESWAR LALL SAHOO*

[15 B. L. R., 208: 23 W. R., 305]

I. L. R., 2 I. A., 131

## SALE IN EXECUTION OF DECREE

—continued

18 SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*continued*

Reversing the judgment of the High Court in *DISPENSER LALL SINGH v. RAM TILAK SINGH* (11 B. L. R., 121; 19 W. R., 351)

580

Suit to recover

purchase money when sale is set aside—*Minor—Fraud*—A decree-holder fraudulently caused the sale in execution of his decree of certain immovable property belonging to a minor. The minor brought a suit for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction purchaser sued the decree holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held per PARSONS TURNER, SPARKIE and OLDFIELD JJ.* it being found that the auction purchaser was not a party to, or cognizant of, the fraud on the part of the decree-holder that neither the mere fact that the auction purchaser knew that he was purchasing the property of a minor nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree disentitled him to recover the purchase-money or from the decree holder. *Held also* that being innocent of fraud and having purchased in the bona fide belief that the property of the minor was saleable he was entitled to recover the purchase-money. *ALLY v. Gokul Das* 6 A. W., 18, distinguished. *Held also* that he could not recover the costs incurred by him in defending the suit brought by the minor because a suit he ought not to have defended. *Per STUART C.J.*—That the auction purchaser being guilty of fraud was not entitled to recover the purchase money and assuming that he was innocent of fraud that having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree he could not recover the purchase money. *MAHENDRI LALL v. KACHWALA* 1 I. L. R., 1 All., 508

567

Decree passed

without jurisdiction—*Suit to recover possession of lands sold in execution*—The plaintiff sued to establish his right to, and to recover certain lands in, the possession of which he had been obstructed by the defendant. The plaintiff purchased the lands at a sale held in execution of a decree obtained against the first and second defendants in the Court of the District Munsif of Tripasore. The sale was directed by the District Munsif of Tripasore. Between the date of the decree and the sale the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripasore to the District Munsif of Conchagram. *Held* that the sale was a nullity and conferred no title upon the plaintiff, but that the plaintiff was entitled to recover from the first and second defendants the amount of the purchase-money paid by him. *BARAYANA SAWMY DAIX v. SARAYANA MENDALI* 6 Mad., 68

568.

Civil Procedure

Code, 1859, ss. 206, 255—*Right on sale being set*

## SALE IN EXECUTION OF DECREE

—concluded

18 SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*concluded*

aside for irregularity—*Right to recover money expended for benefit of indigo factory*—When a sale is set aside under Act VIII of 1853 s. 255, where the purchaser had, before the sale was confirmed, taken possession, laid out money, and received rents or profits and he is turned out some time after by reason of such reversal of sale, he should get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and should account to the judgment-debtor for the profits received by him. At the same time it would depend upon the circumstances under which the purchaser took possession, and the nature of his outlay, whether he ought in equity to be allowed to claim reimbursement of the money expended by him. Where a purchaser bona fide took possession of the property, and from time to time laid out money thereon, because he thought that otherwise from its peculiar nature it would become even worse than valueless (e.g. making advances in an indigo concern lest the opportunity of the season should pass away), it was held that he was entitled to have it made a condition of setting aside the sale that he be repaid so much of the outlay as he could show was beneficial to the estate, he accounting for the rents and profits realized by him. *MORGAN v. ARDOL HYS*

[23 W. R., 393]

Confirming order setting aside sale. *ARDOL HYS v. MACRAE* 23 W. R., 1

569.

Suit by pur-

chaser for interest on purchase-money—*Act VIII of 1859—Act X of 1877 s. 315*—A judgment debtor, whose property had been sold in execution of a decree under Act VIII of 1853, appealed from the order disallowing his application to set aside the sale, after Act X of 1877 (Civil Procedure Code) came into force. The Appellate Court set aside the sale. The purchaser sued the decree holder for interest on the purchase-money and the expenses of the sale, the purchase money having been returned to him, under the order of the Court executing the decree, without interest and less such expenses. *Held by the Full Bench* that the provisions of Act X of 1877, and not of Act VIII of 1853, were applicable to the determination of the matter in dispute in the suit. *Held by the Divisional Bench (STRAIGHT and TREVELL, JJ.)* that, with reference to the ruling of the Full Bench, the suit was maintainable. *Held also by the Divisional Bench* that under the circumstances of the case, the plaintiff ought not to be granted the relief sought. *RAHMAN DIAL v. BANK OF UPPER INDIA* 1 I. L. R., 5 All., 384

## SALE OF GOODS.

See CASES UNDER CONTRACT

See CONTRACT ACT, s. 73

[15 B. L. R., 276]

See CONTRACT ACT, s. 74

[I. L. R., 4 Calc., 80]

I. L. R., 15 Calc., 1

## SALE OF GOODS—continued.

See LIEN . I. L. R., 18 Calc, 573  
[L. R., 18 I. A., 78]

See PRINCIPAL AND AGENT—COMMISSION  
AGENTS . I. L. R., 18 Mad., 238  
[I. L. R., 17 Bom., 520  
I. L. R., 20 Mad., 97]

See SHIPMENTS . 5 B. L. R., 619

## — Agreement for—

See STAMP ACT, 1879, SCH. I, ART. 46.  
[I. L. R., 14 Bom., 102]

See STAMP ACT, 1879, SCH. II, ART. 2.  
[I. L. R., 10 Mad., 27  
I. L. R., 15 Mad., 150]

## — Note or memorandum of—

See STAMP ACT, 1879, SCH. I, ART. 46  
[I. L. R., 14 Bom., 102]

— Appropriation to vendee—*Passing of property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit—Termination of transit—Goods landed in dock and held by dock authorities—Bom. Act VI of 1879, ss. 43, 62—Port Trustees of Bombay—Bye-laws of Port Trust, rule 59.*—In August 1890 the plaintiffs, through B, A & Co., of Bombay, ordered from B, R & Co., in London, 100 bales of grey shirtings at 7s. 10d. per piece f. o. b., November-December shipment. In order to carry out this order, B, R & Co. purchased goods of the required description from D & Co., of Manchester. The heading of the invoice of the goods supplied by D & Co. contained these words: "Proceeds to be remitted to B, R & Co., London, specifically for the protection of their acceptances of G & R D's draft against this or any of these shipments," and the letter addressed by D & Co. to B, R & Co. forwarding draft contained the following clause: "It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm" To this letter B, R & Co. replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of B, R & Co., and were to be delivered f. o. b. at Liverpool. D & Co. accordingly despatched the 100 bales to Liverpool, and there B, R & Co. had them shipped in eight different vessels, viz., 13 bales in each of the four steamers *Nubia*, *Clan Drummond*, *Inchulca*, and *Roumania*, and 12 bales in each of the ships *Hispania*, *Eden Hall*, *City of Edinburgh*, and *Wistow Hall*. The 100 bales were consigned to Bombay by B, R & Co. in their own name, the bills of lading being made out to "their order or to his or their assigns." B, R & Co. paid the freight at Liverpool and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December 1890, except the 12 bales by the *Wistow Hall*, which were shipped on that day. On the several shipments being affected, B, R & Co. accepted bills of D & Co.,

## SALE OF GOODS—continued.

payable three months after date. The bills of lading of the bales shipped in the *Nubia*, *Clan Drummond*, and *Hispania* were endorsed in blank by B, R & Co., and sent by post to B, A & Co., of Bombay. The *Nubia* arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, B, A & Co. having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of B, A & Co. The invoices of 25 more bales, viz., 13 bales *ex Clan Drummond* and 12 bales *ex Hispania*, arrived in Bombay later in November, and were handed to the plaintiffs. On the 1st December 1890 the plaintiffs paid Rs25,000 to B, A & Co. Neither the *Clan Drummond* nor the *Hispania* had then arrived in Bombay. On the 4th December 1890 B, R & Co. suspended payment, and on that day a receiving order was made vesting their assets in the first defendant, W; and on the next day P was appointed special manager of the estate under s. 12 of the English Bankruptcy Act (Stat. 46 & 47 Vict., c. 52). At that time the bills of lading for the remaining 62 bales were still with B, R & Co., who then handed them over to P. On the same 5th December 1890 B, A & Co. suspended payment in Bombay. On the 13th December 1890 D & Co. telegraphed to their agents in Bombay, R, S & Co., directing them to stop the goods in transit, including the 25 bales *ex Clan Drummond* and *Hispania*. On the 15th December R, S & Co., on behalf of D & Co., gave notice to the agents of the *Hispania* to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the dock at Bombay. They then gave the dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, viz., the 15th December, R, S & Co. gave notice to the agents of the *Clan Drummond* to stop the 13 bales on board. These bales had not then been landed, and were then still on board. The other five steamers with the remaining 62 bales duly arrived in Bombay and went into dock. On the 22nd January 1891 the *Roumania*, the *City of Edinburgh*, and the *Wistow Hall* had landed all the bales which they had on board. The *Eden Hall* had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the *Inchulca* had not landed any of her bales, the whole 13 being still on board. On that day (2nd January 1891) R, S & Co., on behalf of D & Co., wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the *Wistow Hall*, in respect of which no notice was sent. These notices were all delivered on the 3rd January 1891. Held, (1) on the evidence, that the payment of the Rs25,000 by the plaintiff to B, A & Co. in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to B, A & Co. was a payment to B, R & Co.; but if that were not so, B, A & Co. were agents to receive payment. (2) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from D & Co. to B, R

**SALE OF GOODS—concluded**

*d Co* and from the latter by reason of the plaintiffs' contract with *B R & Co* to the plaintiffs—*B R & Co* having by holding the bills of lading, the constructive possessions of the goods and the legal right to their actual possession and to retain the same until their price was paid by the plaintiffs with the charges (3) That the plaintiffs were entitled as against the representatives of *B R & Co* and *B A & Co* in bankruptcy to the bills of lading and the goods reposed by them with out further payment *R S & Co* as agents of the Official Receiver, had not therefore the right to withhold the bills of lading of any of these bales from the plaintiffs (4) On the evidence that when *D & Co* forwarded the goods to *B P & Co* at Liverpool they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were 'at home' in Bombay. Until then the right of *D & Co* to stop the goods in transit lasted (5) That effectual notice on behalf of *D & Co* to stop in transit was given in respect of the 13 bales *ex Romania* by the notice sent by *R S & Co* on the 15th December 1890. The general notice given on that day to the agents of the *Romania* not only as to specific bales but as to any other bales shipped on account of *G and R D* to *B A & Co* although indefinite, covered the shipment by the *Romania*, and was given in time to prevent the bales on board that ship from reaching 'home' (6) That effectual notice by *R S & Co* on behalf of *D & Co* to stop in transit was given in respect of the 12 bales *ex Isakalen* and the 3 bales (out of the 12) *ex Eden Hall* which were still on board and undischarged at the date of the notice of the 2nd January 1891 (7) As to the 12 bales *ex Hispania* landed prior to the notice of the 15th December and as to the 12 bales *ex City of Edinburgh* and the 9 (out of the 12) *ex Eden Hall* landed before the notice of the 2nd January 1891 and as to the 12 *ex Wistow Hall*, in respect of which no notice at all was given that the plaintiffs were entitled to them. (8) That the goods ceased to be in transit when landed in dock in Bombay. **LILLADHAR JAIRAM NARAYAN v WATFORD** **L. L. R., 17 Bom., 62**

**SALE PROCEEDS**

**See APPEAL—EXECUTION OF DECREE—PARTIES TO SUITS**

**[B L. R., Sup Vol., 13, 927]**

**See SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE.**

**See SALE FOR ARREARS OF REVENUE—SALE PROCEEDS**

**Distribution of—**

**See CASES UNDER SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE PROCEEDS**

**Right of Government to—**

**See PAUPER SUITS—SUITS**  
**[L. L. R., 1 All., 506]**

**SALE-PROCEEDS—concluded**

**Suit for refund of—**

**See RIGHT OF SUIT—SALE BY EXECUTION OF DECREE** **W R., F. R., 180**  
**[I. L. R., 12 All., 546]**

**Suit to recover surplus—**

**See LIMITATION ACT, 1877, s. 10**  
**[I. L. R., 18 Calc., 234]**

**See LIMITATION ACT 1877, ART. 62.**  
**[I. L. R., 18 Calc., 234]**

**See LIMITATION ACT 1877 ART. 120.**  
**[I. L. R., 20 Calc., 51]**

**See LIMITATION ACT 1877 ART. 145.**  
**[I. L. R., 18 Calc., 234]**

**See MORTGAGE—POWER OF SALE**  
**[I. L. R., 18 Bom., 141]**

**Taking out of Court—**

**See LIMITATION ACT, 1877 ART. 173—STEP IN AID OF EXECUTION—SUITS AND OTHER PROCEEDINGS BY DECREE HOLDERS**  
**[6 W. R., Mss., 49]**  
**15 W. R., 182**  
**I. L. R., 6 All., 368**  
**I. L. R., 10 Calc., 549**  
**I. L. R., 17 Mad., 185**  
**I. L. R., 23 Bom., 340**

**SALSETTE.**

**Law applicable in—Christian inhabitants of the Island of Salsette—Converts from Hinduism to Christianity—Succession to property before Succession Act—Primumogeniture—Hindu law, how far applicable—Manager of family—Mortgage by manager when binding on family property—Suit for redemption of mortgage—Sale in execution of decree—Purchaser, Rights of—Power of Christian inhabitant of Salsette to make a will dealing with his share in ancestral property—The law of a conquered territory continues in force until altered by the Crown or the Legislature The Island of Salsette was conquered from the Marathas by the British in 1774, and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1855) Until that Act was passed the law of primogeniture was not in force among the Christian inhabitants of Salsette In the absence of a widow and daughter, the sons took the property of their father in equal shares. **Quære—Whether they did so under the Hindu law or the Portuguese law, or by force of usage existing among them. A mortgage of certain property was made in 1875 by the eldest of three brothers P, M, and E, who were Christian inhabitants of the Island of Salsette They had inherited the property from their father, who died in 1840 The family had originally been a Hindu family, but had been converted to Christianity E died in 1876, and M died in 1883, bequeathing his interest in the property to his nephew, the plaintiff, who was****

**SALSETTE—concluded.**

*P*'s son. In that year (1883) the mortgagee sued *P* alone upon the mortgage and obtained a decree which he afterwards assigned to the defendant, who sold the mortgaged property in execution of the decree, and at the sale purchased the property himself. The plaintiff now sued to redeem the property, and the question arose (1) whether, under the law applicable to Christian inhabitants of Salsette, the eldest brother *P* had succeeded on the father's death to the whole of the family property, and (2) if not, then to what extent the mortgage in question bound the property of the family. *Held* (1) that the law of primogeniture prior to the passing of the Indian Succession Act (X of 1865) did not exist among the Christian inhabitants of Salsette, and that *P*, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father. (2) That the mortgage by *P* had been authorized by the family and was for family purposes, and was binding upon the family property. Although *P* and his brothers could not be regarded as co-parceners under Hindu law, yet, having regard to the fact that they were descendants of converts from Hinduism, among whom Hindu usages largely prevailed, the question should be treated in much the same way as if the family was still a Hindu family, and the Court would not require the same direct proof of the manager's authority to mortgage as it would in the case of an English manager under similar circumstances. (3) That the plaintiff was not entitled to redeem. What was intended to be sold at the sale held in execution of the decree upon the mortgage was the whole interest in the mortgaged property. The defendant purchased that interest, subject to the right of the plaintiff to show that his share derived from *M* was not bound by the mortgage, and he had failed to do so. *M*'s share as well as *P*'s had passed by the sale. (4) A member of the Christian community of the Island of Salsette is entitled to deal with his share in ancestral property by will. **JALBHAI ABDESHIR SHET v. MANORL** . . . I. L. R., 19 Bom., 680

**SALT.****Search for contraband—**

See **ESCAPE FROM CUSTODY.**

[I. L. R., 19 Mad., 310]

**SALT, ACTS AND REGULATIONS RELATING TO—**

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**1. BENGAL.**

1. ———— **Beng. Reg. X of 1819, s. 36**  
—*Possession of salt—Arrangement by Government.*  
The absence of a protective document makes salt contraband. But where the Government has made such an arrangement with a particular party as places him in possession of a large quantity of salt,

**SALT, ACTS AND REGULATIONS RELATING TO—continued.****1. BENGAL—continued.**

the element and condition which give a Salt officer the jurisdiction to seize salt in the absence of a protective document are wanting. **KOOMARNARAIN ROY v. SUPERINTENDENT OF SALT CHOWKEE, JULESSUR**  
[1 Hay, 247]

2. ———— **Beng. Act VII of 1864, ss. 12 and 16—Confiscation of salt found without rowana or pass—Intention to sell.**—If salt exceeding five seers is found within the limits prescribed by s. 12 of Bengal Act VII of 1864, unprotected by a rowana or pass, the salt is contraband and liable to seizure, and the parties transporting it are punishable under s. 16. It matters not whether any attempt or intention to sell is proved or not. **QUEEN v. ORATULLA** . . . . . 6 B. L. R., 381

**S. C. GOVERNMENT OF BENGAL v. AKATOOLLAH**  
[15 W. R., Cr., 21]

3. ———— **s. 16—Rowana, Endorsement of, by police or customs officers.**—A rowana as defined by Bengal Act VII of 1864 is complete on the face of it without any certificate by way of endorsement signed by the Superintendent showing that the endorsement made by the preventive officers of customs has been examined by him. S. 16 of Act VII only gives power to fine when the salt is not specified in a rowana. **IN THE MATTER OF THE PETITION OF KISHORY MOHUN PRAMANICK**  
[23 W. R., Cr., 6]

4. ———— **Salt carried partly by land and partly by water.**—Where a person who had taken a quantity of salt under a rowana for transit from Calcutta to his golah, part of the journey to be performed by water and part by land, conveyed a portion of it to his golah where the rowana was, and was conveying the rest in two separate batches by land, it was held that he could not be convicted under Bengal Act VII of 1864, s. 16. **QUEEN v. CHUNDER CHURN DASS**

[22 W. R., Cr., 71]

5. ———— **ss. 16 and 18—Possession of contraband salt.**—In a case of conviction under s. 16, Bengal Act VII of 1864, for having in possession contraband salt, the Sessions Judge recommended that it should be set aside on the ground that the salt had already reached its destination, and was not *en route*; s. 18 consequently not applying. The High Court set aside the conviction accordingly. **QUEEN v. CHUNDRU MOHUN BROOXA**

[22 W. R., Cr., 82]

6. ———— **ss. 16 and 21—Possession and sale of salt.**—*A* was convicted under s. 16, Bengal Act VII of 1864, and *B* under s. 21 of the same Act; the former with having had in his possession salt not covered by a rowana, and the latter with having sold to *A* the said salt. *Held* that the conviction of *A* under s. 16 was illegal, the salt in his possession having been a portion of salt for which *B* had taken out a rowana, but that the conviction of *B* under s. 21 was proper, as he had failed to certify the salt sold by him to *A* on the back

# SALT, ACTS AND REGULATIONS RELATING TO—continued

## 1 BENGAL—concluded

of the rowana. IN THE MATTER OF THE PETITION OF BHAGBUT DEY 18 W R., Cr., 84

7 ——— a. 17—*Infliction of penalty on owner and servant*—In a case of conviction under Act VII of 1864 of having in possession contraband salt the penalty cannot be inflicted on the owner of the salt and also on the servant or gomastha of the owner who has the salt in his possession, as the possession of the latter is the possession of the former. IN THE MATTER OF THE PETITION OF GUNGADHAR SANKO 22 W R., Cr., 9

8. ——— a. 18 — *Confiscation of salt—Power of releasing from confiscation*—By s. 18, Bengal Act VII of 1864 salt, not being conveyed by the route and to the place prescribed in the rowana, becomes absolutely confiscated. The power of releasing any salt is vested in the Board of Revenue under s. 39 and not in the Magistrate. QUEEN v. BOIDOWATH 27 W R., Cr., 48

9 ——— — *Conviction of both principal and agent*—The High Court in this case upheld the conviction by the Magistrate under Bengal Act VII of 1864 s. 8, both of the owner of contraband salt and of his agent who was transporting the salt, and declined to direct the Magistrate to pass sentence on the manjers of the boat in which the salt was being transported when seized, their boat having been already confiscated by the Magistrate. QUEEN v. MODUR MOHUN PAL CHOWDHURY 23 W R., Cr., 7

## 2 MADRAS

10 ——— Act XVII of 1840—*Possession of salt earth*—Being in possession of salt earth from which salt may be manufactured, with the object of making salt is an offence under the salt laws. ANONYMOUS 4 Mad., Ap., 53

11. ——— Mad. Reg. I of 1805 s. 18 — *"Spontaneous salt"*—*Possession of—Salt Excise Act 1871*—"Spontaneous salt" is salt which produced naturally requires no process of manufacture to render it suitable for human consumption. To collect spontaneous salt for domestic consumption or to be found in possession of it for that purpose or to be found in the act of conveying it home from the place in which it is collected are not *per se* acts prohibited by Regulation I of 1805 s. 18. *Smuggling*—In districts to which the Salt Excise Act 1871 is extended, to obtain or to be found in possession of spontaneous salt under circumstances which show an intent on to evade payment of the excise is an offence. ANONYMOUS

[I. L. R., 3 Mad., 17

12. ——— — *Salt-earth Collection of or possession of*—The collecting of salt-earth from salt swamps, or the being in possession of salt-earth for the purpose of making salt, is not an

# SALT, ACTS AND REGULATIONS RELATING TO—continued.

## 2. MADRAS—concluded

offence within the meaning of a 18 of Madras Regulation I of 1805 I 20 v. PILLAI ARACHU [I. L. R., 1 Mad., 278

13 ——— Mad. Act I of 1892, s. 20—*Possession of salt-earth*—The possession of earth impregnated with salt, not being a natural saline effluence or deposit, is no offence under s. 20 of the Salt Laws Amendment Act, 1892 (Madras). QUEEN v. THURAI I. L. R., 7 Mad., 163

14. ——— — cl. 3, s. 27 (e)—*Salt imported from foreign State Contraband*—S. 26 of the Salt Laws Amendment Act (Madras Act I of 1892) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the salt laws and s. 27 of the said Act authorizes, *inter alia* the Governor in Council to make rules for regulating the import of salt by land. No such rules having been passed in 1894 a person was convicted of being in possession of salt known to have been manufactured in and imported from the Native State of Pudukkottai. Held that the conviction was right. QUEEN EMERALD v. PONDIAL THAL I. L. R., 8 Mad., 342

## 3 BOMBAY

15 ——— Acts XXVII of 1837 and XXXI of 1850—*Maxim "Omnia presumuntur contra spoliatores"*—*Salt thrown overboard to avoid measurement*—Salt removed in excess of permit—Applying the maxim "Omnia presumuntur contra spoliatores" the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and with the assistance of the agent of the owner threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit. Where under a permit to pass a certain number of mounds of salt on which duty has been paid, an amount in excess of such number is removed, the whole of such salt must be considered as removed contrary to the provisions of the Salt Acts (Act XXVII of 1837 and Act XXXI of 1850) and the whole of such salt and not merely the excess, is under these Acts liable to confiscation. FRAMJI HORMASJI v. COMMISSIONER OF CUSTOMS 7 Bom., A. C., 59

16. ——— — *Removal of salt—Property in salt naturally formed—Theft*—Disbonest removal of salt naturally formed in a creek which was under the supervision of an officer belonging to the Customs Department, constitutes theft, the salt having been legally appropriated by such officer (*Per BAYLEY and WILKINS JJ*). But removal for one's own use from a creek of such salt not legally appropriated constitutes no offence either under the Penal Code or Act XXXI of 1850 or XXVII of 1837, though under s. 7 of the latter Act

# SALT, ACTS AND REGULATIONS RELATING TO—continued.

## 3. BOMBAY—continued.

made applicable by s. 8 of the former, the salt removed becomes liable to detention. (*Per LLOYD and KEMBALL, JJ.*) *REG. v. MANSANG BHAYSANG*  
[10 Bom., 74

17. ——— Bom. Act VII of 1873—*Act XVIII of 1877—Duty paid under former Act—Effect of new Act by which duty increased coming into operation before removal of salt—Increased duty paid under protest—Suit to recover excess—Set-off—Excise duty—Customs.*—Prior to the 28th December 1877, the excise duty on salt manufactured in Bombay was Rs 13-0 per maund, and the Act which regulated the importation and transport of salt in the Presidency of Bombay was the Bombay Salt Act (VII of 1873). The plaintiffs, who were salt merchants, were desirous of exporting salt from the salt-works at Uran and Panvel, and accordingly, under the provisions of Act VII of 1873, made four several applications in writing to the Assistant Collector of Salt Revenue for the necessary permits on the following dates, viz., 27th November 1877, 17th December 1877, 17th December 1877, and 24th December 1877. Each application stated the amount of salt which it was proposed to export, and at the time of sending in such applications the duty payable in respect of the amount of salt therein mentioned was paid. Receipts for the duty so paid were given to the plaintiffs, and all four applications were duly registered before the 28th December 1877. The salt comprised in the first three applications amounted in all to maunds 20,972, and the whole of this quantity, with the exception of maunds 2,748, had been removed by the plaintiffs before the 28th December 1877, but at that date no part of the salt which was the subject-matter of the last application (24th December 1877), and which consisted of maunds 10,483, had yet been removed. On the 28th December 1877 Act XVIII of 1877 came into force, by which Act the excise duty on salt manufactured in Bombay was raised from Rs 13-0 to Rs 2-8-0 per maund, and on that day the sarkarkun refused to allow the plaintiffs to remove the balance of the first three lots (viz., 2,748 maunds) or the last lot of maunds 10,483, unless an additional duty, at the rate of eleven annas per maund, was paid in respect thereof, alleging that the same was leviable under Act XVIII of 1877. The plaintiffs paid under protest the additional duty demanded, amounting to Rs 9,096-5-0, and exported the salt to British Malabar, having previously obtained certificates from the Collector that excise duty, at the full rate of Rs 2-8-0 per maund, had been paid upon the said salt. On production of these certificates at the ports of British Malabar, the salt was admitted free of customs duty. The plaintiffs subsequently brought this suit to recover the said sum of Rs 9,096-5-0, together with a sum of Rs 1,000 damages alleged to have been sustained by reason of the delay in removing the salt caused by the conduct of the sarkarkun. The plaintiffs contended that, having paid the duty in respect of the salt comprised in the four applications and the said duty having been received by the Collector before

# SALT, ACTS AND REGULATIONS RELATING TO—concluded.

## 3. BOMBAY—concluded.

Act XVIII came into force, they were not liable to pay any further duty, and that Act XVIII of 1877 did not apply to the said salt. The defendant contended that the additional duty was rightly levied on the salt, and further claimed to set off against the plaintiff's claims the sum of Rs 9,053-5-0 which the plaintiffs would have been obliged to pay in importing the salt into British Malabar if they had not already paid it to the authorities in Bombay, but from payment of which they had been exempted on production of the certificates above mentioned. *Held* that on the 28th December 1877 the plaintiffs had acquired the right to remove the salt, whenever they might think proper, by simply complying with the usual forms required by Act VII of 1873, and that Act XVIII of 1877 did not operate retrospectively so as to destroy that right and to impose on the plaintiffs a heavier burden as a condition of their removing the salt. *Held* also, however, that, as the salt was allowed to pass free into British Malabar on the strength of its having already paid the duty of Rs 2-8-0 per maund at Bombay, the sum of Rs 9,096-5-0 must be deemed to have been appropriated by the plaintiffs to the payment of the customs duty payable on the importation of the salt into the ports of British Malabar, and was therefore no longer recoverable from the defendant. The plaintiffs, by applying to the Collector of Customs at Bombay for certificates that the duty had been paid, by presenting them at the Malabar ports, and claiming, in virtue of such certificates, that the salt should be admitted free of customs duty, virtually appropriated the Rs 9,096-5-0 excise duty (which remained in the hands of the customs authorities as money had and received to the use of the plaintiff) to the payment of the enhanced customs duties at such ports. *BRITO v. SECRETARY OF STATE FOR INDIA*

[I. L. R., 6 Bom., 251

# SALT ACT.

## ———Breach of—

*See SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.*

[I. L. R., 4 Mad., 335, 335 note  
5 Bom., Cr., 61

# SALT ACT (XII OF 1882).

——— s. 11—*Limitation prescribed for charging with offence—Fraud in concealing date of offence.*—The provisions of s. 18 of the Limitation Act of 1877 do not apply to criminal cases, and the peremptory terms of s. 11 of the Indian Salt Act (XII of 1882) are not affected by that section. *QUEEN-EMPERESS v. NAGESHAPPA PAI*

[I. L. R., 20 Bom., 543

# SALT-PANS, LEASE OF—

*See STAMP ACT, SCH. II, ART. 13.*

[I. L. R., 18 Bom., 546

**SALVAGE**

See CO SHARERS—GENERAL RIGHTS IN JOINT PROPERTY

[L. L. R., 14 All, 273]

Consolidation of claims for—

See PRACTICE—CIVIL CASES ADMIRALTY COURT L. L. R., 22 Cal., 511  
[3 C W N., 67]

Lien for—

See LIEN L. L. R., 2 Cal., 58

See SMALL CAUSE COURT, MOVES—JURISDICTION—SALVAGE 8 W R., 252

1. ——— Principles of salvage lien.—*Right to salvage*—A claim to salvage is founded on a principle of equity which the Courts of British India are bound to recognize. It accrues irrespective of the circumstance that the rescue is from a danger incurred on inland waters, or of the circumstance that a portion of the services may be rendered from the shore. A boat laden with indigo seed left Permit Ghat, about three miles above the pontoon bridge over the Ganges at Cawnpore on the morning of the 6th of August. While the boatmen were endeavouring to cross the stream the boat struck the bridge at a point where the current was running with a velocity of 3 feet per minute. The boat came athwart two of the pontoons, and by the pressure of the stream canted over on its side. From this cause and also from the strain and other injuries, it began to take in water. Had it been allowed to remain in this position, the bridge must have broken from its moorings, or, more probably still, the boat and cargo would have been submerged. The persons in charge of the bridge must have at once availed all danger to the bridge by submerging the boat. They took measures to relieve the strain on the bridge and to remove the cargo. It was impossible to remove the boat until the whole of the cargo had been discharged. This was done and the boat was towed to a place of safety and the cargo was removed and stored in a warehouse. *Held* that a right to salvage accrued. Persons in these provinces, to whom a right of salvage has accrued, are entitled to retain the property saved until a reasonable sum has been paid or tendered to them in satisfaction of their claim. *GILVON & ROSS v. G. N. W., 311*

2. ——— Services entitling vessel to salvage.—*Towage*—Where a ship is in a condition of actual peril, and the services of a tug are sought for and directed to the purpose of releasing her from that condition, such services are salvage services. But where there is nothing in these services as regards risk or exertion or other conduct of the sailors to make them differ from ordinary towage services, their reward should be estimated as for towage with salvage liberality. *IN THE MATTER OF THE "ALABAMA"* 2 Ind. Jur., N. R., 139

3. ——— *Towage Extraordinary*—*Claim of master and crew*—*Award*—*Apportionment*—The S. S. C., while employed as a Government transport to convey troops and stores from Bombay to Port, broke her screw

**SALVAGE—continued**

shaft and became disabled. While in that condition, the S. S. H. B. met her and towed her back to Bombay, the voyage occupying eleven days. The owners of the S. S. C. settled the claim of the owners of the S. S. H. B. for £37,500, but refused to recognize any separate claim to remuneration to the plaintiffs, the master and crew of the S. S. H. B. *Held* that the services rendered were, under all the circumstances of the case, salvage and not merely towage services and that £10,000 was a fair remuneration for the master and crew of the salving vessel to be apportioned, £4,000 to the master, the rest to the crew according to their ratings. The plaintiffs held entitled also to one third second part of the freight, if any, which might be recovered by the S. S. C. under her charter party with the Indian Government. If towage leads to the rescue of a vessel in actual danger, or in reasonable apprehension of danger, the services should be remunerated as salvage. When the steam power of the salving vessel is the efficient cause of the salvage the owners are entitled to the larger share of the reward. This is especially the case where the master and crew of the salving vessel incur no risk to life. But the reward of the latter ought nevertheless, in the interests of commerce and humanity alike, to be on a liberal scale. The rule no longer obtains which made the salvage reward proportionate to the value of the salved ship. The Courts are only bound to give such amount as is fit and proper with reference to all the circumstances of the case including value. *RAVING & S. S. "CHITRA" L. L. R., 7 Bom., 196*

4. ——— Calculation of salvage award.—*Steamers*—The Court is bound to consider the time, labour, skill, enterprise, and risk of the salvors, as well as the value of the property engaged in the service, and also the degree of danger from which the property is rescued, and the value of the property so rescued. Steamboats are entitled to a higher rate of reward than other vessels by reason of the promptness with which they are enabled to render services in such cases. *IN THE MATTER OF THE "LADY JOCKEY"* 2 Mad., 355

5. ——— *Goods put on flat during squall*—A dinghee laden with guilders valued at Rs. 20,000 was being propelled across the river when a squall coming on and the dinghee being in some danger the guilders were taken on board a flat for safety and kept there till the squall subsided. *Held* that the owners of the flat had no claim for salvage, and that £15 was a fair remuneration for services rendered. *URSA CHURN CHETTY & GORDON*

[1 Hyde, 212]

6. ——— *Arrest—Excessive bail—Costs Salvage services—Amount of award increased on appeal*—In an action of salvage in which a ship was arrested, and the bail asked for was found to be excessive, the Court (PILOT and TREVELLAN, JJ.) held that the promoters must pay the impugnants the costs occasioned by the bail required being excessive. *George Gordon, L. R., 9 P. D., 451*, followed. In this case the Court increased the amount of salvage award from £1,500 to £2,400, in consideration of the great risk incurred



**SALVAGE—continued.**

by the salvors in rescuing the ship and cargo, which were very valuable, from imminent destruction. IN THE MATTER OF THE SHIP "CHAMPION"

[I. L. R., 17 Cal., 84

7. ——— Amount of salvage awarded—Mode of estimating salvage services—Allocation of salvage amongst officers and crew—Bail—Costs.—On the 13th August 1893 the S.S. *Cashmere*, being (as found by the Court) in a position of risk and hazard, which by a change in the weather might have at once become one of danger, was in need of assistance which the *Naseri* afforded her. The services, however, rendered by the *Naseri* were not of an extraordinary or protracted character. The owners of the *Naseri* sued claiming Rs1,00,000 for salvage services, and the master and crew of the *Naseri* filed a second suit claiming Rs5,000. The defendant ship paid into Court Rs5,000 for the owners of the *Naseri* in the first suit and Rs2,257 for the crew in the second suit. The value of the S.S. *Cashmere* was Rs75,000, and that of the cargo on board was Rs56,510. Held that the amount paid into Court by the defendant ship was sufficient for the salvage services rendered. Held also that the cargo was liable in the same proportion. Principles regarding (a) salvage generally, (b) allocation of salvage amongst officers and crew, (c) costs, (d) bail discussed. BOMBAY AND PERSIA STEAM NAVIGATION Co. v. S.S. "CASHMERE"

[I. L. R., 24 Bom., 55

8. ——— Service to a vessel in distress, though not an imminent danger—Interruption of service by accident—Towage service convertible into salvage service—Distinction between towage and salvage service—The indicia of salvage service—Costs—Practice of the Court in giving costs.—Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes in some degree to its ultimate safety, entitles the person rendering the service to salvage reward. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered. Services rendered to a ship which is in a normal condition, and has received no injury, and needs nothing more than expedition or acceleration of progress, will be treated as mere towage; it is otherwise in the case of a vessel which is in a disabled condition or has received substantial injury. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it have all to be taken into consideration. An ordinary towage service may, in consequence of supervenient danger, be converted into salvage service; but the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct or gross negligence on the part of the salvors. The mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners of the vessels, will

**SALVAGE—concluded.**

not disentitle the salvors from their reward. In assessing the award the Court will take into consideration, not only the danger and difficulties to which the salvor was exposed, but also the skill with which the work was performed. The shortness of service may often be taken as showing extraordinary skill and labour. When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovers are entitled to separate costs. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civil Procedure Code, and not under the schedule relating to Vice-Admiralty actions. IN THE MATTER OF THE STEAMSHIP "DRACHENFELS." "RETRIFER" v. "DRACHENFELS." "HUGHLI" v. "DRACHENFELS" . I. L. R., 27 Cal., 880

**SALVATION ARMY.**

Obstruction of street by—

See MADRAS POLICE ACT, 1888, s. 71.

[I. L. R., 14 Mad., 223

**SANAD.**

See GRANT—CONSTRUCTION OF GRANTS.

[I. L. R., 9 Bom., 561

[I. L. R., 12 Bom., 80, 534, 595

I. L. R., 15 Bom., 222, 625

L. R., 18 I. A., 22

See HEREDITARY OFFICE.

[I. L. R., 16 Bom., 374

L. R., 19 I. A., 39

See OUDH ESTATES ACT, 1859.

[I. L. R., 17 Cal., 311, 444

L. R., 16 I. A., 183

L. R., 17 I. A., 54

I. L. R., 26 Cal., 81, 879

See OWNERSHIP, PRESUMPTION OF.

[I. L. R., 15 Mad., 101

L. R., 18 I. A., 149

See SERVICE TENURE.

[I. L. R., 14 Bom., 82

See SETTLEMENT—CONSTRUCTION.

[I. L. R., 17 Bom., 40

See SETTLEMENT—EXPIRATION OF SETTLEMENT . . . I. L. R., 4 Bom., 367

——— Endorsement on—

See REGISTRATION ACT, s. 17, cl. (b).

[I. L. R., 14 Bom., 472

——— for collection of rents by go mashta.

See STAMP ACT, 1862, SCH. A, CL. 43.

[I. B. L. R., F. B., 55

——— Grant of—

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . . I. L. R., 17 Mad., 384

[L. R., 21 I. A., 93

## SANAD—continued

## Production of—

See BOMBAY DISTRICT MUNICIPAL ACT  
1873 s 33 I L R., 15 Bom., 518

## Title under—

See OUDH ESTATES ACT, 1869

[I L R., 3 Cal., 645]

1. — Construction of sanad—  
*Mokurr v. Semle*—The word "mokurr" in a  
sanad does not necessarily import perpetuity. *GOV-  
ERNMENT OF BENGAL v. JAYR HOSSAIN KHAN*  
[5 Moore's I. A., 467]

2. — *Utemwar sanad*,  
*Effect of*—The effect of the utemwar sanad is to as-  
certain and limit the demand of the Government for  
revenue and to recognize and confirm subject to this,  
the proprietary rights already in existence. *Kalama  
Natchiar v. Rajah of Shingunga*, 9 Moore's I. A.,  
639 distinguished. *CANNAMMAL AYYAR v. VIJAYA  
RAGUNADA CHIGASAMY NINGAPILLAI*  
[8 Mad., 114]

3. — *Right to cut  
timber*—*Prescriptive title*—Construction of grant  
—In construing grants by former Governments,  
the rule of English law as to the construction of  
grants to the subject by the Crown is the correct rule  
to be applied by the Courts in India. Where a sanad  
contained only the words "The village of Manavali  
has been conferred on you as imam, to be enjoyed by  
you, your son and grandsons. The Government dues  
of the village, viz., the koolha kolikunoo (i.e.,  
all taxes and assessments), present taxes and future  
taxes, together with the house-tax but exclusive of  
baks due to hakdars shall continue to be debited  
from year to year from the year next succeeding,"  
—it was held that the plaintiff's sanad did not  
operate as an alienation of the soil of the villages or  
confer on him a proprietary title in it, and therefore  
gave the plaintiff no right to the timber growing  
upon the soil. The owner of such sanad, having only  
a right in the revenues and none in the soil of a vil-  
lage, cannot by thirty years' user become the prop-  
rietor of the timber. *YAMAN JAYARDAN JOSHI v.  
COLLECTOR OF THANA* 8 Bom., A C, 191

4. — *Grant of village  
by Government*, *Existing rights how affected by*—  
The grant of a village by Government whether  
native or British, is subject to all existing rights  
against Government whether or not the deed of  
grant contains an exception or reservation of such  
rights. Government cannot, by alienating its own  
rights in a village, abrogate that the sanad purports  
to grant the village as a whole, extinguish or affect any  
subsidiary right therein appertaining to third per-  
sons, or convey to the grantee any larger or better  
estate or interest than was vested in Government.  
*DESAI HIMATSINGJI JORAVARSINGJI v. BHAVARHAI  
KATARHAI* I. L. R., 4 Bom., 643

5. — *Grant by Gov-  
ernment*—*Property in the soil*—A sanad by the  
State purporting to grant a village in *inam*—includ-  
ing the waters, the trees, the stones and quarries,

## SANAD—continued.

the mines and the hidden treasures but excluding the  
hakdars and *inamdars*, "held to be a grant by the  
State of such proprietary right as it had in the soil of  
the village to the grantee. It is not open to the  
grantor to say that such words as the above mean  
nothing but land revenue. The saving of the rights  
of the hakdars and *inamdars* does not prevent the  
property in the soil, so far as it can be regarded as  
vested in Government, from passing to the grantee."  
*RAJJI NARAYAN MAHLIE v. DADAJI RAJJI*  
[I. L. R., 1 Bom., 523]

6. — *Office of bhoooyee  
in Cuttack*—*Jagirdari right*—Plaintiff's ancestor  
held certain lands from Government under a set-  
tlement at a fixed rent of Rs 10-13-0 but was subsequently  
appointed bhoooyee with a remuneration of Rs 8  
receivable by deduction from the rent, leaving only  
6 annas and 4 pies payable to Government by way of  
rent. Held that the sanad of appointment to the  
office of bhoooyee created no jagirdari right, but  
that, on the contrary, the reservation of the rent of  
6 annas 4 pies seemed to indicate that the tenancy  
remained, giving no right of exclusive occupancy to  
plaintiff as against defendant. *CHHOTU MOHANTY v.  
BHUKAN MOHANTY* 17 W. R., 410

7. — *Nature of estate  
assigned*—*Prohibition of alienation*—The zamindar  
in possession by a sanad conveyed to A as the head  
of a branch of the grantor's family an estate, part  
of the zamindari, in lieu of maintenance to which A  
was entitled out of the zamindari "to hold and enjoy  
possession from generation to generation," subject to  
an allowance for maintenance to a certain class of the  
family described as "lowahokans" and "motahokans"  
(dependants and relations). A's heir afterwards  
alienated a part of the estate for a valuable considera-  
tion. Held first, in the absence of evidence of any  
class of persons answering the description of "lowa-  
hokans" and "motahokans" (which might have  
created a trust), that A took an absolute estate in  
the lands assigned to him, and, secondly, that the  
limitation in the sanad "from generation to genera-  
tion" did not create such an estate as to operate as a  
bar to alienation by sale. *NARSINGH DESAI v. ROY  
KOLASHAKNATH* 9 Moore's I. A., 65

8. — *S C*, a Hindu,  
granted a talukh to his sister, K, by a sanad in the  
following terms: "You are my sister; I accordingly  
grant you as a talukh for your support the three  
villages H, F, and A, belonging to my zamindari,  
with all rights appertaining thereto, at a tabut  
jumma of Rs 61. Being in possession of the lands  
and paying rent according to the tabut jumma, do you  
and the generations born of your womb successively  
(*sanant srenti kreme*) enjoy the same. No other heir  
of yours shall have right or interest." At the date of  
the sanad A had one child, a daughter C, who had  
afterwards a son, who died in her lifetime without  
issue, but whose widow, by his permission, adopted,  
after his death, a son, C L. K held undisputed pos-  
session of the talukh, during her lifetime, and by her  
will devised it to C, her daughter and C L, her grand-  
son by adoption, in equal moieties. On K's death,

**SANAD—continued.**

*H C*, as heir of his father, *S C*, took possession of the talukh, whereupon *C* and *C L*, claiming under the will of *K*, sued for possession. *Held* by the Court of first instance that *C* took an absolute estate under the sanad on the death of her mother, *K*, but that having elected to take under her mother's will, and to admit the co-plaintiff *C L* to a half share in the estate, both plaintiffs were entitled to maintain the action. *Held* by the High Court, on appeal, that *C*, having been born before the date of the sanad, took under it a life-interest in the talukh, in succession to the life-interest of her mother; but that, as the plaintiffs had not sued in respect of the life-interest, but claimed under the will of *K*, which she was incompetent to make, the suit must be dismissed. The term "sontan" bears the wider and more general meaning of issue, and is not confined to male progeny. The true meaning of the words "santi kreme" in a sanad, as gathered from the context, was held to be in "succession" in the sense of succession first of the mother, and then of the children born of her womb. *Held* by the Judicial Committee of the Privy Council that the earlier words of the sanad, when read together, were to be taken as conferring an absolute estate on *K*; and that the effect of the concluding words "no other heir of yours, etc.," was to make the absolute estate before given defeasible in the event of a failure of issue living at the time of *K*'s death, in which event the estate was to return to the donor and his heirs, but as that event had not occurred, it followed that *K* took an estate which she could dispose of by will, and consequently that the plaintiffs were entitled to succeed in their suit. *BHOORUN MOHAMMAD DEIA v. HURRISH CHUNDER CHOWDHURY*

[I. L. R., 4 Cal., 23; 3 C. L. R., 339  
L. R., 5 I. A., 138]

Reversing the decision of the High Court on the whole effect and construction of the sanad in *HURRISH CHUNDER CHOWDHURY v. CHUNDER MOHAMMAD DEIA*

[24 W. R., 268]

9. *Grant of Oudh talukh to Hindu widow and her heirs—Oudh Estates Act (I of 1869), ss. 3, 4, 8, and s. 22, cl. 11—Separate property of Hindu widow, Descent of.*—A sanad of a taluk in Oudh which had been previously confiscated by Government was granted with full power of alienation to the widow of the last owner, a Hindu, and to her heirs for ever, her name being entered in the first and second lists under Act I of 1869, s. 8, one condition of the grant being expressed to be that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture. *Held*, in suits against the widow and her heirs made the full proprietary right and title to the estate, and not merely an estate for life with the remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime. *Held* also, as regards succession, that the limitation in the sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by s. 22 of that Act, the provisions of which are not con-

**SANAD—continued.**

trolled in any way by ss. 3 and 4 thereof. *Held* further that under cl. 11 of s. 22 the above talukh, which was the separate property of the widow, descended, in the absence of a proved custom of her tribe to the contrary, to her daughter in preference to the son of the daughter of a rival widow and the remote male heirs of her husband. *BRIJ INDAR BAHADUR SINGH v. JANKEE KOER. LAL SHUNKER BUX v. JANKEE KOER. 1 AL SEETLA BUX v. JANKEE KOER*

[L. R., 5 I. A., 1; 1 C. L. R., 318]

10. *Impartibility of zamindari—Partition—Succession by widow.*—The owner of an impartible zamindari, which, though forming part of the family property, had by ancient custom been held and enjoyed by the eldest male member in the direct line, died leaving four sons and an infant grandson, *A*, by his eldest son, who had predeceased him. During the minority of that grandson the four surviving sons executed a sanad which, after reciting certain arrangements made by their father, directed that "the zamindari should be held by *A*, the son of the eldest son. *A* and we four also shall take in equal shares the inam lands. Until *A* attains his proper age, we all should jointly manage the affairs of the said zamindari. After *A* attains his proper age, the zamindari of the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him." Certain jewellery was also divided in similar manner. *A* died leaving a son, *C*, who died in 1865 without issue, but leaving a widow. *Held* by the Privy Council (reversing the decision of the High Court of Madras) that the sanad amounted to an agreement by which the joint family was divided, and that on the death of *C* his widow was entitled to the zamindari. *Periasami v. Periasami, L. R., 5 I. A., 61*, cited. *VADREYU RANGANAYA KAMMA v. VADREYU BULLI RAMAIA*

11. *Impartibility—"Heirs."*—In 1793 the ancient zamindari of Nuzvid, which descended to a single heir, having been before British rule a raj or principality held on the tenure of military service, was resumed by the Government for arrears of revenue. In 1802 the Government formed two zamindaris out of it, and granted one of them, since called Nuzvid, to the second son of the rajah, under a "sanad i-milkhat istemrari," which described the zamindari lands comprised in it as "the six pergunnahs of Nuzvid in the Kondapalli Circar." The provisions of the sanad did not differ from those of an ordinary grant under the permanent settlement. On the question whether this zamindari was, or was not, subject to the same rule of impartibility as that to which the ancient and entire zamindari of Nuzvid had been subject before 1793, *Held* that the six pergunnahs granted in 1802 were a new zamindari, subject only to the ordinary obligations imposed on zamindaris in general; and the word "heirs" used in the sanad construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu law. The Hansapur case, *Beer Pertab Sahee v. Rajender Pertab Sahee, 12 Moore's I. A., 1*, distinguished. *VINEKATA RAO v. COURT OF WARDS*

[I. L. R., 2 Mad., 128]

**SANAD—continued**

S. C. VENKATA NARASIMHA APPA ROW & NAR-  
ATTYA APPA POW 8 C. L. R., 153

S. C. VENKATA NARASIMHA APPA ROW & NAR-  
ATTYA APPA POW VENKATA NARASIMHA APPA  
LOW & COURT OF WARDS L. R., 7 I. A., 39

12. *Impartibility*—*M. d. Reg. XVI of 1902*—A zamindari originally impartible having become the property of the Government and having been granted by it to a zamindar who, having been appointed by proclamation in 1801 and having been put into possession, received a sanad in 1803—*Held* that the zamindari retained the quality of impartibility. Also that this quality had not been transmitted into partitionable either by the passing of the Regulation XXV of 1902 or by that law coupled with the issue of the sanad containing certain of its terms. *Venkata Rao v. Court of Wards* 1 I. L. R., 2 Mad. 128 (determining that the Nuzvid zamindari could not be identified with any estate existing before the sanad of 1802 put it on the same footing with ordinary zamindaris) distinguished. Preference made to *Beer Perlak Sahas v. Rajender Perlak Sahas* 12 Moore's I. A. 1 as an authority for holding that a mode of acquisition which constitutes property as "self-acquired" in the hands of a member of an undivided family and thereby subjects it to rules of devolution and of disposition different from those applicable to ancestral property, does not thereby destroy its character of impartibility. *Muttu Aduganatha Tevar v. Doraswami Tevar* [I. L. R., 3 Mad., 280  
L. R., 8 I. A., 83

13. *Impartibility*—*Hindu law of succession*.—Where an ancient pollicem was converted into a zamindari with a permanent assessment in 1803 by Government, and a "sanad i-mulkat intemrari" (deed of permanent property) was granted to the zamindar with the usual stipulations, reservations, and directions, concluding with the words, "continuing to perform the above stipulations and to perform the duties of allegiance to the British Government its laws and regulations you are hereby authorized and empowered to hold in perpetuity to your heirs, successors and assigns at the permanent assessment therein named the zamindari of Sivagiri." *Held* that the Hindu law of succession was applicable, subject to such modifications as flowed from the impartible nature of the estate. *Muttu Chetti v. Sangoili Vira Pandia Chinnai Tambar* [I. L. R., 3 Mad., 370

14. *Real free sanad*—*Purchaser at Government sale*—*Confirmation issued by Government*.—In 1775 a rent-free sanad was granted to M for having put down wild elephants, the consideration in future being to cultivate and keep a body of men and take care of the rajyats. M died and a fresh sanad was, in 1776, granted to K and R, they being thought to be his heirs; but in 1807, M's true heirs having established their title, the Government gave them a fresh sanad in lieu of the one to K and R, reciting the circumstances. The zamindari in which these lands were situated was

**SANAD—concluded**

settled in 1802, and was in 1850 sold for arrears of Government revenue. The appellant claimed to set aside the sanad of 1807, on the ground that Government had no right to give such a sanad, but he contended that if it had, it could be set aside by a purchaser at a Government sale. *Held* that the sanad was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation. *Lopez v. Madan Thakoor* 5 B. L. R., 521

S. C. LOPEZ & MUDUN MORTU THAKOOR  
[13 Moore's I. A., 407. 14 W. R., P. C., 11

15. *Proof of lost sanad*—*Mirandars*—*Proof of title*—*Evidence*—*Long possession*.—Mirandars who had sanads, but who have lost them, and those who never had them, may prove their title by other evidence, and long possession is a strong element in such proof. A sanad is not indispensable to the proof of miras tenure. A miras right or perpetuity of tenure like other facts, may be proved by various means. *Bharati v. Narayan* [I. L. R., 3 Bom., 340

16. *Evidence*—*Reg. II of 1919 s. 29*—*Reg. Peg XIV of 1920 s. 5*—*Title*.—Where an alleged original sanad was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient sanads by Regulations II of 1919, a. 23 and XIV of 1920, s. 5, and taking all the circumstances into consideration, refused to consider the title under it established. *FORESTER & SECRETARY OF STATE* [12 B. L. R., 120; 18 W. R., 348  
L. R., I. A., Sup. Vol., 10

**SANCTION.**

— of Board of Revenue.

See BOMBAY SURVEY AND SETTLEMENT  
ACT, 1855 s. 32 I. L. R., 3 Bom., 110

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[5 B. L. R., 135; 13 W. R., 381

— of Court.

See COMPROMISE—COMPROMISE OF SUITS  
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to proceedings in lunacy.

See LUNATIC . 8 B. L. R., Ap., 50

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See COURT OF WARDS ACT (BENGAL ACT IX OF 1879), s. 55.

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I. L. R., 27 Calc., 242

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**SANCTION FOR PROSECUTION.**

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See REGISTRATION ACT, 1877, s. 82.

[I. L. R., 11 Calc., 566

8 B. L. R., 422: 17 W. R., Cr., 39

5 B. L. R., Ap., 89: 18 W. R., Cr., 15

8 B. L. R., 423 note: 14 W. R., Cr., 74  
24 W. R., Cr., 1

See REGISTRATION ACT, 1877, s. 83 (1866,  
s. 95).

[4 B. L. R., Ap., 89: 13 W. R., Cr., 21

See REVISION—CRIMINAL CASES—MISCELLANEOUS CASES.

[I. L. R., 20 Calc., 349

See SESSIONS JUDGE, JURISDICTION OF.  
[I. L. R., 16 Calc., 766

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R., 3 All., 508

**Application for—**

See PRACTICE—CRIMINAL CASES—APPROVERS . I. L. R., 24 Calc., 492

**Order for—**

See APPEAL IN CRIMINAL CASES—ACT—PRESIDENCY MAGISTRATES ACT.  
[I. L. R., 2 Calc., 468

See LETTERS PATENT, HIGH COURT, CL. 15.  
[I. L. R., 17 Mad., 105

**Order granting or refusing—**

See APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODE.  
[I. L. R., 15 All., 61

**1. APPLICATION FOR, AND GRANT OF, SANCTION.**

1. — Court to which application should be made—*Criminal Procedure Code, 1869, s. 169.*—An application under s. 169 of the Criminal Procedure Code praying for sanction to institute a prosecution on a charge of perjury should, as a general rule, be first made to the Court before which the perjury is alleged to have been committed. IN THE MATTER OF THE PETITION OF RAJAH OF VENKATAGIRI . . . . . 6 Mad., 92

IN THE MATTER OF THE PETITION OF SHREEDHAR CHUCKERBUTTY . . . 17 W. R., Cr., 46

2. — *Change of incumbents of office of Subordinate Magistrate*—A Subordinate Magistrate refused to grant sanction for a prosecution under s. 169 of the Criminal Procedure Code, 1861, on the sole ground that the perjury was alleged to have been committed before his predecessor in office. Held that the Subordinate Magistrate was wrong in his construction of the section. The Court before which the perjury is alleged to have been committed is to give the permission: the change of incumbent leaves it still the same Court. ANONYMOUS  
[7 Mad., Ap., 12

## SANCTION FOR PROSECUTION

—contd.

## 1 APPLICATION FOR AND GRANT OF, SANCTION—continued

3. — Initiation of case needing sanction—*In re copy right and by Court—Criminal Procedure Code 1861 ss 170-171*—In a case under s 170 Criminal Procedure Code 1861 the initiation was taken by the party interested, and the Court took no part in the matter except in the way of giving, or refusing its sanction. s 170 contemplates cases in which the Court itself took the initiative but it was not intended that the Court should proceed in the manner there described except when the propriety or necessity of doing so is unmistakable IN THE MATTER OF HONN BHARAT GATE 11 W R, 171

4. — *Initiation by Court—Criminal Procedure Code 1872 s 468—False charge—Penal Code s 211* There being nothing in the law requiring that sanction to prosecute under s 211 of the Penal Code should only be granted upon application by a private prosecutor a District Magistrate was competent under s 415 of the Code of Criminal Procedure of his own motion to direct a prosecution where a complaint had been entertained and found to be false by a Magistrate subordinate to him JAGAT MOHINI DAS v MAHARUDHAN DUTT 10 C L R, 4

5. — *Initiation by Court—Criminal Procedure Code 1872 ss 470, 471*—There was a difference in the proceedings to be adopted when a sanction was given under s 40 and the institution by the Court of its own motion of proceedings under s 471 GAN CHANDER ROY v PROJAY CHANDER DASS 11 C L R, 7 Cal, 208 8 C L R, 267

6. — Effect of grant of sanction—*Criminal Procedure Code (Act X of 1852) ss 195 and 478—Civil Court's power to proceed under s 578 after sanction given to a private person—Dismissal of a complaint by a private person—Effect of*—The granting of sanction to a private person under cl. (c) of s 195 of the Code of Criminal Procedure (Act X of 1852) does not disbar a Civil Court from proceeding under s 478 nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar till set aside to a proceeding under that section. QUEEN EMPRESS v SHANKAR 11 C L R, 13 Bom., 384

7. — Practice in granting sanction—*Criminal Procedure Code (Act X of 1852) s 195—Exercise of power—Exercise of, by High Court*—When subordinate Courts grant sanction to prosecute under s 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. A Magistrate in disposing of a charge of theft delivered the following judgment "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There

## SANCTION FOR PROSECUTION

—continued

## 1 APPLICATION FOR AND GRANT OF, SANCTION—continued.

was no further record of the proceedings. On an application to the High Court to revoke the sanction, —*Held* that the mere fact of the charge laid by the complainant not having been proved was not in itself sufficient ground for granting sanction to prosecute him under ss 182 and 211 of the Penal Code and as beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked. HANNA DATH DAS v MOHARR CHUNDER CHUCKERBUTTY 11 C L R, 18 Cal., 681

## 2 WHERE SANCTION IS NECESSARY OR OTHERWISE

8. — Prosecution of Municipal Corporation—*Presidency Magistrate's Act (15 of 1877) s 39—Police sergeant*—A Municipal Corporation was not a public servant within the meaning of s 9 of Act 15 of 1877 and might therefore be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section. EXPRESS v MUNICIPAL CORPORATION OF THE TOWN OF CALCUTTA

[11 C L R, 3 Cal., 758 2 C L R, 520]

9. — Prosecution of Judge—*Sanction of Government—Criminal Procedure Code, 1861 s 16*—The sanction of Government is required for the prosecution of any Judge, if a complaint is made against him as Judge. Construction of a 16<sup>th</sup> of the Criminal Procedure Code, 1861 ANONYMOUS 6 Mad., Ap., 22

10. — *Criminal Procedure Code 1852, s 117—Sanction to prosecute Judge for words uttered on the bench*—Where a Judge was charged with using defamatory language to a witness during the trial of a suit—*Held* that, under s 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction. IN RE GULAM MUHAMMAD SHARIF UD-DARLAN 11 C L R, 9 Mad., 439

11. — *Sanction to prosecute a Judge—Criminal Procedure Code (Act I of 1858) s 19*—A pleader applied to the Chief Presidency Magistrate for sanction under s 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case and sanction was refused. On application to the High Court,—*Held* that no sanction under s 197 of the Code is necessary unless the Judge or public servant commits an offence in his judicial or official capacity. REG v PARSHRAM KESAR, 7 Bom. H. C., Cr., 61; *Imperialist v Lakshman Saklaram* 11 C L R, 2 Bom., 491, and *In re Sreenam Chatterjee* unreported approved of. *In re Ghulam Muhammad* 11 C L R, 9 Mad., 439, disented from. NANDO LAL BASU v MITTER

[11 C L R, 28 Cal., 689  
3 C W N., 539]

## SANCTION FOR PROSECUTION —continued.

### 2. WHERE SANCTION IS NECESSARY OR OTHERWISE—continued.

12. ———— Offence committed in judicial proceeding—*False evidence*—No special sanction was needed for the prosecution of a person for giving false evidence in a judicial proceeding. **QUEEN v. RAMAOTAR PANDE** 25 W. R., Cr., 5

13. ———— Criminal Procedure Code (1882), s. 195—*Abetment of offence*—*Penal Code*, s. 109.—Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in s. 195, Criminal Procedure Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences. **QUEEN-EMRESS v. ABDUL KADAR SHERIFF SAHIB** [I. L. R., 20 Mad., 8

14. ———— Offence under s. 182, Penal Code—*Charge and conviction under different section of Penal Code than that for which sanction was given*.—In a case in which a false charge was brought, a Magistrate gave the accused (A) permission under s. 169, Code of Criminal Procedure, 1861, to prosecute the complainant (B) of an offence under s. 211, Penal Code. The Magistrate tried the complaint of A as a complaint under s. 211, but he subsequently framed a charge against B under s. 182, Penal Code, and punished him under that section. *Held* with reference to s. 168, Code of Criminal Procedure, that the offences under ss. 182 and 211, Penal Code, being offences under Ch. XIV of the Code of Criminal Procedure, the Magistrate was wrong in framing the charge under s. 182 without obtaining the previous sanction of the Criminal Court which heard the previous complaint of B. **RAJ COOMAR v. KIRTHU OJHA** [13 W. R., Cr., 67

15. ———— Prosecution by private person—*Criminal Procedure Code* (1882), s. 195.—A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. **Queen-Emress v. Radha Kishan**, I. L. R., 5 All., 36, overruled. **QUEEN-EMRESS v. JUDAL KISHORE** . . . I. L. R., 8 All., 382

16. ———— Criminal Procedure Code (Act X of 1882), s. 195—*Presidency Magistrate, Jurisdiction of*—*Penal Code* (Act XLV of 1860), ss. 116, 193—*Abetment*—*Instigating person to give false evidence*—B, without having obtained sanction under s. 195 of the Criminal Procedure Code, charged C before the Chief Presidency Magistrate with instigating her to give false evidence in a certain divorce suit in which C was co-respondent. *Held* that the Chief Presidency Magistrate had no jurisdiction to try the case without the sanction of the Court before which the divorce proceedings were pending, as the offence charged was alleged to have been committed in relation to those proceedings. **CHANDRA MOHAN BANERJEE v. BALFOUR** [I. L. R., 26 Calc., 359

## SANCTION FOR PROSECUTION —continued.

### 2. WHERE SANCTION IS NECESSARY OR OTHERWISE—continued.

17. ———— Offence under Penal Code (Act XLV of 1860), s. 193—*Giving false evidence*—*Investigation by Police*—No sanction under s. 195 of the Criminal Procedure Code is necessary for taking cognizance of an offence under s. 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the police into the matter of information received by them. **Chandra Mohan Banerjee v. Balfour**, I. L. R., 26 Calc., 359, distinguished. **JAGAT CHANDRA MOZUMDAR v. QUEEN-EMRESS** I. L. R., 26 Calc., 788 [3 C. W. N., 491

18. ———— Charge under s. 82 of Registration Act (III of 1877)—It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act. **GORI NATH v. KULDIP SINGH** I. L. R., 11 Calc., 568

19. ———— Criminal Procedure Code, s. 195—*Registration Act*, s. 41—*Sanction of Registrar—Condition precedent to trial for forgery of will registered*.—A Sub-Registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. His sanction therefore was held to be necessary under s. 195 before a Criminal Court could take cognizance of an offence committed before the Registrar while so acting. **IN RE VENKATACHALA** [I. L. R., 10 Mad., 154

20. ———— Police officer acting under s. 361—*Prosecution for giving false evidence to a police officer*.—A police constable taking down a statement under s. 161 of the Criminal Procedure Code is not a Judge, nor is the place where he officiates a Court. His sanction is therefore not necessary under s. 195 of the Criminal Procedure Code, to a prosecution for a false statement made to him, whether the charge be framed singly or alternatively. **QUEEN-EMRESS v. ISMAIL ALAD FATARU** [I. L. R., 11 Bom., 659

21. ———— Registration Act (III of 1877), s. 34—*Forged document registered by Sub-Registrar*.—A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. **QUEEN-EMRESS v. SUBBA** [I. L. R., 11 Mad., 3

22. ———— Registration Act, 1877, ss. 82, 83.—Certain persons were charged with offences falling under s. 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under s. 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction. *Held*

## SANCTION FOR PROSECUTION

—*cont. sued*2 WHEN A SANCTION IS NECESSARY OR OTHERWISE—*cont. sued*

that no sanction was necessary as to the charge of forgery and that the provisions of s. 190 of the Code of Criminal Procedure were not applicable. *QUEEN EMPRESS v VITHILINGA I L R., 11 Mad., 500*

23. — *Sub Registrar—Forgery—Penal Code (Act XLV of 1860) s. 463 467—Court—Judicial inquiry—Administrative inquiry*—A Sub-Registrar under the Registration Act (III of 1857) is not a Judge and therefore not a Court within the meaning of s. 195 of the Code of Criminal Procedure (Act X of 1859). His sanction is therefore not necessary for a prosecution on for forgery in respect of a forged document presented for registration in his office. *In re Venkatasahai I L R. 10 Mad. 104* dissented from. The word forgery is used as a general term in s. 463 of the Penal Code (Act XLV of 1860) and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code (Act X of 1859) so as to embrace all species of forgery and thus includes a case falling under s. 467 of the Penal Code. The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself and should not be extended beyond its legitimate scope. District on between a judicial and an administrative inquiry pointed out. *QUEEN EMPRESS v TULJA*

[I L R., 12 Bom., 38]

24. — *Registrar on Act (III of 1857) s. 34 35 41 Forged document registered by Sub Registrar*—A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar. Held that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery. *In re Venkatasahai I L R. 10 Mad. 104* and *Queen Empress v Subba I L R., 11 Mad. 3* explained. *QUEEN EMPRESS v SOBHANADI I L R., 12 Mad., 201*

25. — *Registration Act (III of 1857) s. 27 28—Court—Sanction for prosecution on for perjury*—A Registrar acting under the Registration Act, s. 70 is a Court for the purposes of the Criminal Procedure Code s. 195 and his sanction is therefore necessary for a prosecution for perjury committed in respect of the representation of a document to him for registration. *ATCHAYIA v GANGAYIA I L R., 15 Mad., 138*

26. — *Registrar—Court—Registration Act 1877 s. 73—A Registrar acting under s. 73 of the Registration Act 1877 is not a Court within the meaning of s. 195 of the Code of Criminal Procedure* *Allogaya v Gangayya I L R., 15 Mad., 138* dissented from. *QUEEN EMPRESS v RAM LAL*

[I L R., 15 All., 141]

27. — *"Court"—Appraisement proceedings—Bengal Tenancy Act (VIII of 1855) s. 69 70—The word "Court" used in s. 195 of the Criminal Procedure Code without the previous sanction of which offences*

## SANCTION FOR PROSECUTION

—*continued*12 WHEN A SANCTION IS NECESSARY OR OTHERWISE—*cont. sued*

therein referred to, committed before it cannot be taken cognizance of has a wider meaning than the words "Court of Justice" as defined in s. 20 of the Penal Code. It includes a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable it to arrive at a determination. A Collector acting in appraisement proceedings under ss. 69 and 70 of the Bengal Tenancy Act is a Court within the meaning of the term as there used. Where therefore in certain appraisement proceedings some rent receipts, which were alleged to be forgeries, were filed by tenants before the Collector and proceedings were subsequently taken against them before the Joint Magistrate charging them with offences under ss. 463 and 471 of the Penal Code,—Held that the Joint Magistrate could not take cognizance of the offences charged without the previous sanction of the Collector having been granted. *RAGHOOBHAI SANYAL v HOHEL SINGH alias GORAL SINGH*

[I L R., 17 Cal., 873]

28. — *Criminal Procedure Code (Act X of 1859) s. 193—Complaint made to police—Penal Code (Act XLV of 1860) s. 211—Prosecution on for laying false charge*—A complaint made before the police and judicially declared to be false is not an offence committed in or in relation to, any proceeding in any Court, within the meaning of sub-s. (b) of s. 95 of the Criminal Procedure Code (Act X of 1859); and no sanction is therefore necessary for the prosecution of the complainant under s. 211 of the Penal Code. *PETIRAM PUDAS v MAHOMED KASIM*

[3 C W N., 33]

29. — *Prosecution for false charge in complaint made at police station—Criminal Procedure Code 1872 s. 463*—A complaint made at a police station is not made before any Civil or Criminal Court and, if it proved false prosecution for it did not require the sanction of any Court under s. 468 Code of Criminal Procedure. *GOVERNMENT OF BENGAL v GORAKH CHANDER CHOWDHURY*

[24 W R., Cr., 41]

RAM RUSSEN BHANDARI MADHUS GHOSH

[25 W R., Cr., 33]

30. — *Giving false evidence before a police patrol—Criminal Procedure Code 1872 s. 467 468—Bom. Act VIII of 1867 (Village Police) s. 13—Penal Code (Act XLV of 1860) s. 181 191, and 193*—A person who makes a false statement upon oath before a police patrol acting under s. 13 of Bombay Act VIII of 1867 gives false evidence within the meaning of s. 191 of the Penal Code and is punishable under s. 193; but his trial for that offence required no sanction a police patrol not being a Criminal Court within the definition of s. 4 of the Code of Criminal Procedure (see s. 468) although offences under Ch. X of the Penal Code committed before the same officer cannot be tried



## SANCTION FOR PROSECUTION —continued.

### 2. WHERE SANCTION IS NECESSARY OR OTHERWISE—continued.

without a sanction. (See s. 467 of the Code of Criminal Procedure.) *IMPERATRIX v. IBBASAPA*

[I. L. R., 4 Bom., 479]

31. ——— Prosecution of police patel —*Criminal Procedure Code (1872), s. 466—Bombay Village Police Act (VIII of 1867), s. 9—Bombay Police Amendment Act (I of 1876).*—The prosecution of a police patel, for an offence committed by him in his official capacity as such, needs no previous sanction. The provisions of the Bombay Village Police Act (VIII of 1867), s. 9, as amended by the Bombay Police Amendment Act (I of 1876), render a police patel removable from his office without the previous sanction of Government, and therefore s. 466 of the Criminal Procedure Code (Act X of 1872) did not apply. *IMPERATRIX v. BHAGWAN DEVRAJ*

[I. L. R., 4 Bom., 357]

32. ——— Prosecution on alternative charge—*Giving false evidence in one Court or in another—Criminal Procedure Code, 1872, s. 470.*—When it is intended to charge a person with having made a false statement in the Court of a Magistrate or, alternatively, a false statement in the Court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative. *IN RE BALAJI SITARAM*

11 Bom., 34

33. ——— *Accused to whom pardon has been tendered, Contradictory statements of—False evidence.*—When a pardon is legally tendered to the accused under s. 337 of the Criminal Procedure Code (Act X of 1882), and the accused makes a statement on oath which he retracts in a subsequent judicial proceeding, a proper sanction is necessary for a prosecution for giving false evidence on each branch of the alternative charges. *In re Balaji Sitaram*, 11 Bom., 34, followed. *QUEEN-EMRESS v. DALA JIVA*

I. L. R., 10 Bom., 190

34. ——— *Criminal Procedure Code (Act V of 1898), s. 339—Tender of pardon—Trial of person who, having accepted a pardon, has not fulfilled the conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court.*—No prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court, as provided by s. 339, cl. (3), of the Code. *QUEEN-EMRESS v. NATU*

[I. L. R., 27 Calc., 137]

35. ——— Charge of forgery—*Forged document used in civil case—Power of Deputy Magistrate—Criminal Procedure Code, 1861, ss. 169, 170.*—A Deputy Magistrate could not commit a person for forgery under s. 170 of the Code of Criminal Procedure when the Civil Court had sanctioned the prisoner's committal under s. 169, unless with the express sanction of that Court. *QUEEN v. DWARKANATH BOSE*

2 W. R., Cr., 31

## SANCTION FOR PROSECUTION —continued.

### 2. WHERE SANCTION IS NECESSARY OR OTHERWISE—continued.

36. ——— *Forged document used in civil case—Power of Magistrate—Criminal Procedure Code, 1861, s. 170.*—S. 170, Code of Criminal Procedure, referred only to cases where a forged document had been put in evidence in a Civil or Criminal Court; in other cases, a Magistrate was competent *proprio motu* to inquire into allegations of forgery, and no sanction under s. 170, Code of Criminal Procedure, was necessary. *QUEEN v. RAMDHARRY SINGH*

10 W. R., Cr., 5

37. ——— *Criminal Procedure Code, 1872, s. 469—Prosecution of witness for forgery.*—The sanction required by s. 469 of the Criminal Procedure Code as a condition precedent to the prosecution of a party to a civil suit for forgery of a document given in evidence in such suit is unnecessary in the case of persons not parties to, but witnesses in, the suit, who are charged with the forgery of the document jointly with a party to the suit. *EADARA VIDANA v. QUEEN*

[I. L. R., 3 Mad., 400]

38. ——— Offence before or against Mamlatdar's Court—*Code of Criminal Procedure (Act X of 1872), s. 468.*—The Mamlatdar's Court constituted by Bombay Act III of 1876 was a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure; therefore a complaint of an offence mentioned in that section, when such offence is committed before or against the Mamlatdar's Court, could not be entertained in the Criminal Courts except with the sanction of the Mamlatdar's Court or of the High Court to which it is subordinate. *IN RE SAVANTA*

I. L. R., 5 Bom., 137

39. ——— Departmental inquiry into the misconduct of a revenue officer—*Judicial proceeding—Bombay Land Revenue Code (Bom. Act V of 1879), ss. 196, 197—Criminal Procedure Code (Act X of 1892), s. 195.*—A Collector, on receiving information that his Deputy Chitnis had attempted to obtain a bribe, ordered his Assistant Collector to make an inquiry into the matter, with a view to taking action under s. 32 of the Bombay Land Revenue Code. The Assistant Collector found on inquiry that the charge of bribery was unfounded, and gave a sanction to prosecute the informant and his witnesses for giving false evidence. This sanction was revoked by the Collector. The Chitnis appealed to the High Court against the order revoking the sanction. *Held* that the inquiry made by the Assistant Collector was a departmental inquiry, and not a judicial proceeding, and that the Assistant Collector, while holding the inquiry, was not a Court. No sanction for prosecution was therefore necessary under s. 195 of the Criminal Procedure Code. *IN RE CHOTALAL MATHURADAS*

[I. L. R., 22 Bom., 936]

40. ——— Charge against Village Magistrate for alleged offence while acting not in a judicial capacity—*Criminal Procedure Code (1918), s. 197—Mad Reg. XI*

# SANCTION FOR PROSECUTION

—continued

## 2 WHEN SANCTION IS NECESSARY OR OTHERWISE—concluded

of 1816—*Penal Code s. 9—Judge*—A Village Magistrate having been apprized of a disturbance in his village forcibly separated the combatants one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in s. 197 of the Code of Criminal Procedure. The Village Magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The Village Magistrate presented a petition to the District Magistrate raising the same ground of objection whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained. *Held* that sanction was not necessary under s. 197 of the Code of Criminal Procedure. The Village Magistrate while preventing an offence was not acting in the capacity of a Judge or a public servant not removable from office without the sanction of Government and therefore the sanction referred to had no application. *Held* also that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction. *Semle*—That a Village Magistrate exercising jurisdiction and trying an offender under Regulation XI of 1816 is a Judge within the meaning of s. 197 of the Code of Criminal Procedure and s. 19 of the Penal Code. *KANDASAMI CHETTI v. SOLT GOVINDAN*

[L. L. R., 23 Mad., 540]

## 3 WHEN SANCTION MAY BE GRANTED

41. —Sanction previous to prosecution—*Jurisdiction of tribunal without sanction—Illegal sanction—Criminal Procedure Code 1861 s. 16*—s. 16 of the Code of Criminal Procedure required that sanction to prosecute therein mentioned should be given before any such prosecution was commenced, and until the sanction was obtained, the tribunal by which the offence was triable had no jurisdiction and a conviction founded on evidence taken without such sanction would be bad. *120 v. PARANATH KESAV 7 Bom., Cr., 61*

*See QUEEN v. MOHINA CHANDER CHAKRABARTY*  
[7 B. L. R., 28 15 W. R., Cr., 45]

42. —Prosecution for perjury—*Sanction after order for commitment to sessions—Sanction to a prosecution for perjury may be given by the Court before which the perjury was committed at any time even after the order for commitment to the sessions has been made.* *QUEEN v. GOLLA BIRSH*

[3 B. L. R., A. Cr., 10]

*QUEEN v. LEXHALL*

[2 N. W., 132 Agri., F. R., Ed. 1874, 208]

# SANCTION FOR PROSECUTION

—continued.

## 3 WHEN SANCTION MAY BE GRANTED

—concluded

43. —Sanction "at any time"—*Criminal Procedure Code, 1861 s. 159—At any time*—The words "such sanction may be given at any time" in s. 163 Code of Criminal Procedure must be construed reasonable and "any time" meant a time which did not unly prejudice the party to be prosecuted or put him in a worse position than he was before. *SESTARAM SAHOO SHRENGOLAM SAHOO* 18 W. R., Cr., 62

44. —Sanction after trial and conviction—*Criminal Procedure Code, 1872 s. 470*—Under the words "at any time" in s. 470 of Act X of 1872 sanction to prosecute could not be given after the trial and conviction of the accused person. *EMPEROR OF INDIA v. AS-SUKH* I. L. R., 2 All., 533

45. —Charges of false evidence on alternative statements after tender of pardon—The sanction necessary for a charge of giving false evidence made by the accused in retracting in a subsequent judicial proceeding a statement made by him on oath after a tender of pardon can only be granted before and not after the commencement of the prosecution. *QUEEN EMPEROR v. DILIA JITA*

[I. L. R., 10 Bom., 180]

## 4 NOTICE OF SANCTION

46. —Necessity of notice—*Criminal Procedure Code (Act X of 1882) s. 193 cl. c, para 2*—A sanction to prosecute when applied for subsequently to the termination of the proceedings in the course of which the offence is alleged to have been committed, ought not to be granted unless the person against whom the sanction is applied for has had notice of the application and an opportunity of being heard. *ABHILASH SINGH v. KHUSH LALL*

[I. L. R., 10 Cal., 1100]

47. —Criminal Procedure Code (Act X of 1882) s. 193—*Notice to accused*—*Held* by the Full Bench that no notice is necessary to the person against whom it is intended to proceed before the Court before which the alleged offence has been committed can, under s. 193 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section. *IN THE MATTER OF THE PETITION OF KRISHNANUND DAS KRISHNANUND DAS v. HARI BEHA*

[I. L. R., 12 Cal., 58]

*MANGAR RAM v. BEHARI* I. L. R., 18 All., 358

48. —Criminal Procedure Code, s. 193—*Notice to accused*—A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused. Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment

## SANCTION FOR PROSECUTION

—continued.

### 4 NOTICE OF SANCTION—concluded.

formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given. *QUEEN-EMPEROR v. BHARI*  
[I. L. R., 10 Mad., 232]

49. ————— *Criminal Procedure Code, s. 195—Omission to give notice of sanction to accused.*—A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. Immediately, on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications. The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to, and in the absence of, the complainant or his attorney, and the Magistrate granted the sanction asked for. On an application to the High Court to revoke the sanction, —Held that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard. *KEDARNATH DAS v. MOHESH CHUNDER CHUCKERBUTTY* . . . I. L. R., 16 Cal., 661

50. ————— *Criminal Procedure Code (Act V of 1898), s. 195—Omission to give accused opportunity to be heard.*—Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the person sought to be prosecuted have given an opportunity to be heard. *PAMPAPATI SASTRI v. SUBBA SASTRI* . . . I. L. R., 23 Mad., 210

## 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION.

51. ————— *Nature of sanction—Permissive nature of sanction—Discretion of party obtaining sanction—Criminal Procedure Code, 1872, s. 468.*—The sanction to prosecute, contemplated in

## SANCTION FOR PROSECUTION

—continued.

### 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued.

s. 468 of the Criminal Procedure Code, was not a direction to prosecute, but was a permission granted to a private person to exercise his own unfettered discretion as to whether he would take proceedings or not. IN THE MATTER OF THE PETITION OF GRIDHARI MONDUL. *GRIDHARI MONDUL v. UCHIT JHA*  
[I. L. R., 8 Cal., 435; 10 C. L. R., 46]

52. ————— *Sanction by High Court to prosecution for perjury—Presumption that proper procedure will be adopted.*—Where the High Court sanctions a prosecution for perjury, it is implied that the proper legal procedure will be adopted, and the proceedings instituted in a Court having jurisdiction to entertain the charge. *KERUT SINGH v. NARAIN PASSEE* . . . 25 W. R., Cr., 14

53. ————— *Form of sanction—Sanction in writing and attached to record.*—It is very desirable that such sanction or direction should be in writing and attached to the record, but it is by no means legally imperative. *QUEEN v. KRISTNA RAO*  
[7 Mad., 58]

54. ————— *The law does not require the sanction to a prosecution to be given in any particular form of words.* *QUEEN v. LEKHRAJ*  
[2 N. W., 132; Agra, F. B., Ed. 1874, 206]

55. ————— *Criminal Procedure Code (1882), s. 195—Form of sanction for prosecution for false evidence—Requisites of a proper sanction.*—A sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false, so that the person sought to be charged may be definitely informed what is the criminal act alleged against him. *IN RE JIVAN AMBAIDAS* . . . I. L. R., 19 Bom., 362

56. ————— *Criminal Procedure Code, 1861, ss. 169-170—Statement of particular offences.*—When a Civil Court gives sanction to a prosecution under ss. 169 and 170, Code of Criminal Procedure, it should state with precision the particular offence or offences for the prosecution of which it gives sanction. *QUEEN v. OOMA MOTER DEBEA* . . . 13 W. R., Cr., 25

57. ————— *General sanction—Prosecution for false evidence—Penal Code, s. 193.*—A general sanction by a Judge to a prosecution for giving false evidence under s. 193 of the Penal Code, and for false verification, is not sufficient. The exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate, should be pointed out. *QUEEN v. KARTICK CHUNDER HOUDAR* . . . 9 W. R., Cr., 58

*Contra, QUEEN v. KADIR BUX alias KADIR MAHOMED* . . . 11 W. R., Cr., 17

58. ————— *Prosecution under Criminal Procedure Code, 1872, s. 470—Requisites of proper sanction.*—A sanction for a prosecution under s. 470 of the Criminal Procedure

# SANCTION FOR PROSECUTION

—cont used

## 5 NATURE FORM AND SUFFICIENCY OF SANCTION

—cont used

Code must designate the Court where the false statement was allged to have been made and the occasion on which it was committed. It is desirable if not necessary that in the sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms, although details may be omitted. **IN RE BALAJI SITARAM**

[11 Bom., 34]

50. *Criminal Procedure Code 1892 s. 195—False evidence—Specified on of place and time of offence.*—A sanction to a prosecution for giving false evidence granted under s. 195 of the Criminal Procedure Code should specify the place where and the time when the alleged false evidence was given and in substance the circumstances of perjury as also the sections of the Penal Code under which proceedings are authorized. **HAR DIAL v. DOORGA PRASAD** I L R., 8 All. 105

60. *Specified on of place and occasion of offence—Criminal Procedure Code 1892 s. 195.*—Sanction to a prosecution granted under s. 19 Criminal Procedure Code 1892 should specify the Court or other place in which, and the occasion on which the offence was committed; and such sanction should not be granted without a preliminary inquiry where such inquiry is necessary within the meaning of s. 46 of the Code. **EMPRIS v. NAROTAM DAS** I L R., 8 All., 88

61. *Specified on of particulars of offence—Criminal Procedure Code 1892 s. 195—False evidence—Preliminary inquiry.*—In a sanction on a bond, instituted in the Court of a Munsif the question whether the defendant had executed the bond or not was referred to arbitration. The arbitrator decided that the defendant had not executed the bond, and that it was a forgery. The Munsif dismissed the suit in accordance with the award. The defendant then applied to the Munsif for sanction to prosecute the plaintiff, without specifying in his application the offences in respect of which he desired to prosecute. The Munsif granted sanction merely observing that there were sufficient grounds for sanctioning the prosecution without giving any reasons or specifying the offence or offences in respect of which sanction was granted. Held that the terms in which the Munsif had given the sanction to a prosecution were not sufficiently explicit, and that he should have mentioned the sections or sections of the Penal Code under which he authorized criminal proceedings to be taken as also in a general way the offence or offences to be charged the date of commission, and the place where committed. Further that as the Munsif himself had not determined the question of forgery in the suit, he should have made some inquiry to satisfy himself that there were materials to justify a prosecution. **PANOTAM LAL v. BUAL** I L R., 8 All., 101

63. *Specified on of particulars of offence—False evidence—Criminal Procedure Code (Act XXV of 1861)*

# SANCTION FOR PROSECUTION

—cont used

## 5 NATURE FORM AND SUFFICIENCY OF SANCTION

—cont used

as 169 and 170.—Where persons were charged with offences under ss. 471 and 193 of the Penal Code committed in proceedings before the Civil Court, and for which therefore the sanction of the Civil Court was necessary under ss. 169 and 170 of Act XXV of 1861—Held that the sanction which simply gave permission, and did not specify the particular act or acts and the particular words which constituted the offences was insufficient. **QUEEN v. CASINO CHANDRA GHOSH**

[7 B. L. R. 23 note 10 W. R., Cr. 41]

63. *Criminal Procedure Code (1892) s. 195—Necessary contents of application for sanction.*—An application for sanction to prosecute for forgery or perjury must indicate precisely the document in respect of which forgery is said to have been committed, or must set forth in detail the statements alleged to be false showing the place where and the occasion on which such alleged false statements were made. **HALWAT SINGH v. UMED SINGH** I L R., 18 All., 203

64. *Criminal Procedure Code (Act V of 1899) s. 195—Not as to person to prosecute whom sanction is sought—Procedings before Sessions Court—Proper exercise of discretion.*—A Sessions Court when granting sanction to prosecute under s. 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. An order of a Sessions Judge sanctioning a prosecution containing nothing, from which the High Court could conclude that he had directed his mind to the real question in such cases namely whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction. **PANAPATI BASTRI v. SUBBA BASTRI**

[I L R., 23 Mad., 210]

65. *General false evidence in a judicial proceeding—Penal Code (Act XLV of 1861) s. 193—Onus as to sanction to prosecute youthful offenders.*—A sanction to prosecute under the provisions of s. 193 of the Criminal Procedure Code (Act V of 1892) must specify the Court in which and the occasions on which the offence was committed, and where the offence is that of giving false evidence in a judicial proceeding (s. 193, Penal Code) it should further specify the particular statements in respect of which the offence is imputed. Where therefore sanction was granted to prosecute certain persons, one of whom was a boy of eleven years, for giving false evidence in a dacoity case and the sanction did not contain the essentials referred to—Held that it was defective in form and could not stand, and that the High Court could not take it upon itself to rectify the informality by supplying the necessary particulars. Held also that the sanction for prosecution against the boy petitioner was inadmissible in

## SANCTION FOR PROSECUTION —continued.

### 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued.

consideration of his youth, and should therefore be revoked. *GOBARDHANE CHOWKIDAR v. HABIBULLA* [3 C. W. N., 35]

66. ————— *Refusal of sanction under mistake or as being unnecessary.*—Held that the declining by a Court of revenue to sanction a prosecution under ss. 463 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary, did not constitute sanction. *EXPRESS OF INDIA v. SABSUKH* [I. L. R., 2 All., 533]

67. ————— *Statement by Collector that he has no objection to give sanction again after sanction by Deputy Collector.*—In a suit by A for arrears of rent above Rs 100, a decree was passed against B, C, and D, wherein certain documents filed by them were held to be forgeries. A applied for and obtained an order from the Deputy Collector who tried the suit for leave to prosecute B and C in the Criminal Court. A afterwards applied to the Collector for leave to prosecute B, C, and D, whereupon the Collector passed the following order: "Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it." D was convicted by the Sessions Judge on a charge under s. 471 of the Penal Code. On appeal by D, —Held that no proper leave had been obtained to prosecute D, and this defect was not cured by the subsequent proceedings, and the conviction must be quashed. *QUEEN v. MAHIMA CHANDRA CHUCKRABORTY* [7 B. L. R., 26; 15 W. R., Cr, 45]

68. ————— *Statement by Munsif that he has no objection to give sanction if evidence is thought sufficient.*—Sufficiency of sanction.—On an application to a Munsif for sanction to prosecute, the following order was made upon the petition: "If the petitioner thinks there is sufficient evidence against A, I have no objection to give such sanction." Held that the order was a sufficient sanction to support a prosecution. *IN THE MATTER OF JADU NATH HAZRA v. ANNODA PROSAD SIRCAR* [11 C. L. R., 53]

69. ————— *Penal Code, s. 193.*—Sufficiency of sanction.—Sanction for the prosecution of the accused was accorded by an Assistant Sessions-Judge in the following terms: "There is no doubt whatever that Tai, Baji, and Bala, these three persons, made before me certain statements contradictory of the statements which they had made before the committing Magistrate. Therefore if from such statements of theirs they may be liable to any charge, there is sanction from here" (i.e., I give my sanction) "for their prosecution." Held that this gave sufficient sanction for the prosecution of the accused under s. 193 of the Penal Code, and that it was not necessary that the authority giving the sanction should specify the particular section of the Penal

## SANCTION FOR PROSECUTION —continued.

### 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued.

Code under which the accused was permitted to be prosecuted. *REG. v. TAI*. 8 Bom., Cr., 24.

70. ————— *Issue of warrant.*—Implied sanction.—*Criminal Procedure Code, 1861, s. 169.*—The object of the sanction required by s. 169, Code of Criminal Procedure, was to ensure that the prosecution should be instituted after due consideration on the part of the Court before whom the false evidence was given, or on the part of a Court to which such Court was subordinate. When a Magistrate perused the papers of a case which had been forwarded to him by a Subordinate Magistrate for consideration, and then sent on the papers to the District Superintendent of Police with an opinion adverse to the prisoner, and the District Superintendent of Police requested the Magistrate to issue a warrant against the prisoner, charging him with giving false evidence, it was held that the issue of the warrant was a sufficient sanction under s. 169 on the part of the Magistrate. *QUEEN v. MAHOMED HOSSAIN* [16 W. R., Cr., 37]

71. ————— *Instruction from Sessions Judge to Magistrate.*—*Criminal Procedure Code, 1872, s. 469.*—Prosecution for giving false evidence.—An instruction to the Magistrate of the district by the Court of Session, contained in the concluding sentence of its judgment in a case tried by it, to prosecute a person for giving false evidence before it in such case, was held not to amount to sanction to a prosecution of such person for such offence, within the meaning of s. 463 of Act X of 1872, that section supposing a complaint, or at least an application for sanction for a complaint. *EXPRESS v. GOBARDHAN DAS*. I. L. R., 3 All., 62.

72. ————— *Criminal Procedure Code (1882), ss. 195 and 476.*—Nature of sanction.—Sanction granted by Court without application being made by the person to whom it is granted.—A sanction to prosecute under s. 195 of the Code of Criminal Procedure presupposes an application for sanction, and where no such application is made, a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by s. 476 of the Code. *Empress of India v. Gobardhan Das*, I. L. R., 3 All., 62, referred to. *IN THE MATTER OF THE PETITION OF BANARSI DAS* [I. L. R., 18 All., 213]

73. ————— *Order of Munsif directing that Magistrate inquire into a case.*—*Criminal Procedure Code, 1882, ss. 195 and 476.*—"Sanction"—"Complaint"—*Civil Procedure Code, 1882, s. 643.*—On the 2nd August 1884 a Munsif, who was of opinion that in the course of a suit which had been tried before him certain persons had committed offences under ss. 193, 463, and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should

## SANCTION FOR PROSECUTION

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## 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued

inquire into the matter. In May 1885 upon an application by one of the accused to the District Court to revoke the sanction for prosecution granted by the Munsif it was contended that the "sanction" had expired on the 2nd February 1885 and had ceased to have effect. Held by the Full Bench that the Munsif's order whether it was or was not a sanction was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case. *PER PETHERAM, C.J., and STRAIGHT, J.*—That considering that s. 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code the Munsif's order might be taken as having been passed under the latter section. Also *per PETHERAM, C.J., and STRAIGHT, J.*—The words in s. 170 of the Criminal Procedure Code except with the previous sanction or on the complaint of the public servant concerned, "must be read in connection with s. 476 which was enacted with a view of giving the person concerned which might be caused by a Munsif or a Subordinate Judge or a Judge be obliged to appear before a Magistrate and make a complaint on oath like an ordinary complainant in order to lay the foundation for a prosecution. The language of s. 476 indicates that where a Court is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the 'complaint' mentioned in s. 175. *INRI PRASAD & DEAN LAL* I. L. R., 7 All., 871

74. — *Report of police medical officers—Prosecution under Bombay Medical Contaminants Act III of 1877*—Reports of police or medical officers are not a sufficient sanction for prosecutions under the Act. A complaint on oath or solemn affirmation is necessary. *RGO & LADU* [7 Bom., Cr., 87]

75. — *Implied sanction Criminal Procedure Code 1862, s. 169—Penal Code ss. 177, 193—Framing charge*—The form of question by a District Superintendent of Police granted s. 13 of the Penal Code does not preclude a sufficient ground for framing the charge under s. 177, the without the District Superintendent required or official Code of Criminal Procedure, to give the *Held* that jurisdiction, need not be express, but may be implied sanction. *THE MATTER OF ASHRAFF HOSSEIN* and that [18 W. R., Cr., 67]

— *Implied sanction Criminal Procedure Code, 1862, s. 169.*—Where general way of the case whom a witness gave false date of commission, uttered such a witness for trial, further, that as the accusation under s. 179 of the question of forgery, was held to be implied, some inquiry to satisfy the jury was held to be implied materials to justify a [8 Bom., Cr., 54]

— *Implied sanction Criminal Procedure Code*—*Inducement in obedience to specify particulars of the Code, 1862, s. 169.*

## SANCTION FOR PROSECUTION

—continued

## 5. NATURE, FORM AND SUFFICIENCY OF SANCTION—continued

Prosecution for non-attendance in obedience to a summons was entertained without the sanction required by s. 168 of the Criminal Procedure Code. *Held* that there was an implied sanction for the prosecution, as the conviction was by the same Magistrate whose summons was treated with contempt. *REG & GAYE BY TATIA SELLAR* 5 Bom., Cr., 38

78. — *Implied sanction*—*Direction to commit*—When a Criminal Court directs a commitment it must be taken to sanction the prosecution out of which the commitment arises. *QUEEN & LEKHELI* [2 N. W., 132 Agra, F. B., Ed. 1874, 208]

79. — *Letter from Civil Court to Subordinate Magistrate—Specification of sections of Penal Code for which sanction is given*—*Jurisdiction of Magistrate to commit under other section.*—Where a Civil Court by letter to a Subordinate Magistrate with committing powers, gave sanction for the prosecution of the accused under ss. 463 and 471 of the Penal Code (making and using a false document), and where the Magistrate, in committing the accused for trial in addition to framing a charge under these sections added a head of charge under s. 193 (giving false evidence), it was held that the Magistrate had no jurisdiction to commit the accused for trial on the last mentioned head of charge. *REG & SUBRAMANIAM* [8 Bom., Cr., 28]

80. — *Suggestion that person ought to be prosecuted*—When a Subordinate Magistrate after trying a case sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute. *IN THE MATTER OF THE PETITION OF KHUFT NATH SIKHAR, KHUFT NATH SIKHAR & GHAN CHANDER MEHRA* [I. L. R., 18 Cal., 730]

81. — *Criminal Procedure Code s. 197—Prosecution of public servants*—*Indefiniteness of sanction.*—An order by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the District for "bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court" is not a legal sanction within the meaning of the Criminal Procedure Code, s. 197, and a commitment on any of such charges should be quashed. *QUEEN EMERALD & SAMANTH* [I. L. R., 10 Mad., 488]

82. — *Criminal Procedure Code, ss. 165-176—Preliminary inquiry—Penal Code (Act XLV of 1860), s. 152—Criminal Procedure Code (Act X of 1872), s. 471*—Where a Deputy Commissioner issued a sanction to prosecute the accused upon an express application made on behalf of a certain person against whom a charge of torture had been made, and which he found, from

## SANCTION FOR PROSECUTION —continued.

### 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued.

reasons stated in his judgment, to be false,—*Held*, taking the order to have been one made under s. 195 of the Code of Criminal Procedure, that it was a proper sanction, inasmuch as it was given to a contemplated prosecution by a definite person. *Semble*—On the supposition that the order was one under s. 476 of the Criminal Procedure Code, that it was not necessary for the validity of an order under that section that there should be any evidence on the record contradicting the case which was thought to be false, or that there should be a preliminary inquiry. Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect is neither rendered imperative by the law nor is it desirable. *In the matter of Muttly Lall Ghose, I. L. R., 6 Calc., 508; Queen v. Baijoo Lall, I. L. R., 1 Calc., 450; and Khepu Nath Sikdar v. Girish Chunder Muljerjee, I. L. R., 16 Calc., 370*, referred to and distinguished. *BAPERAM SURMA v. GOURI NATH DUTT*

[I. L. R., 20 Calc., 474]

83. ————— *Criminal Procedure Code, ss. 476, 195—Sanction by Magistrate for prosecution—Preliminary inquiry.*—When a Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. *Baperam Surma v. Gouri Nath Dutt, I. L. R., 20 Calc., 474*, followed. *QUEEN v. EXPRESS v. MATABADAL* . . . I. L. R., 15 All., 392

84. ————— *Criminal Procedure Code, 1898, ss. 195, 476—Sanction for prosecution for false statement made in proceedings under Land Acquisition Act (I of 1894).*—Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by same person who may desire to complain of the particular offence and whose complaint could not be entertained without such sanction. *In the matter of Banarasi Das, I. L. R., 18 All., 213, and Baperam Surma v. Gouri Nath Dutt, I. L. R., 20 Calc., 474*, referred to. *DURGA DAS RUKH v. QUEEN v. EXPRESS* [I. L. R., 27 Calc., 820]

85. ————— *Sufficiency of sanction—Sanction of official superior—Penal Code, s. 182—Criminal Procedure Code, 1861, s. 168.*—Where a prosecution of an offence under Ch. X of the Penal Code was instituted by an inferior ministerial servant under sanction of the authority of his official superior, the provisions of s. 168 of the Code of Criminal Procedure were held to have been complied with. *QUEEN v. RAM GOLAM SINGH* . . . 11 W. R., Cr., 22

See IN THE MATTER OF THE PETITION OF ABDUOL LUTEEF . . . 9 W. R., Cr., 31

86. ————— *Sanction of official superior—Criminal Procedure Code, 1861, s. 169—Judicial Commissioner sitting as Sessions Judge.*—Where the Judicial Commissioner of Assam, sitting as Sessions Judge, certified, in his capacity of

## SANCTION FOR PROSECUTION —continued.

### 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—continued.

Judge of the Chief Civil Court in Assam, that a charge of false evidence was entertained with the sanction of the District Court of Assam, to which the Court of the Munsif of Debrooghur, before or against which the offence was committed, was subordinate,—*Held* that the sanction required by s. 169, Code of Criminal Procedure, had been given. *BAROORAM AHAM v. GUNGARAM KACHARJE*

[17 W. R., Cr., 54]

87. ————— *Sanction mentioning wrong section of Code—Criminal Procedure Code, 1861, ss. 169, 170—Prosecution under different section than that for which sanction was obtained.*—The prosecutor applied to a Civil Court for leave to prosecute, under s. 170 of the Criminal Procedure Code, a witness who had appeared before the Court. The Court granted the permission as applied for. The prisoner was tried for and convicted of an offence coming under the provisions of s. 169 of the Criminal Procedure Code. *Held* that the mention of s. 170 in the permission to prosecute granted by the Civil Court might be treated as surplusage, and that the prisoner was rightly convicted. *REG. v. KHUSHAL HIRAMAN*

[4 Bom., Cr., 28]

88. ————— *Sanction by official superior—District Superintendent of Police—"Inferior ministerial officer"—Criminal Procedure Code, 1861, s. 168*—The sanction of a District Superintendent of Police to the prosecution of a charge of giving false information, not to such District Superintendent himself, but to an Assistant District Superintendent, was held to be no sufficient sanction under s. 168 of the Criminal Procedure Code, 1861. The words "inferior ministerial officer" referred to public servants of a lower grade than an Assistant Superintendent of Police. *QUEEN v. GOURU CHUND* [2 N. W., 287]

89. ————— *Criminal Procedure Code, 1861, s. 168—Person charged with giving false information under Penal Code, s. 182.*—Where a person was accused under s. 182 of the Penal Code with having given false information to a head constable, it was held that the provisions of s. 168 of the Code of Criminal Procedure, 1861, had been sufficiently complied with, inasmuch as the lower Appellate Court stated in its judgment that "the case had been forwarded under s. 182 by the officer in charge of the District Superintendent's office," the District Superintendent being the official superior of the head constable. *QUEEN v. GRISH CHUNDER SIKKAR* . . . 19 W. R., Cr., 38

90. ————— *Sanction given by Judge who afterwards tried the case—Criminal Procedure Code, 1872, s. 469.*—The Court declined in this case to say under s. 469 of the Code of Criminal Procedure, 1872, that a conviction was bad, because the Judge who tried the case and the Judge who sanctioned the criminal proceedings was the same person. *QUEEN v. SUPAL CHUNDER GANGOLLY* [22 W. R., Cr., 16]

# SANCTION FOR PROSECUTION

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## 5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—concluded

91. — Notice to show cause not a necessary preliminary—*Criminal Procedure Code (1892) s 195*—An order under s. 195 of the Code of Criminal Procedure sanctioning a prosecution for perjury is not bad by reason of notice to show cause not having been issued previously to the person against whom sanction is made. *Arulakumaran Das v Hari Bera 1 L. R. 12 Cal. 53* followed *MANGAM PAM v BENARI*

[L. L. R., 18 All., 358]

92. — *Criminal Procedure Code (Act 3 of 1862) ss 196, 532—Charge under Penal Code (Act 3 of 1860), s 124A*—The accused, who was the editor, proprietor, and publisher of the *Kesari* newspaper, was charged under s. 124A of the Penal Code with exciting and attempting to excite feelings of disaffection to Government by the publication of certain articles etc. in the *Kesari* in its issue of the 15th June 1897. At the trial an order for the prosecution given by Government under s. 196 of the Criminal Procedure Code in the following form dated July 26, 1897 was tendered in evidence. Under the provisions of s. 196 of the Code of Criminal Procedure, Mirza Abbas Ali Baig, Oriental Translator to Government, is hereby ordered by His Excellency the Governor in Council to make a complaint against Mr. Bal Gangadhar Tilak, B.A., LL.B., of Poona, publisher, proprietor, and editor of the *Kesari*, a weekly vernacular newspaper of Poona, and against Mr. Hari Narayan Gokhale, of Poona, printer of the said newspaper in respect of certain articles appearing in the said newspaper, under s. 124A of the Penal Code and any other section of the said Code which may be found to be applicable to the case. Counsel for the accused objected that the order was too vague, and should have specified the articles with reference to which the accused was to be charged. Held that the order was sufficient and was admissible, but that, if it were not sufficient, the commitment might be accepted and the trial proceeded with under s. 532 of the Code of Criminal Procedure. *Queen-Empress v Morton, 1 L. R. 9 Bom. 283*, followed *QUEEN EMPRESS v BAL GANGADHAR TILAK*

I. L. R., 23 Bom., 112

## 6. POWER TO GRANT SANCTION

93. — Implied power—*Criminal Procedure Code, 1861, s 167—Prosecution of public servant*—Upon the construction of a 167 of the Criminal Procedure Code,—Held that the section by implication vested in the Court or authority to whom the Judge or other public servant not removable, etc., was subordinate, the power of sanctioning or directing such prosecution. It did not say that the Government must give the power, but that it shall exist unless limited or reserved. Every Court or authority therefore has it unless there is a limitation. *QUEEN v KRISHNA RAO*

7 Mad., 58

94. — Power to sanction where no particular party is accused—*Sendang case*

# SANCTION FOR PROSECUTION

—continued.

95. — *POWER TO GRANT SANCTION—continued* for investigation.—A Court had power to send a case for investigation to a Magistrate under s. 171 of the Criminal Procedure Code, 1861, where no particular individual had been accused. *ESAK CHUDRA DUTT v PRASAD CHOWDHRY W. R., F. R., 71*

95. — What Courts can give sanction—*Criminal Procedure Code, 1872 s. 465—Case settled without evidence*—The Courts that had jurisdiction to grant a sanction to proceedings under s. 465 of Act X of 1872, where the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate. IN THE MATTER OF THE PETITION OF KARI CHUDRA MOZUMDAR. JAGOT CHUDRA MOZUMDAR v KARI CHUDRA MOZUMDAR

[L. L. R., 6 Cal., 440]

S C KARI CHUDRA MOZUMDAR v. JAGOT CHUDRA MOZUMDAR . 7 C. L. R., 830

96. — *Criminal Procedure Code, 1862, s 195—Offence committed in presence of Court—Preliminary inquiry—Case settled without evidence*—It is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing the offence of the nature referred to in s. 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry, and thus satisfy itself whether a *prima facie* case has been made out for granting sanction, and, if so satisfied, to grant sanction for the prosecution of the person alleged to have committed such offence. A sanction granted after such preliminary enquiry and based thereon is not illegal. *In re Kari Chunder Mozumdar, 1 L. R., 6 Cal., 440*, and *Zamindar of Sagar v Queen, 1 L. R. 6 Mad., 27*, dissented from on this point. *SHASHI KUMAR DEY v SHASHI KUMAR DEY*

[L. L. R., 18 Cal., 345]

97. — Power of Appellate Court to sanction prosecution of abettor—*Offence committed before lower Court*—Where an offence was committed against a Court of first instance, the Appellate Court to which it was subordinate was competent to sanction a prosecution under Ch. XI of the Criminal Procedure Code, 1861. Sanction to such a prosecution might be given even if the offence was abetment. IN THE MATTER OF ISAK CHUDRA GHOSH

15 W. R., 353

98. — Power of Civil Court—*Criminal Procedure Code, 1861 s 170*—A Civil Court had no power to make an order, under s. 170 of the Criminal Procedure Code, sanctioning a prosecution for an offence committed before the Court of the Principal Sudder Ameer on the Small Cause side, that Court not being subordinate to the Civil Court. *EX-PARTE MAHALINGAYAN*

6 Mad., 191

99. — Power of Civil Court to commit for forgery or perjury—*Criminal Procedure Code (1892), ss 195 and 470—Witness*



## SANCTION FOR PROSECUTION —continued.

### 6. POWER TO GRANT SANCTION—continued.

*of party to proceeding.*—The power given to a Civil Court under Ch. XXXV of the Code of Criminal Procedure (Act X of 1882) to take action regarding "any offence referred to in s. 195" is not ordinarily restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. It extends also to such offences when committed by a witness of the party. *IN RE DEVJI VALAD BHAVANT* I. L. R., 18 Bom., 581

100. ——— Power of Mamlatdar—*Sanction of Collector—Prosecution of kulkarni for false report—Criminal Procedure Code, 1861, s. 167*—The sanction for the prosecution of a kulkarni for making a false report as a public servant required by s. 167 of the Code of Criminal Procedure might be given by the Mamlatdar or by the patil to whom such kulkarni was subordinate. The sanction of the Collector was not necessary for that purpose. *REG. v. MALHAR RAMCHANDRA* 7 Bom., Cr., 64

101. ——— Power of Revenue Court—*Criminal Procedure Code, 1872, ss. 468, 469, 470—Prosecution for offence against public justice and offence relating to document given in evidence—"Subordination" of Revenue Courts to High Court.*—*Held* (SPANKE, J., doubting), on a reference to the Full Bench, that a Court of Revenue was a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872. Observations by STUART, C.J., on the "subordination" of Courts of Revenue to the High Court within the meaning of ss. 468 and 469 of Act X of 1872. *EMPERESS v. SABSUKH* [I. L. R., 2 All., 533]

102. ——— Power of District Magistrate—*Court of Assistant Magistrate—Preliminary inquiry—Criminal Procedure Code, 1882, ss. 195, 476*—The Court of an Assistant Collector is not subordinate to that of the Magistrate of the district within the meaning of s. 195 of the Criminal Procedure Code. *EMPERESS v. NAROTAM DAS* [I. L. R., 6 All., 98]

103. ——— Information by accused of offence—*Report by a police officer of falsity of information—Sanction by District Magistrate on police report—Judicial proceeding—Subordination of police officer to District Magistrate—Complaint—Criminal Procedure Code (Act I of 1898), ss. 195 and 537—Penal Code (Act XLV of 1860), s. 182*—The accused gave certain information to the police, who after investigating the matter reported that the information given was false and constituted an offence under s. 182 of the Penal Code. The District Magistrate on this sanctioned the prosecution of the accused, who was convicted and sentenced under that section. The accused appealed against the conviction and sentence. His appeal was heard and dismissed by the District Magistrate, who had previously sanctioned his prosecution. On revision the accused contended that the District Magistrate, having sanctioned his prosecution on the police report, was not competent to hear the appeal. *Held*

## SANCTION FOR PROSECUTION —continued.

### 6. POWER TO GRANT SANCTION—continued.

that, although police officers in a district were generally subordinate to the District Magistrate, the subordination contemplated by s. 195 of the Code of Criminal Procedure was not such subordination. That subordination contemplated some superior officer of police. Nor could the report of the police officer be regarded as a complaint under s. 195 of the Code of Criminal Procedure, and therefore no proper sanction had been obtained. The defect, however, was cured by s. 537 of the Code of Criminal Procedure, as no failure of justice had been occasioned. *RAMASOREY LALL v. QUEEN-EMPRESS* I L. R., 27 Cal., 452 [4 C. W. N., 594]

104. ——— *Criminal Procedure Code, 1872, s. 468—Relative positions of a Magistrate of the first class, the Magistrate of the district, and the Court of Session.*—*Held* (OLD-FIELD, J., dissenting) that, for the purposes of s. 468 of Act X of 1872, a Magistrate of the first class was subordinate to the Magistrate of the district, and consequently application for sanction to prosecute a person for intentionally giving false evidence before the former might, where such sanction was refused by the former, be made to the latter, and not to the Court of Session, which had not power to give such sanction. *IN THE MATTER OF THE PETITION OF GUR DATAL* I. L. R., 2 All., 205

105. ——— *Criminal Procedure Code, 1872, s. 468—Sessions Court—Magistrate of first class—Magistrate of district.*—For the purposes of s. 468 of the Code of Criminal Procedure (Act X of 1872), a Magistrate of the first class was subordinate to the Magistrate of the district a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former was therefore legal and sufficient, notwithstanding the refusal by the former to give such sanction himself. *Semble*—That the Sessions Court had not power to give such sanction. *IMPERATRIX v. PADMANABH PAI* I. L. R., 2 Bom., 384

106. ——— *Criminal Procedure Code, 1872, s. 468—Subordinate Judge—District Judge*—For the purpose of sanctioning a criminal prosecution under s. 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge was subordinate to that of the District Judge, notwithstanding that the subject matter of the litigation in the former Court involved more than Rs. 5,000, and an appeal lay direct to the High Court from the decision of that Court in that matter. *IMPERATRIX v. LAKSHMAN SAKHARAN* [I. L. R., 2 Bom., 481]

107. ——— Power of second class Magistrate—*Criminal Procedure Code, 1872, s. 467—Sanction for prosecution for giving false information to police officer, given by second class Magistrate of talukh.*—A second class Magistrate of a talukh, not being the official superior of a police station-house officer within the meaning of s. 467 of the Code of Criminal Procedure, 1872, could not sanction a prosecution under s. 182 of the Penal Code for

# SANCTION FOR PROSECUTION

*—continued—*  
**G. LOWEY TO GRANT SANCTION**—*continued*  
 giving false information to the station house officer  
**QUEEN v. VELAYUDAM PILLAI**

[I. L. R., 8 Mad., 146]

**108** — **Power of Sub-divisional Magistrate**—*Criminal Procedure Code, 1882* s. 117—Sanction to prosecute for false evidence granted by Magistrate on returning calendar—A Sub-divisional Magistrate, after perusing the calendar of a case tried by a Magistrate subordinate to him, went for the record, and passed an order under s. 194 of the Criminal Procedure Code sanctioning the prosecution of a witness in the case for perjury. *Held* that the order was illegal. **QUEEN EXPRESS v. KUTTU**

[I. L. R., 7 Mad., 560]

**109** — **Power of Small Cause Court Judge**—*Proceeding before Registrar—Forgery—Criminal Procedure Code (Act XXV of 1861)* s. 170—A specially constituted court was constituted before the Small Cause Court Judge for execution under s. 53 Act XX of 1860, and a decree passed upon it in usual form. Subsequently the Registrar sanctioned the prosecution of the decree-holder on the ground that the bond was a forgery. The Small Cause Court Judge thereupon on application made without taking any evidence or making further inquiry set aside the decree and sanctioned the prosecution under s. 10 of the Criminal Procedure Code. *Held* that he was justified in sanctioning the prosecution on, but not in setting aside the decree. **QUEEN v. NAWAB BINGH** 3 B. L. R., A Cr., 9

**110** — **Power of Civil Judge**—*Criminal Procedure Code, 1861* ss. 170-171—*Power of Judge to make order where application had been made to Sudder Ameen in whose Court offence occurred and refused*—The Civil Judge made an order, under ss. 10 and 17 of the Penal Code, directing the Magistrate to investigate whether certain documents used before the Sudder Ameen were forged, and if so, by whom. *Held* that he had jurisdiction to make the order, notwithstanding the Sudder Ameen had been applied to and had refused to make a similar order. **PANDEYAN v. HANDEYAN v. KANGALIE MOHAN**

(Marab., 407-2 Hay, 538)

**111** — **Power of District Judge to order prosecution for forgery committed before Munsif**—*Witness—Criminal Procedure Code (1862)* ss. 195 and 476—Where a defendant in a suit in the Court of a Munsif applied to the District Judge for sanction under s. 195 of the Code of Criminal Procedure to prosecute a witness who had given evidence in the Munsif's Court in support of a deed, produced as evidence before that Court, which had been found by the Munsif to be a forgery, and the District Judge refused the application, but, purporting to act under s. 476 of the Code himself ordered the prosecution of such witness—*Held* that the Judge's order was made without jurisdiction, the offence in respect of which the sanction was directed not having been committed before him nor brought to his notice in the course of a judicial

# SANCTION FOR PROSECUTION

*—continued—*  
**G. POWER TO GRANT SANCTION**—*continued.*

proceeding in the matter of the petition of **MATHURA DAS** I. L. R., 16 All., 80

**112** — **Power of Sessions Judge**—*Sanction given on inquiry ordered during trial*—Where during an inquiry into allegations that a confession had been made under such circumstances as to render it inadmissible in evidence, the Sessions Judge accorded his sanction to the prosecution for perjury of some of the witnesses who deposed on behalf of the prisoners the High Court considered such a proceeding improper and eminently calculated to defeat the object of the inquiry. **REG v. KASHI NATH DIXIT** 8 Bom., Cr., 126

**113** — **Criminal Procedure Code 1852, s. 195—Sanction to prosecute**—“Subordinate Court” What is a—Sanction to prosecute refused by Subordinate Judge in suit over Rs. 5,000—Jurisdiction of District Court to grant sanction in cases to which appeal lies to High Court from Subordinate Judge—In matters relating to the grant of sanction to prosecute under s. 195 of the Criminal Procedure Code (Act X of 1852), a Court is regarded as “subordinate” to another Court where the latter is the Court to which an appeal from the former ordinarily lies, and an application for such sanction must be made to such superior Court even in those particular cases in which an appeal lies to some other Court, e.g., to the High Court. A decree-holder applied to the first class Subordinate Judge for sanction to prosecute his judgment-debtor under ss. 205 and 424 of the Indian Penal Code for fraudulent concealment of certain moveable property, worth about Rs. 10,000, awarded by the decree. This application was rejected by the Subordinate Judge. The District Judge declined to interfere on the ground that, the decree being appealable to the High Court, the High Court alone could deal with the application under s. 195 of the Criminal Procedure Code. *Held* that, though the decree in the present instance was appealable to the High Court, still as appeals from the Court of the first class Subordinate Judge ordinarily lay to the District Court, the former was subordinate to the latter Court within the meaning of s. 125 of the Criminal Procedure Code. **IN RE ASANT RAYCHANDRA LOTIKAR**

[I. L. R., 11 Bom., 438]

**114** — **Criminal Procedure Code s. 195—Sanction for prosecution of witness for perjury by Village Munsif**—F was tried and convicted under s. 193 of the Penal Code for giving false evidence before the Court of a Village Munsif in a suit in which F was defendant. The Village Munsif sanctioned the prosecution of F under s. 195 of the Code of Criminal Procedure. On appeal, the Sessions Judge acquitted F on the ground that a Village Munsif had no power to sanction the prosecution because s. 195 of the Code of Criminal Procedure did not apply. *Held* that the Village Munsif had power to grant the sanction, and that the objection to the conviction was bad in law. **QUEEN EXPRESS v. VENKATESA** I. L. R., 11 Mad., 135

## SANCTION FOR PROSECUTION —continued.

### 6. POWER TO GRANT SANCTION—continued.

**115.** ——— *Criminal Procedure Code, s. 195—Sanction for prosecution for giving false evidence in a suit under Act XII of 1881 tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*—A suit for arrears of rent under s. 93, cl. (a), Act XII of 1881, was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district, who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court, being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer, holding that he had no jurisdiction in the matter, also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge, *Held* that the Court of a Collector, when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the district, was still to be deemed subordinate to it within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie. *HARI PRASAD v. DEBI DAT*

[I. L. R., 10 All., 582]

**116.** ——— *Criminal Procedure Code (Act X of 1882), ss. 195, 476—Order sanctioning prosecution—Evidence necessary for such order.*—Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted. *Queen v. Barjoo Lal, I. L. R., 1 Calc., 450, and In the matter of the petition of Kali, Prosunno Bagchee, 23 W. R., Cr., 23, followed.* *IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR, KHEPU NATH SIKDAR v. GRISH CHUNDER MUKERJI*

[I. L. R., 16 Calc., 730]

**117.** ——— *Criminal Procedure Code (1882), s. 195—"Subordinate Court"—Jurisdiction of the High Court to revoke or*

## SANCTION FOR PROSECUTION —continued.

### 6. POWER TO GRANT SANCTION—continued.

*grant sanction in cases in which appeal lies to "Her Majesty in Council" from the Court of the Recorder of Rangoon.*—In matters relating to the grant of sanction to prosecute, under s. 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as "subordinate" to another Court where the latter is the Court to which appeals from the former ordinarily lie, i.e., in the majority of cases. Though the decree in the present instance was appealable to "Her Majesty in Council," still, as appeals from the Court of the Recorder of Rangoon ordinarily lay to the High Court, the former was held to be subordinate to the latter Court within the meaning of the section. *In re Anant Ramchundra Lotlikar, I. L. R., 11 Bom., 438, followed.* *MADURAY PILLAY v. ELBERTON* . I. L. R., 22 Calc., 487

**118.** ——— *Criminal Procedure Code (1882), ss. 195, 407, and 476—Application for sanction to prosecute—Offence committed before second class Magistrate—Magistrate, Jurisdiction of—Application by letter for sanction to prosecute—District Magistrate's order sanctioning prosecution and prescribing the Court in which the prosecution should take place.*—The District Forest Officer applied by letter to the District Magistrate to take such action as he deemed fit against one S, who, for reasons stated by the District Forest Officer, was suspected of having abetted the offence of giving false evidence in the course of proceedings instituted on behalf of the Forest Department in the Court of a second class Magistrate. The District Magistrate had previously directed that all appeals from the second class Magistrate should be heard by the Deputy Magistrate, but he passed an order himself, whereby he (1) sanctioned the prosecution of S, and (2) directed that it should take place in the Court of the Head Assistant Magistrate. *Held* (1) that the District Magistrate had no jurisdiction to sanction the prosecution, for the reason that he was not the ordinary appellate authority; (2) that the second part of his order was irregular for the reasons that it was not authorized by the Criminal Procedure Code, s. 195, and he had no jurisdiction to act under s. 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding. *QUEEN-EMPERESS v. SUBBARAYA PILLAI* . I. L. R., 18 Mad., 487

**119.** ——— *Inquiry preliminary to exercise of power to grant sanction—Offence by definite person or persons—Criminal Procedure Code (1882), s. 476—Civil Procedure Code (1882), s. 643.*—The provisions of s. 476 of the Criminal Procedure Code as well as of s. 643 of the Civil Procedure Code clearly indicate that the Court taking action under either section must not only have ground for inquiry into an offence of the description referred to in those sections respectively, but must also be *prima facie* satisfied that the offence has been committed by some definite person or persons against whom proceedings in the Criminal Court are to be taken. *Khepu Nath Sikdar v. Grish Chunder Mukerji, I. L. R., 16 Calc., 730, and Chaudhari Mahomed Izarul Huq v. Queen-Empress, I. L. R., 20 Calc.,*

# SANCTION FOR PROSECUTION

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**6 POWER TO GRANT SANCTION—continued**  
 349 followed. A Division Bench of the High Court taking the civil business of a particular group has jurisdiction to deal with an order under s. 643 of the Civil Procedure Code made by a Civil Court in any of the districts included in the group. **MAHOMED BHAKTU v. QUEEN EMPRESS** [I L R., 23 Cal., 532]

**120** *Criminal Procedure Code (1882) s. 476—Inquiry before issue of an order under s. 144—Criminal Procedure Code—Judicial proceeding—False evidence—A Magistrate making an inquiry before issue of an order under the Criminal Procedure Code s. 144 is acting in a stage of a judicial proceeding and has therefore jurisdiction to take action under s. 476 if he is of opinion that false evidence has been given before him.* **QUEEN EMPRESS v. TIRUKARASIMHA CHARI** [I L R., 19 Mad., 18]

**121** *Criminal Procedure Code (1882) s. 190—Power of Court to go outside record—A Magistrate in deciding whether to sanction under Criminal Procedure Code s. 195 a prosecution for giving false evidence, has power to hold an inquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed.* **QUEEN EMPRESS v. MOTILAL** [I L R., 20 Mad., 339]

**122** *Criminal Procedure Code (1882) s. 195—Court to which appeals ordinarily lie—Collector—District Judge—For the purpose of granting or revoking a sanction to prosecute refused or granted under s. 195 of the Code of Criminal Procedure an Assistant Collector of the first class is subordinate to the District Judge.* **HARI PRASAD v. DELI DAL** [I L R., 10 All. 542 followed. *Queen Empress v. Ajudhia Prasad, Weekly Notes All. (1890) 121 considered.* **SHANKAR DIAL v. VENGALIA** [I L R., 19 All., 121]

**123** *Criminal Procedure Code (1882) s. 195—Sanction for prosecution—Complaint found to be false on an investigation by the police but without judicial enquiry—When a complaint was found to be false on an investigation being made by the police and thereupon sanction was given under s. 195 Criminal Procedure Code for prosecuting the complainant for instituting a false complaint—Held that the sanction was bad in law as it was given without a judicial investigation of the complaint.* **MEERUNDA BEHARI v. BHUKARI CHAMAN MAHANTY** [C W N., 452]

**124** *Power of Court to grant sanction with regard to case pending in another Court—Power of Court to dispose of case pending on the file of another Magistrate without withdrawing it—Held that the Deputy Commissioner had no power to pass an order of dismissal under s. 203 Criminal Procedure Code, in a*

# SANCTION FOR PROSECUTION

—continued

**6 POWER TO GRANT SANCTION—continued**  
 case which he had transferred to the First Extra Assistant Commissioner, and which was at the time pending in the Court of the latter, not a grant sanction under the circumstances. **REKIB ALI v. EMPRESS** [C W N., 490]

**125** *Penal Code (Act XLV of 1-60) s. 192—False information with intent to cause public servant to use his lawful power to the injury of another person—Criminal Procedure Code (Act I of 1898), ss. 195, 476—Judicial proceeding—A Deputy Commissioner upon receiving a petition complaining of various acts of misconduct by the Tahsildar and others of the local ry, referred the matter to the Sub-Divisional Magistrate for enquiry and report. The Sub-Divisional Magistrate, in consequence of an opinion formed by him during the enquiry proceeded to try the petitioner, who was one of the persons who made the petition originally to the Deputy Commissioner and convicted him under s. 102, Penal Code. Held that the Sub-Divisional Officer had no jurisdiction to institute the proceedings or to grant sanction inasmuch as the complaint which led to this trial was not made to him, but was made to the Deputy Commissioner without whose previous sanction or complaint no trial under s. 102, Penal Code could be held. That s. 476, Criminal Procedure Code, did not apply to the proceedings, as they were not judicial proceedings.* **ABHUTILLA v. EMPRESS** [C W N., 368]

## 7 DISCRETION IN GRANTING SANCTION

**126** *Exercise of discretion—Criminal Procedure Code 1881, s. 169—The discretion vested in a Civil Court under s. 169 Code of Criminal Procedure, of sanctioning a criminal charge of perjury was one that should be most carefully exercised.* **QUEEN v. POORA RAM** [C W N., Cr., 11]

**127** *Case settled without evidence being gone into—Criminal Procedure Code, 1872, s. 458—Per GARTH, C.J.—Where a case was settled without evidence being gone into, the Court in which the suit was brought, even if it had power to sanction criminal proceedings against any of the parties to such suit under s. 409 of Act X of 1872, was guilty of great impropriety and indiscretion in so doing inasmuch as it could have had an opportunity of judging of the soundness of the claim or defence.* **IN THE MATTER OF THE PETITION OF KASH CHUNDER MAHOMEDAR JEGUT CHUNDER MOZUMDAR v. KASH CHUNDER MOZUMDAR** [I L R., 8 Cal., 440]

**C. C. KASH CHUNDER MAHOMEDAR v. JEGUT CHUNDER MOZUMDAR** [C L R., 330]

**128** *Proof before Court of commission of offence—Criminal Procedure Code 1882 s. 190—Before granting a sanction to prosecute under s. 195 of the Code of Criminal Procedure, a Court is bound to satisfy itself that an offence has been committed, but it is not bound to*

# SANCTION FOR PROSECUTION

—continued.

## 7. DISCRETION IN GRANTING SANCTION

—continued.

hold any inquiry as to all the persons who may be implicated in such offence. IN THE MATTER OF THE PETITION OF GOVINDANNAFAR

[I. L. R., 7 Mad., 224

129. ———— *Proof before Court of commission of offence—Criminal Procedure Code, 1882, s. 195—False charge—Penal Code, s. 211—Preliminary inquiry.*—A prosecution of a charge under s. 211 of the Penal Code should not be granted under s. 195 of the Criminal Procedure Code as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is a strong *prima facie* case against the accused. *Held* therefore where S, who had been tried before the Court of Session for an offence and acquitted, applied to the Court, in respect of the criminal proceedings which had been instituted against him, for sanction to prosecute G for abetment of an offence under s. 211 of the Penal Code, and the Sessions Judge granted the sanction, and there was nothing on the record of the criminal case or of the Judge's proceedings to show on what grounds G was accused of abetting a false charge, or on what grounds the Judge gave the sanction, that before the Judge gave the sanction he should have satisfied himself, by examination of S or other inquiry, whether S had sufficient grounds in fact for accusing G, and whether there were good *prima facie* grounds for suspecting G of abetting a false charge and permitting a prosecution. IN THE MATTER OF THE PETITION OF GOVINDANNAFAR

[I. L. R., 6 All., 114

130. ———— *Criminal Procedure Code, s. 195—Penal Code (Act XLV of 1860), ss. 193, 463.*—In a case in which the Court of first instance finds an instrument to be genuine and the Judge in appeal happens to take a different view of the matter, it is not desirable to grant a sanction to prosecute under s. 195 of the Criminal Procedure Code. Principle which should guide a Court in sanctioning a prosecution explained. RAM PRASAD ROY v. SOOBA ROY . . . 1 C. W. N., 400

131. ———— *Penal Code (Act XLV of 1860), s. 211—Discharge of an accused person—Intentionally bringing a false charge.*—Where a Deputy Magistrate refused to grant sanction to prosecute the complainant for bringing a false charge on an application being made to him by the accused persons four months after the date of their discharge, but on an application being made to the Sessions Judge for the purpose, the latter, without giving any notice to the persons against whom the sanction was asked for, made an order sanctioning their prosecution under s. 211 of the Penal Code. *Held* that, having regard to the view that the Deputy Magistrate took of the matter when he refused the application for sanction, and having regard also to the great delay in making the application for sanction and to the fact of the Sessions Judge's order being made without any notice to the petitioners,

# SANCTION FOR PROSECUTION

—continued.

## 7. DISCRETION IN GRANTING SANCTION

—continued.

that order is not a proper order and must be set aside, RAM NATH CHAMAR v. RAM SARAN LALL

[I. C. W. N., 529

132. ———— *Criminal Procedure Code (Act X of 1882), s. 195—Sanction to prosecute for making false affidavit—Application by person not a party to the suit through enemy—Proper grounds of sanction—Stage of proceedings when sanction to be granted.*—No Court should entertain an application to prosecute made by persons who are not parties to the suit out of which the proceedings for sanction arise. An order granting sanction ought only to be given after careful consideration, and having in view the ends of justice, and not in order to assist the private ends of individuals. It is desirable in most cases that the Court should conclude and have all the facts before it before giving sanction, and that it should not do so at an early stage of the proceedings. Where an application for sanction, unsigned and unverified, was filed before a Munsif, purporting to be on behalf of the defendant in a civil suit, who deposed that he was not aware of the application or its contents and was not desirous of prosecuting, and the Munsif found that it was filed by one B who was not a party to the suit, out of ill feeling, and thereupon rejected the same: and where the sanction was, on appeal, granted by the Sessions Judge without deciding who the real applicant was, or determining the object of the application, but on the ground that there was evidence forthcoming to prove the falsity of the affidavit to the knowledge of the present petitioner,—*Held* that, under the circumstances of the case, sanction was improperly granted by the Judge, and must be revoked. IN THE MATTER OF THE PETITION OF CHANDRA KANT GHOSE . . . 3 C. W. N., 3

133. ———— *Criminal Procedure Code, 1872, s. 468—Discretion of High Court to grant sanction after refusal by Small Cause Court.*—In a case in which the High Court was asked under s. 468, Code of Criminal Procedure, to sanction a prosecution for giving false evidence of a plaintiff in a suit before a Small Cause Court, which Court had refused such leave to the defendant, it was held that the High Court would not be justified in exercising the discretion vested in them by s. 468 unless it appeared very clearly that there were strong grounds for granting the sanction. MONEY MOHUN DEY v. DINONATH MULLICK [22 W. R., Cr., 11

134. ———— *Criminal Procedure Code, 1872, s. 468—Grounds for sanction—Record.*—On an application for sanction to prosecute under s. 468 of the Code of Criminal Procedure, 1872, it was not competent to the Court to go beyond the record in determining whether or not sanction should be granted when the record itself discloses no foundation for the charges. *In re Kasi Chunder Mozumdar*, I. L. R., 6 Cal., 440,

## SANCTION FOR PROSECUTION

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## 7. DISCRETION IN GRANTING SANCTION

—continued

approved. **DANGILI VIRA PANDIA CHINNATAMBIAH & QUEEN ZAMINDAR OF SIVAGIRI v QUEEN**

[I. L. R., 8 Mad., 20]

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*Criminal Procedure Code ss 195, 430, 478—Excluded documents filed in court—Prosecution ordered by Court as to documents not on record—Power of High Court in revision.—*Certain documents having been put in to Court in a suit pending before a District Munsif, but not given in evidence the District Munsif made an order for the prosecution of the party who so put them in, on the ground that the documents were forged. Held that the High Court had power to revise the proceedings of the District Munsif, that the District Munsif was not competent to go beyond the record. **Zamindar of Sivagiri v Queen**, I. L. R. 8 Mad., 20, followed, and that the order was wrong and should be set aside. **ABDUL KHADAR v MEERA SAKIB** I. L. R., 15 Mad., 224

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*Criminal Procedure Code 1892 ss 202, 203 476—Penal Code, s 211—Complaint dismissed without preliminary inquiry into the truth of complaint—A Magistrate of the first class, after considering the result of an investigation by a police officer under s. 202 of the Code of Criminal Procedure dismissed a complaint as false and passed an order sanctioning the prosecution of the complainant for an offence punishable under s. 211 of the Penal Code, and directed a third class Magistrate to hold a preliminary inquiry into the offence being cognisable by the Court of Sessions only. Held that, as there was no application before the first class Magistrate for sanction to prosecute, the order must be taken to be a complaint made by the said Magistrate and therefore under s. 476 of the Code of Criminal Procedure, the third class Magistrate had no jurisdiction to hold an inquiry. Held also that the first class Magistrate ought to have held a preliminary inquiry under s. 476, in order that the complainant might have an opportunity of showing the truth or bona fides of the complaint. **QUEEN v YENDAYA CHANDRAMMA***

[I. L. R., 7 Mad., 189]

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*Forgery—Evidence of charge necessary for—Sanction to a prosecution of a witness or of a party to a suit, for the forgery of a document put forward in course of the trial of that suit, should not be given, without all the testimony available at the trial and bearing on the question of forgery having been first received, and it being satisfactorily proved that there is a *prima facie* case made out for the charge. **Queen**—Where a document was not put in evidence or dealt with as evidence but merely had a place on the Judge's file, sanction was necessary. **SATTARAM SARDU v NED GOLLAM SARDU** 19 W. R., 183*

## 8. REVOCATION OF SANCTION

138. —Extent of power of revocation—*Criminal Procedure Code (Act V of 1895),*

## SANCTION FOR PROSECUTION

—continued

## 8 REVOCATION OF SANCTION—continued.

s 195.—The power of revoking given under s. 195 (b) is only in respect of sanctions, and not of complaints. **QUEEN EXPRESS v ANKAYIA**

[I. L. R., 23 Mad., 205]

139

*Power to revoke sanction—Distinction between a sanction granted to a private person and a complaint by a Court—Criminal Procedure Code (Act V of 1895), ss 195 and 476.—*S. 195 of the Criminal Procedure Code (Act V of 1895) distinguishes between the sanction granted by a Court to a prosecution by a private individual and a complaint made by the Court itself. A superior Court to which such Court is subordinate may revoke the sanction granted in the former case to the private prosecution, but it has no power in the latter case to set aside a complaint duly made by a subordinate Court. **Jahra Prasad v Akam Lal**, I. L. R., 7 All., 871 **Queen v Essoo Lal**, I. L. R., 1 Cal., 459, and **Gyan Chander Roy v Pratab Chander Dass** I. L. R., 7 Cal., 208, referred to. **QUEEN EXPRESS v PACHAPPA**

[I. L. R., 13 Bom., 109]

140

*Criminal Procedure Code, 1892 ss 195 476—High Court Jurisdiction of—*The High Court has no power on appeal to set aside a complaint duly made by a subordinate Court under s. 476 of the Code of Criminal Procedure. **QUEEN EXPRESS v NARAYIA**

[I. L. R., 13 Mad., 144]

But see **KHEP VATH SINDAR v GRISH CHATTER MOOKERJEE** I. L. R., 16 Cal., 730

and **IN THE MATTER OF THE PETITION OF MATHEKA DAS** I. L. R., 16 All., 80

where the High Courts of Calcutta and Allahabad, respectively, have held that the High Court has power to set aside such an order on revision.

141.

*Criminal Procedure Code (1892), s 195—Revocation of sanction granted in respect of an offence committed in the course of a civil suit of over Rs. 5,000 in value—Falsification of suit.—*Where sanction to prosecute is granted in respect of perjury committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie. **GANGA DEVI v SHEER DINGH**

[I. L. R., 17 All., 51]

142.

*Criminal Procedure Code (Act V of 1892), ss 195 269—Sessions Judge's power to review his order in proceedings taken to revoke sanction.—*A Sessions Judge, having once refused to revoke a sanction granted by a subordinate Court under s. 194 of the Criminal Procedure Code (Act V of 1892), has no jurisdiction afterwards to review his order and set aside the sanction. An application to a Sessions Judge for revocation of a sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be

## SANCTION FOR PROSECUTION —continued.

### S. REVOCATION OF SANCTION—concluded.

revised or revised by him QUREN-EMPRSS r. GANESH RAMANISHNA . I. L. R., 23 Bom., 50

### 9. EXPIRY OF SANCTION.

143. ——— Prosecution commenced more than six months after granting of sanction, the period intervening being close holidays—*Penal Code, ss. 193 and 471—Criminal Procedure Code (1882), ss. 195 and 537—Irregularity in criminal proceedings—Magistrate, Jurisdiction of—General Causes Consolidation Act (I of 1887).*—Sanction to prosecute R for offences under ss. 193 and 471 of the Penal Code, committed in the course of a judicial proceeding, was granted on the 5th September 1893, and the prosecution was commenced before the Magistrate on the 7th March 1894, the 1st March being a Sunday, and the 5th and 6th Court holidays. R was committed to the Sessions. *Held* that, as s 7 of Act I of 1887 does not apply to the Code of Criminal Procedure of 1882, and there is no provision of law by which the period provided by s. 195 during which a sanction may remain in force can be extended by reason of the period expiring during Court holidays, the proceedings of the Magistrate were without jurisdiction, and the commitment must be quashed. *Held* further that s 537 of the Code of Criminal Procedure was not intended to override the provisions of s. 195, nor can it be said that there has not been a failure of justice in the prosecution of a person after the period for which the sanction was in force has expired. *RAJ CHUNDER MOZUMDAR v. GOTT CHUNDER MOZUMDAR*

[I. L. R., 22 Cal., 176

### 10. FRESH SANCTION

144. ——— Necessity for fresh sanction—*Postponement of case—Expiration of limitation—Criminal Procedure Code, 1882, s. 195.*—It is competent for a Court which has granted sanction to a prosecution under s. 195 of the Criminal Procedure Code to give a fresh sanction, if the one previously granted has expired by efflux of time. The limitation of six months mentioned in s. 195 means that a Magistrate shall not take cognizance of a case under a sanction which is more than six months old, not that the whole prosecution must be completed within that period. *Held* therefore where sanction to a prosecution had been granted under s. 195, and the prosecution had been instituted, and the Magistrate, in consequence of the evidence of the complainant not being procurable, had ordered "the case to be shelved for the present," and the complainant, after the six months mentioned in s. 195 had expired, applied to the Magistrate to re open the proceedings, that it was competent for the Magistrate, having once taken cognizance of the case, and it still remaining on his file undetermined, to take it up again at any moment, and proceed with the prosecution, without fresh sanction. *IN THE MATTER*

## SANCTION FOR PROSECUTION —continued.

### 10. FRESH SANCTION—continued.

OF THE PETITION OF GULAB SINGH. GULAB SINGH v. DFFRI PRASAD . I. L. R., 6 All., 45

145. ——— Power to grant fresh sanction—*Fresh sanction granted more than six months after expiry of prior sanction—Grounds upon which such fresh sanction should not be granted—Criminal Procedure Code (Act X of 1882), s. 195.*—Sanction was granted to prosecute a defendant for forgery and perjury alleged to have been committed by him in a civil suit which was decided against him on the 22nd August 1882. The defendant then preferred an appeal which was dismissed on the 9th August 1883. The plaintiff commenced criminal proceedings against the defendant, under the sanction, on the 23rd July 1884, but such proceedings having been commenced more than six months after the date of the sanction, the charge was dismissed. The plaintiff then, on the 20th August 1884, applied for a fresh sanction, which was granted on the 13th April 1885. *Held* that assuming that the Munsif who granted the fresh sanction had power to do so, as to which the Court expressed no opinion, such fresh sanction should not have been granted unless some explanation was given for the omission to commence proceedings within six months; and as no such explanation was given, nor any special grounds shown why a fresh sanction should be given, the Munsif did not exercise a sound discretion in granting such fresh sanction, and consequently his order was set aside. *JORDEO SINGH v. HARIHAR PERSHAD SINGH* . I. L. R., 11 Cal., 577

146. ——— Power to re-try without fresh sanction—*Conviction quashed for want of jurisdiction.*—Where sanction is given for a prosecution for perjury, and the case tried by an incompetent Court and the conviction quashed on appeal, a competent Court may re-try the prisoner upon the subsisting sanction without any order of the Appellate Court by whom the conviction is quashed. *IN THE MATTER OF THE PETITION OF RAMI REDDI* . I. L. R., 3 Mad., 48

147. ——— Fresh sanction, Grant of, after expiry of six months from the date of the first sanction—*Criminal Procedure Code (1882), s. 195.*—If six months expire after the grant of sanction under s. 195 of the Criminal Procedure Code, and no prosecution is commenced under it within that time, it is not open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction. The words "six months from the date on which the sanction was given" must be taken to mean six months from the date on which it was given in the first instance, and not from any subsequent date on which the purport of the order might have been repeated. The Munsif who tried the suit out of which the application for sanction arose refused to sanction any prosecution; the Munsif who originally sanctioned the prosecution was a different officer; while the Munsif who gave the fresh sanction was neither the Munsif who tried the case nor the Munsif who sanctioned the

## SANCTION FOR PROSECUTION

—continued

## 10 FRESH SANCTION—concluded

prosecution originally *semble*—Under these circumstances, it is extremely doubtful whether the sanction was such as is contemplated by s. 195 of the Criminal Procedure Code. **DARBARI MAXDAR v JAGOO LAL** L. L. R., 22 Cal., 573

148 Sanction not acted upon within six months—*Criminal Procedure Code (1892) s. 195*—Lapse of sanction—If an order under s. 195 of the Code of Criminal Procedure lapses, not having been acted upon within six months, this does not bar the granting of fresh sanction on the same grounds if a sufficient reason for the delay be shown. **Darbari Mandar v Jagoo Lal**, L. L. R., 22 Cal., 573 not followed. **Gulab Singh v Debi Prasad** L. L. R., 6 All., 45 and **Baldeo Singh v Prasad** Weekly Digest All (1932) 245 referred to. **MANOHAR RAM v BEHARI** (L. L. R., 18 All., 358)

## 11 POWER TO QUESTION GRANT OF SANCTION

149 Power of Deputy Magistrate—*Local Code ss 152 and 211*—Sanction granted by superior Court—A Deputy Magistrate has no power to question an order made by his superior sanctioning a prosecution under ss 152 and 211 of the Penal Code. Whether such sanction has been rightly or wrongly given is a question for the accused to raise before a competent Court. **EMPRESS v IRAD ALI** L. L. R., 4 Cal., 889

**S C NUSUBHAI BIKER v IRAD ALI** [4 C. L. R., 413]

150 Power of superior Court—*Criminal Procedure Code of 1872 ss 463 465*—Finality of order as to sanction—Held that the sanction referred to in ss 463 and 465 of Act X of 1872, when given by any of the Courts empowered under the Act, could not be disturbed by a superior Court. *Per TURNER, Off. C.J., and PRABHON, OLDFIELD and SPANKS JJ.*—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them. **BARKAT ULLAH KHAN v RUSTUM** (L. L. R., 1 All., 17)

## 12 WANT OF SANCTION

151 Objection to want of sanction—*Scalls*—The objection to the want of sanction should be taken at the trial. **QUEEN v KRISHNA LAL** 7 Mad., 58

152 Jurisdiction of Court without sanction—*Trial of offence under Criminal Procedure Code, 1872 s. 463*—A complaint of an offence under s. 463 of the Criminal Procedure Code, 1872, unaccompanied by the requisite sanction, could not be entertained at all by the Magistrate even for the examination of the complainant. **ANONYMOUS** [8 Mad., Ap., 2]

## SANCTION FOR PROSECUTION

—continued

## 12 WANT OF SANCTION—continued

153.—Institution of case without sanction—*Discretion of High Court to interfere*—*Trial flawed without sanction*—Where a charge was instituted without the necessary sanction, and the accused was tried and convicted, the High Court refused to interfere being of opinion that there was nothing to entitle the accused to the benefit of the exception in s. 426 of the Criminal Procedure Code 1951. **KIARI OJHA v PANKHAR** [7 B. L. R., 23 note]

154.—Trial without sanction—*Criminal Procedure Code, 1892 s. 197*—*Effect of subsequent sanction*—Where, after a magisterial inquiry a European British subject, being a public servant within the meaning of s. 197 of the Criminal Procedure Code (Act X of 1892) was committed for trial to the High Court of Bombay by the Judicial Superintendent of Railways in His Highness the Nizam's Dominions, without any previous sanction having been obtained as required by that section, *Held* that the proceedings were illegal and without jurisdiction, and that a sanction subsequently obtained was of no effect. **QUEEN EMRESS v MONTOM** (L. L. R., 9 Bom., 289)

155.—*Criminal Procedure Code, 1892 s. 195*—Where a witness was prosecuted for disobedience to a summons without sanction previously obtained under s. 195 of the Criminal Procedure Code, the High Court refused to interfere there being no evidence that the want of sanction had occasioned a failure of justice. **KALLY MONTOM MOOKERJEE v EMPRESS** 13 C. L. R., 117

156.—*Ground for quashing proceedings—Criminal Procedure Code 1872 ss 463 465*—Held by the Judge making the reference (**STRAIGHT J.**) on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss 463 and 465 of Act X of 1872 all the proceedings were invalid, and must be quashed, and the accused must be re-tried sanction to their prosecution having been obtained. **EMPRESS v SARJAN**

[L. L. R., 2 All., 533]

157.—Inquiry and commitment without sanction—*Local sanction—Criminal Procedure Code 1892 s. 195 476*—Where sanction to the prosecution of a person for the offence of using certain evidence known to be false was granted by a Court to which the Court in which such evidence was used was not subordinate, and such sanction did not specify the place in which and the occasion on which, such offence was committed, and the Court granting the sanction did not make any preliminary inquiry although such an inquiry was "necessary" in the sense of s. 476 of the Criminal Procedure Code—Held that the indispensable preliminary conditions of s. 195 of the Code being wanting to the prosecution, the committing Magistrate was incompetent to entertain the case.



## SANCTION FOR PROSECUTION

—continued.

### 12. WANT OF SANCTION—concluded.

and the commitment was illegal and should be quashed. *EMRESS v. NAROTAM DAS* [I. L. R., 6 All, 98]

158. ——— Commitment without sanction as to one prisoner—Ground for quashing commitment.—Where the sanction to the prosecution accorded under s. 169, Code of Criminal Procedure, 1861, extended only to one of the persons charged, the High Court quashed the commitment, and directed the discharge of the persons to whom the sanction did not apply. *QUEEN v. WOODBURN SINGH* [10 W. R., Cr., 24]

*QUEEN v. RAJKISHORE ROY* 15 W. R., Cr., 55

159. ——— Proceedings without sanction—Extortion—Public servant—Criminal Procedure Code, 1861, s. 167.—Where a complaint charged a person, who was one of the public servants mentioned in s. 167 of the Criminal Procedure Code, with committing acts which, if committed by a private individual, would have constituted the offence of extortion, it was held that it was not illegal to treat the charge as a charge of extortion, and to proceed with the trial without sanction for the prosecution. *REG. v. PARSURAM KESHAV* [7 Bom., Cr., 61]

### 13. NON-COMPLIANCE WITH SANCTION.

160. ——— Departure from terms of sanction—Power of Local Government—Prosecution of Judge or public servant—Criminal Procedure Code, 1861, s. 167.—The Local Government, in sanctioning or directing (under s. 167 of the Criminal Procedure Code) a charge against a public servant of an offence as such public servant, had power to limit its sanction, by giving directions as to the person by whom, and the manner in which, the prosecution was to be preferred and conducted, and a Court had no jurisdiction to entertain a charge against such public servant if preferred otherwise than in accordance with such directions. *Semle*—The Local Government had power in the like case to direct that the accused public servant should be tried before a specified tribunal, being one having jurisdiction in that behalf. Therefore, where the sanction directed that the accused public servant should be prosecuted upon such charges as *Mr. C* might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear, that *Mr. C* had preferred any charge against, or taken any part in the prosecution of, the accused public servant, the High Court quashed the conviction of the accused, as having been without jurisdiction. *REG. v. VINAYAK DITAKAR* [8 Bom., Cr., 32]

161. ——— Non-prosecution under sanction—Criminal Procedure Code, 1872, s. 469 and s. 142—Power of District Magistrate to proceed without complaint.—Where sanction had been given under s. 468 of Act X of 1872 by a Deputy

## SANCTION FOR PROSECUTION

—concluded.

### 13. NON-COMPLIANCE WITH SANCTION

—concluded.

Magistrate to a person to prosecute another for bringing a false charge, and such sanction was not proceeded under, it was open to the District Magistrate to take up the case under s. 142 without complaint. *EMRESS v. NITCHA* I. L. R., 4 Calc., 712

162. ——— Effect on sanction of death of grantee—Criminal Procedure Code, s. 195.—A Civil Court granted sanction under s. 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother thereupon preferred a complaint, and the Magistrate dismissed it under s. 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive, and directed the District Magistrate to make further inquiry under s. 437. Held that the Sessions Judge was right. *IN RE THATHAYYA* [I. L. R., 12 Mad., 47]

## SAPINDAS.

See HINDU LAW—INHERITANCE—GENERAL HEIRS—SAPINDAS.

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—GRAND-DAUGHTER. [I. L. R., 20 Bom., 173]

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—STEP-MOTHER.

[I. L. R., 5 Mad., 29  
I. L. R., 8 Mad., 132  
I. L. R., 11 Bom., 47]

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—WIDOW.

[I. L. R., 2 Bom., 388  
I. L. R., 5 Bom., 110  
I. L. R., 7 I. A., 212  
I. L. R., 15 Bom., 234  
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See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—BROTHER'S DAUGHTER'S SON. [I. L. R., 9 Calc., 563]

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—COUSIN.

[I. L. R., 17 Calc., 518  
I. L. R., 22 Calc., 339  
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See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—HALF BLOOD RELATIVES. I. L. R., 19 All., 215

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[I. L. R., 12 Bom., 505  
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## BARANJAM

See GRANT—CONSTITUTION OF GRANTS  
[I. L. R., 8 Bom., 593  
I. L. R., 15 Bom., 247]

See HINDU LAW PARTITION—PROPERTY  
LIABLE OR NOT TO PARTITION  
[I. L. R., 15 Bom., 247, 519]

— Right to possession and management of—

See LIMITATION ACT, 1877, ART. 141—IN  
MOVABLE PROPERTY  
[I. L. R., 15 Bom., 247]

See PENSIONS ACT 4  
[I. L. R., 16 Bom., 598]

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[I. L. R., 17 Bom., 431  
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## BAYER COMPENSATION

See MURDER JURISDICTION OF  
[I. L. R., 19 Calc., 8]

## SCHEDULE

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[I. L. R., Ap., 34]

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See APPEAL IN CRIMINAL CASES—ACTS—  
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See APPEAL IN CRIMINAL CASES—ACTS—  
ACT XXVII OF 1935  
[I. L. R., 12 Calc., 536]

See CRIMINAL PROCEEDINGS  
[I. L. R., 13 Mad., 353]

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s 1  
[I. L. R., 18 Mad., 227]

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[I. L. R., 10 Bom., 274]

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MADRAS—CRIMINAL  
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— s 5

See EXECUTION OF DECREE—TRANSFER OF  
DECREE FOR EXECUTION AND POWERS  
OF COURT, ETC. I. L. R., 15 Calc., 385

— s 6

See HIGH COURT JURISDICTION OF—CAL-  
CUTTA—CRIMINAL  
[I. L. R., 26 Calc., 874]

## SCIRE FACIAS, WRIT OF—

— Sult upon writ—Non-jurisdiction of  
plaintiff—Partes—Where a scire facias was issued  
under the old Supreme Court procedure at the suit  
of two, and one of them only sued upon it—Held  
that the non-jurisdiction of the other was a ground of  
non-suit, and that the objection might be taken at  
any stage. ISHAR CHANDER MEHTA & HEMS OF  
GOLAN ALI. 1 Ind. Jur., N. S., 249

## SEA CUSTOMS ACT (VIII OF 1878)

— s 128—Transshipment—Permit—  
Let a goods mentioned in permit—A trans ship-  
ment permit issued under s 128 of the Sea Customs  
Act (VIII of 1878) does not, like a bill of lading,  
represent the goods mentioned in it or give any lien  
upon or control over them. PERUMI THIRAKANDAS &  
MADHAWJI MEYJI. I. L. R., 4 Bom., 447

— s 127 and s 8—Duty and liability  
of Customs Collector—Negligence of Superintendent  
of Customs—By the negligence of the Superintendent  
of Sea Customs at the port of C. in removing  
goods to a sea custom warehouse and in keeping  
them in the warehouse, which owing to its leaky roof  
was utterly unfit for such purpose, the goods were  
damaged. The owner of the goods sued the Collector  
of the district, who under s 8 of the Sea Customs  
Act, 1878 has to perform all duties imposed by the  
Act on a Customs Collector for damages. It was not  
proved that the Collector was aware of the condition  
of the warehouse which had been repaired by the  
Public Works Department less than a year before.  
Held that the loss was not caused by the neglect or  
wilful act of the Collector within the meaning of  
s 127 of the Sea Customs Act 1878 and that the  
Collector was not responsible for the acts of the  
Superintendent of Sea Customs. COLLECTOR OF  
GODAVARI & ISHAR HASIM NANA. [I. L. R., 7 Mad., 49]

## SEAMAN, DISCHARGE OF—

See MERCHANT SHIPPING ACT 1854.  
ss 43 207. 1 Ind. Jur., N. S., 371  
[8 Bom., O. C., 42]

## SEARCH BY POLICE.

See CRIMINAL PROCEDURE CODES s. 103.  
[I. L. R., 21 Mad., 83]  
See OFFICE ACT, s 7  
[I. L. R., 24 Calc., 691]  
See PRIVATE DEFENCE, RIGHT OF  
[I. L. R., 19 Mad., 349]

## SEARCH WARRANT

• See ARMS ACT, 1878, s. 19.  
[I. L. R., 15 All., 129]  
• See CALCUTTA POLICE ACT, s. 2.  
[I. L. R., 20 Calc., 670]

**SEARCH-WARRANT—concluded.***See* ESCAPE FROM CUSTODY.

[I. L. R., 19 Mad., 310]

*See* WARRANT

8 W. R., Cr., 74

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**SEAWORTHINESS.***See* BILL OF LADING

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*See* CONTRACT—CONDITIONS PRECEDENT.

[2 B. L. R., O. C., 127]

*See* INSURANCE—MARINE INSURANCE.

[5 Moore's I. A., 361]

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**SECOND APPEAL.***See* CASES UNDER APPEAL.*See* BURMA COURTS ACT, 1875, s. 27.

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*See* CASES UNDER SMALL CAUSE COURT,  
MOFUSSIL.*See* CASES UNDER SPECIAL OR SECOND  
APPEAL.**SECRETARY OF CHARITABLE INSTITUTION.**

——— Suit by, against subscriber.

*See* RIGHT OF SUIT—SUBSCRIPTION.

[10 C. L. R., 187]

**SECRETARY OF MUNICIPAL BOARD.**

——— Order of—

*See* STAMP ACT, 1879, SCH. I, ART. 22.

[I. L. R., 19 All., 293]

**SECRETARY OF STATE.***See* PARTIES—PARTIES TO SUITS—GOVERNMENT.

——— Liability of—

*See* CASES UNDER ACT OF STATE.

——— Power of—

*See* CESSION OF BRITISH TERRITORY IN  
INDIA

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——— Privilege of, as to debts.

*See* CROWN DEBTS.

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——— Suit against—

*See* COSTS—TAXATION OF COSTS.

[I. L. R., 15 Mad., 405]

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1. Liability of Secretary of State for acts of public servants—*acts done within scope of his authority.*—The Secretary of State is only responsible for the acts of public servants done within the scope of his authority. SETH DHUNRAJ v. SECRETARY OF STATE FOR INDIA [1 N. W., 118: Ed. 1873, 204]

2. Liability of Secretary of State for damages occasioned by negligence of Government servants—*Negligence which would render ordinary employer liable.*—The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. v. SECRETARY OF STATE FOR INDIA [Bourke, A. O. C., 166: 5 Bom. Ap., 1]

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[9 B. L. R., Ap., 17]

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I L. R., 12 Calc., 402

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I L. R., 16 Calc., 323

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## 1 SUITS.

1. ——— Security by plaintiff—"Immovable property"—Leasehold—Leasehold property is "immovable property" within the meaning of a 34 Act VIII of 1859. *ILMAN v. JUSTICES OF THE PEACE FOR CALCUTTA* 7 B. L. R., Ap., 60

2. ——— Civil Procedure Code (Act XIV of 1852), s. 380—Suit by female.—The Court has a discretion in exercising the powers conferred by s. 380 Civil Procedure Code, and it will not order the plaintiff to give security unless grounds are shown tending to show that the defence is true. *SHAMA SUNDARY DASSEE v. RASH BEHARY DUTTA*

[3 C. W. N., 783]

3. ——— Infant female plaintiff or next friend—Civil Procedure Code (Act XIV of 1852), s. 340—Practice.—Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs. *BAI POKHAI v. DATJI MUGHAI*

[I L. R., 23 Bom., 100]

4. ——— Practice—Suit for money—Civil Procedure Code (Act XIV of 1852), s. 380, (Act VI of 1859) s. 6.—A suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant, or to recover the value thereof, is a suit for money within the terms of the second paragraph of s. 380 of the Civil Procedure Code, the term "suit for money" as there used being wider than a suit for debts. Circumstances under which the Court will order security for costs to be given by a female plaintiff in such a suit. *DEGUMBARI DEBI v. AUSHOOTOGH BANERJEE* I L. R., 17 Calc., 610

5. ——— Civil Procedure Code (1852), s. 380—Suit for amount of legacy under will—Suit in nature of administration—Discretion of Court—Construction of Statutes—"May"—"Shall"—The power given to the Court under s. 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought, or ought not, to exercise according to the

## SECURITY FOR COSTS—continued

## 1 SUIT—continued.

circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Debi v. Aushootog Banerjee*, I L. R., 17 Calc., 613, approved of. Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's cost—Held that the Court would not order the plaintiff, although she was not in possession of any immovable property within British India, to give security for the costs of the suit. A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immovable property does not become thereby "possessed of immovable property" within the meaning of s. 380. *IN THE GOODS OF FREEMAN MOONSHER, BISHNATH DASSEE v. MITYI LALL GHOSH*

[I L. R., 21 Calc., 832]

6. ——— Plaintiff in another presidency.—The Court was held to have no power to order a plaintiff resident in another presidency to give security for costs. *GHAN v. OWEN* . . . Cor., 11

7. ——— Inhabitant of foreign territory.—When an inhabitant of foreign territory sues within British territory it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant in the suit, even though the defendant also is a resident of foreign territory. *KOROOVAMOTES DEBIA v. OOMA CHURN DEB* . . . 12 W. R., 485

8. ——— Plaintiff residing out of jurisdiction—Suit for administration.—The provisions of s. 34, Act VIII of 1859, were not intended to apply to a case where the plaintiffs brought a suit for administration and partition of property in which they were entitled to a share, the extent of the share being in dispute. *RUSSICK LALL DAY v. JADDERAM DAY* . . . 10 B. L. R., Ap., 25

9. ——— Civil Procedure Code, 1877, s. 380—"Residence".—The meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The "residence" intended in s. 380 of the Civil Procedure Code (Act X of 1877) is residence under such circumstance as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. *MAHOMED SUTTIL v. LALDEX ABDULA* . . . I L. R., 3 Bom., 227

10. ——— Civil Procedure Code (Act XIV of 1852), s. 380—Wadhwan—British India—Residence—Held that a plaintiff, being a resident in Wadhwan in Kathiawar and possessed of immovable property there, could not be required to give security for costs under s. 380 of the

## SECURITY FOR COSTS—continued.

## 1. SUITS—concluded.

Civil Procedure Code (Act XIV of 1882), Wadhwan being within the limits of British India. *TRICOAN PANACHAND v. BOMBAY, RAHODA, AND CENTRAL INDIA RAILWAY COMPANY* I. L. R., 9 Bom., 244

11. ————— *Civil Procedure Code (Act XIV of 1882), s. 380—Cantonment of Secunderabad.*—For the purposes of s. 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India. *HOSSAIN ALI MIRZA v. ABID ALI MIRZA* I. L. R., 21 Calc., 177

12. ————— *Security where plaintiff has left the country.*—Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and if no security be furnished, the Court will pass judgment against the plaintiff by default. But if the defendant allows the case to go to judgment, the Court on appeal cannot pass any order calling for security for the costs of the lower Court, which must be left to be realized in execution. *IN THE MATTER OF THE PETITION OF CALCUTTA AND SOUTH-EASTERN RAILWAY COMPANY* 8 W. R., 217

13. ————— *Suit to enforce trust under a will—Want of personal interest.*—In a suit by the representatives of a testator to enforce the due performance of charitable and religious trusts in which they are not personally interested, the plaintiffs ought to be required to give security for costs. *BRJOMOHUN DOSS v. HURROLOH DOSS* [6 C. L. R., 58

14. ————— *Poverty—Speculative suit.*—The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him; it is otherwise where he is, not the real litigant, but a mere puppet in the hands of others. *KHAJAH ASSENOLLAJOO v. SOLOMON* [I. L. R., 14 Calc., 538

[I. L. R., 14 Calc., 538

## 2. APPEALS.

15. ————— *Security by appellant—Power of single Judge of High Court to make order for security.*—A single Judge has full power to make an order for security for the costs of an appeal. *MUZHUR HOSSAIN v. DENOBUNDU SEN*

[Bourke, O. C., 118

Affirmed on appeal . Bourke, A. O. C., 40

16. ————— *Power of single Judge of High Court to make order for security.*—On a rule nisi for security for the costs of an appeal to be given by a defendant, five-twenty-fourths of the property in dispute having been decreed to him, but subsequently attached under a prohibitory order, cause was shown that the Court had not jurisdiction, and that no reason for the application had been given. Held that a single Judge is vested with all the powers of an Appellate Court with reference to the

## SECURITY FOR COSTS—continued.

## 2. APPEALS—continued.

costs of an appeal; that when an appellant resides within the jurisdiction of the Court, he is amenable to its orders as to the costs of an appeal; and that an appellant who has no available property must, if required, give security for the costs of an appeal before proceeding with it. *MONOHUR DOSS v. KHONRUM BEGUM* . . . Bourke, O. C., 110

17. ————— *Appeal from order of Commissioner of Insolvent Court—Civil Procedure Code, 1859, s. 342.*—S. 342 of Act VIII of 1859 did not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. *IN THE MATTER OF RAMSABAK MISSEER*

[5 B. L. R., 179

18. ————— *Discretion of Judge—Notice to party affected—Civil Procedure Code, 1882, s. 549.*—The discretion conferred on an Appellate Court by s. 549, Civil Procedure Code, 1882, to demand security for costs, must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made. No order affecting a party should be made without notice to him calling upon him to show cause why the order should not be made. *SIRAJ-UL-HAQ v. KHADIM HUSAIN*

[I. L. R., 5 All., 380

19. ————— *Notice of order for security.*—The issue of a preliminary notice to show cause why an appellant should not furnish security for the costs of appeal is not equivalent to a demand, and, if the order to furnish security is made in the absence of the appellant, the order must be communicated to him before he can be held to have disobeyed it. *TIRUMU v. DEVA RAI*

[I. L. R., 5 Mad., 265

20. ————— *Civil Procedure Code, 1859, s. 342.*—Circumstances under which an order may be made requiring security for costs of appeal to be deposited under s. 342 of Act VIII of 1859. *BAMASUNDARI DAS v. RAMNARATAN MITTER* . . . 7 B. L. R., Ap., 59

21. ————— *Civil Procedure Code, 1859, ss. 342, 345, 346—Pauper appellant.*—By the words "before the appellant is called upon to appear and answer" in s. 342, as compared with similar words used in subsequent sections, especially ss. 345 and 346, is meant, not the date mentioned in the notice, but the date on which the appeal is called on to be heard; and the Court has a discretion at any time before the hearing of the appeal to make an order demanding security for costs from the appellant. Where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given. *JOGENDRO DEB ROYKUT v. FUNINDRO DEB ROYKUT*

[18 W. R., 102

22. ————— *Grounds for order for security—Poverty of appellant—Civil*

## SECURITY FOR COSTS—continued

## 2 APPEALS—continued

*Procedure Code 1882 s. 519*—The Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. *Manecky Laxmi Manckery v Goolbs I L.R. 3 Bom. 241* followed. *Ross v Jacques 8 M. & W. 13*; *Seshayang v Ja sulchand s. I L.R. 3 Mad. 66*; and *Jogendra Deb Roykut v Fuxandro Deb Roykut, 15 W. R. 102* referred to. **LAKHMI CHAND v GATTO BAI** **I L.R., 7 All. 542**

**23** — *Grounds for order for security—Civ. Procedure Code, 1882 s. 519—Poverty of appellant—Held by the Full Bench (TYRELL, J., dissenting), without laying down any general rule by which the exercise of the discretion conferred by s. 43 of the Civil Procedure Code should be governed that the mere fact of the poverty of an appellant standing by itself and without reference to any general facts of the case under appeal ought not to be considered sufficient alone to warrant his being required to furnish security for costs. **JIWAN ALI BEG v BABA MAL** **I L.R., 8 All. 203***

**24** — *Civ. Procedure Code (Act XIV of 1882), s. 519—Poverty of appellant—Ground for order for security for costs of appeal—Under the circumstances of this case, the Court refused an application that the appellant on the ground that he was a person without means, should give security for the costs of the appeal. **HAWETSON v DEAS** **I L.R., 21 Cal. 528***

**25** — *Civ. Procedure Code 1882 s. 519—Poverty of appellant—Vexatious conduct—Ground for requiring security—An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so cannot be required to furnish security for such costs before he is allowed to prosecute his appeal unless his conduct be shown to be vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious. **AHMED BIN ESSA KALIFFA v ESSA BIN KALIFFA** **I L.R., 13 Bom., 458***

**26** — *Civ. Procedure Code (Act XIV of 1882), ss. 519 and 617, Explanation—Appeal by defendant against the order under s. 244, granting execution—Appellant required to give security for the costs of the appeal and of the original suit—The Court can require an appellant from an order made under s. 214 of the Civil Procedure Code (Act XIV of 1882) in execution of a decree to give security for the costs of the appeal and of the original suit. **DAGDU JATRAM v CHANDRABHAN** **I L.R., 24 Bom., 314***

**27** — *Civil Procedure Code, 1882, ss. 106, 542—Assignee substituted for*

## SECURITY FOR COSTS—continued

## 2 APPEALS—continued

*plaintiff.*—Under s. 312 Act VIII of 1859 the High Court had discretion to demand security for costs from an appellant, if it saw fit to do so at any time before the hearing of the appeal. Where an assignee who had been substituted for the plaintiff under s. 10, declined to furnish security for the costs within such reasonable time as the Court ordered it was held that the defendant might within eight days after such neglect or refusal plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit. **HIZRALAL SYAL v CARAFIST** **13 W. R., 431**

**28** — *Appellant's jurisdiction—Quære—Whether in a case in which the appellant is not residing out of the British territories in India the High Court has authority to demand security for costs from the appellant after the issue of summons, & notice of the appeal. **HUFATTOOLAH CHOWDRY v HEMZEDDIN BUKHARI** **6 W. R., 123***

**29** — *Bengal Act XIV of 1829 s. 2 cl. 1—Inhabitant of foreign territory—Bengal Regulation XIV of 1829, s. 2, cl. 1, enacted that every person being an inhabitant of a foreign territory should be required to furnish security for costs such security to be furnished by a plaintiff or appellant within six weeks of the date on which his plaint or appeal was filed, and that, unless such security be so furnished, the suit of such person, if plaintiff should not be proceeded with or appeal admitted unless he had furnished the necessary security to cover costs in the appeal. In an appeal to the Sudder Court from a decree of the Muzilam Court by a party then temporarily absent in England, but having real estates and factories within the jurisdiction of the Court no security was furnished by the appellant's vakil within six weeks after lodging the appeal. The respondent in the first instance put in an answer to the grounds of appeal filed by the appellant, but afterwards filed a petition for dismissal for non compliance with the requirements of Bengal Regulation XIV of 1829, s. 2, cl. 1 contending that the appellant was a resident of a foreign territory, and had not furnished security within six weeks as required by that regulation. The Sudder Court held that such security ought to have been furnished by the appellant who, residing in England and prudent &c. &c. was to be considered as resident in a foreign territory within the meaning of the regulation, and dismissed the appeal. Held by the Judicial Committee (remitting the suit to India for trial) that the Sudder Court had not, by Regulation XIV of 1829 any power *ex vi* *motu* to dismiss the appeal, (1) as the appellant was guilty of no default under that regulation, not having been called upon by the respondent or the Court to furnish security for costs, (2) as the appellant was not guilty of laches in not voluntarily offering security, the regulation providing only that a suit or appeal should not be proceeded with until security was furnished. *Scilicet*—The putting in an answer to the appeal before objecting to the want of security for costs operated as a waiver by the respondent of the want of security for costs required by Bengal Regulation XIV of 1829 s. 2, cl. 1. *Quære—Whether Act III of**

## SECURITY FOR COSTS—continued.

## 2. APPEALS—continued.

1845 repealed Bengal Regulation XIV of 1829, s. 2, cl. 1. WISE *v.* JEGENDOO BOSE

[7 Moore's 1 A., 431]

30. ———— *Grounds for ordering security.*—Cause being shown on a rule nisi for an order for security to be given by the appellant for the costs of an appeal (similar orders having been previously made on the application of other defendants), it appeared that an unusual number of defendants had been joined in the suit, which had been withdrawn on a previous occasion when nearly tried out; and that the plaintiff, who sued as a relator, was poor and resided out of the jurisdiction, and had not paid interlocutory costs, for which an attachment had issued. Held that an appellant will not be ordered to give security for costs previously incurred; that the fact of similar applications having been granted in the suit, the poverty of the appellant, and the fact of his dwelling out of the jurisdiction, as well as the peculiar circumstances of the case, non-payment of interlocutory costs, a former withdrawal of the suit, and the joining of an unusual number of defendants, are grounds for granting an order for security to be given by an appellant for the costs of an appeal: that a relator suing to enforce a public right must give security for the costs of those against whom he proceeds. MUZTUR HUSSEIN *v.* DINOBUNDUO SEIN

[Bourke, A. O. C., 40]

Confirming the judgment in the same case in

[Bourke, O. C., 119]

31. ———— *Continuation of order made against plaintiff for security.*—Civil Procedure Code, 1853, s. 34.—A plaintiff who resided out of India paid a sum of money into Court as security for costs under s. 34 of Act VIII of 1859. He subsequently obtained a decree against the defendant, and the defendant appealed against that decree. Held that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been paid in under s. 34. FLEMING *v.* SHEARMAN . . . 4 B. L. R., O. C., 92

See IN RE DITTA HARAKMAN SINGH

[3 B. L. R., F. B., 45]

S. C. DITTA HURBUCKMAN SINGH *v.* MODHOSOODUN PINE . . . 12 W. R., F. B., 16

32. ———— *Discretion of Court to refuse security.*—Civil Procedure Code (Act XIV of 1852), s. 549.—An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under s. 549, Civil Procedure Code, and refused to receive other security offered in lieu after the time fixed by the order had expired. This was affirmed by the High Court. Held that, as the High Court had a discretion to enlarge the time allowed for finding security and to accept other security in lieu of that rejected or to refuse to do either, it had, under these circumstances, judicially exercised that discretion in refusing. RAJAB AZI *v.* AMIR HOSSEIN . . . 1 L. R., 17 Cal., 1

## SECURITY FOR COSTS—continued.

## 2. APPEALS—continued.

33. ———— *Civil Procedure Code, 1877, s. 549—Extension of time for giving security.*—Procedure.—Where the Appellate Court demands from an appellant security for costs, the Court may extend the time within which it orders such security to be furnished; but if no application is made for such extension of time, and such security is not furnished within the time ordered, it is imperative on the Court to reject the appeal. HAIDRI BAI *v.* EAST INDIAN RAILWAY COMPANY

[I. L. R., 1 All., 687]

34. ———— *Civil Procedure Code, 1882, s. 549—Application for extension of period for finding security for costs of appeal after default.*—S. 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. HAIDRI BAI *v.* East Indian Railway Company, I. L. R., 1 All., 687, followed. SHRAJUDIN *v.* KRISHNA

[I. L. R., 11 Mad., 190]

35. ———— *Civil Procedure Code (Act XIV of 1852), s. 549—Appeal rejected for want of security.*—Extension of time for giving security.—Discretion of Court.—The proper construction of s. 519 of the Civil Procedure Code is that, where an appellant has been ordered to furnish security within a certain time, and that order has not been complied with, and no application has been made to extend the time within the period allowed, the Court is bound to reject the appeal. BUDRI NABAIN *v.* SHEO KOER . I. L. R., 11 Calc., 716

In the same case on appeal to the Privy Council, it was held that, where the High Court, under s. 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired, and may nevertheless reject the appeal, under that section, if the security is not in the end furnished. HAIDRI BAI *v.* East Indian Railway Company, I. L. R., 1 All., 687, overruled. In this case, the Registrar was directed to allow only the costs applicable to the question argued and decided. BUDRI NABAIN *v.* SHEO KOER . I. L. R., 17 Calc., 512

[L. R., 17 L. A., 1]

36. ———— *Civil Procedure Code (Act XIV of 1852), s. 549—Rejection of appeal.*—Discretion of Appellate Court to extend time for furnishing security.—The security for the respondents' costs which the High Court had demanded under s. 519 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. Held that this was not a case for interference. MODHUSUDAN DAS *v.* ADHIKARI PRAPANNA

[I. L. R., 17 Calc., 516]

S. C. MODHUSUDAN DOSS *v.* KRISHNA PRAPANNA RAMANUJ DOSS . . . L. R., 17 L. A., 9

## SECURITY FOR COSTS—continued

## 2 APPEALS—continued

37. — *Extension of time for furnishing security—Exceptional circumstances—Civil Procedure Code (1882), s. 542*—The appellant applied for an extension of the time for giving security for the costs of the appeal on the ground that in the exceptional state of things in Bombay caused by the prevalence of the plague, she had been unable to raise the money required. *Held* that under the circumstances the application should be granted. S. 542 of the Civil Procedure Code (Act XI of 1882) does not absolutely preclude such an order if the circumstances render it just to make it. The Court cannot lay down a hard and fast rule that in no case after the time for giving security has expired can an appellant be allowed further time. *JUNABAI v. VISSONDAS PETTOCHUND*

[L. L. R., 21 Bom., 578]

38. — *Agreement to deposit security—Failure to make deposit*—An order was made by the Court (pursuant to an agreement between the parties after a decree for the plaintiff) that the defendant who had appealed should pay into Court to the credit of the cause a certain sum of money for decree costs, etc., including a sum of money for costs to be incurred on appeal. On an application by the plaintiff that the case be struck off for default of deposit and that the defendant pay costs already incurred at the time of the application, it was ordered that the defendant should deposit a sum to cover costs of the future appeal and in default that the case should be struck off, although the summons to show cause was not in point of form to that effect. *ELIAS v. CHUCKERBUTTY*

[1 Ind. Jur., N. S., 223]

39. — *Civil Procedure Code, s. 549—Security for costs—Amount of security not fixed—Dismissal of appeal—Practice*—S. 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required. The last paragraph of the section seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security. Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal. *Held* that the objection had no force, no such order as was contemplated by s. 549 having been made. *Held* also that the proper course was to have applied to the Judge who passed the order for security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal. *THAKUR DAS v. KISHORI LAL*

[L. L. R., 9 All., 164]

## SECURITY FOR COSTS—continued

## 2. APPEALS—concluded.

40. — *Form and contents of order for security for costs—Omission to state amount—Practice—Civil Procedure Code (1882), s. 549*—Where a Court acting under s. 542 of the Code orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit" or "for the costs of the appeal and of the original suit." *THAKUR DAS v. KISHORI, 1 L. R., 9 All., 164*, overruled on this point. *LEENA v. BHATIA*

[L. L. R., 18 All., 101]

## SECURITY FOR GOOD BEHAVIOUR.

## See APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODES

[L. L. R., 9 Calc., 578]

23 W. R., Cr., 68

## See SENTENCE—IMPRISONMENT—IMPRISONMENT GENERALLY

3 N. W., 128

[L. L. R., 1 All., 666]

1. — *Transfer of proceedings—Criminal Procedure Code (1882), ss. 110 and 525*—Proceedings under s. 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. *IN THE MATTER OF THE PETITION OF AMAN SINGH*

[L. L. R., 18 All., 9]

2. — *Discretion of Court, Exercise of—Criminal Procedure Code, 1872, ss. 505, 506—Deposit of cash in lieu of security bond for good behaviour*—The powers given by ss. 505 and 506 of Act X of 1872 should be exercised with extreme discretion; the former of those sections was not intended to apply to persons of "by no means a reputable character." *EMPERA v. KALA CHAND DASS*

[L. L. R., 6 Calc., 14; 6 C. L. R., 123]

3. — *Person of violent or turbulent character—Criminal Procedure Code, 1871, s. 297*—S. 297 of the Code of Criminal Procedure, 1861, did not refer to persons of a violent or turbulent character. *IN RE NARAIN SOOPOODHI*

[6 W. R., Cr., 6]

4. — *Persons convicted of theft—Criminal Procedure Code, 1861, s. 295—Theft*—S. 295 did not apply to persons convicted and punished for theft. *QUEEN v. KUNER SOYAS*

[7 W. R., Cr., 57]

5. — *Habitual offenders—Acts committed by persons in performance of duties as barkandazes in samandars—Habitual association—Joint trial—Code of Criminal Procedure (Act V of 1898), ss. 110, 112, 117, 118, and 537*—Certain barkandazes employed at the kitchen of the Dijnal estate, who were alleged to have committed acts of extortion and other acts of oppression in the perform-



## SECURITY FOR GOOD BEHAVIOUR

—continued.

ance of their duties, were called upon to execute bonds for their good behaviour on the grounds (1) that they habitually commit extortion; (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community. They were tried jointly by the Magistrate under s. 117 of the Code of Criminal Procedure and each of them was ordered to execute a bond with sureties for his good behaviour for three years. Held that, even supposing the Magistrate was right in considering that there was habitual association between these persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons and thus to render their being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them. S. 110 of the Code of Criminal Procedure is not applicable where certain acts amounting to extortion are committed by certain persons in the performance of their duties as burkandazes in a zamindari, as it cannot be said that these persons are in the habit of committing extortion as individual members of the community, because if they were discharged by the zamindar or ceased to be in his employ, the acts would no longer be committed, it being no longer to their interests to do such acts in the interest of their employer, and they certainly would not be likely to commit them in their own private capacities. The object of enabling a Magistrate to take security for good behaviour is for the prevention and not for the punishment of offences. *HARI TEIANG v. QUEEN-EMPRESS*. I. L. R., 27 Cal., 781

*HARI TEIANG v. EMPRESS*. 4 C. W. N., 531

## 6. — Jurisdiction of Magistrate

—*Person not residing within his jurisdiction—Reputation—Code of Criminal Procedure (Act V of 1898), s. 110.*—It is only when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given in s. 110 of the Code of Criminal Procedure, that the Magistrate can take action under that section, and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction. Under the terms of s. 110 of the Criminal Procedure Code, the reputation which the person is found to have means the reputation of that person in the neighbourhood in which he resides. *KETABOI v. QUEEN-EMPRESS*

[I. L. R., 27 Cal., 993]

7. — Persons not proved to have committed crime—*Criminal Procedure Code, 1872, s. 505.*—The exercise of the power given by s. 505 of the Criminal Procedure Code was not confined to cases in which positive evidence of the commission of crime is forthcoming against the persons charged. *IN BE PEDDA SIVA REDDI*

[I. L. R., 3 Mad., 238]

## SECURITY FOR GOOD BEHAVIOUR

—continued.

8. — Absconded offender arrested without summons—*Criminal Procedure Code, 1861, s. 306.*—Where an accused person was arrested as an absconded offender, and, without evidence being gone into on that charge, an inquiry was made into his mode of livelihood, without any summons being issued under s. 306 of the Criminal Procedure Code, such proceedings were held to be irregular. *QUEEN-EMPRESS v. HUTOO*. 3 N. W., 2

9. — Opportunity to make defence—*Information of accusation to accused—Criminal Procedure Code (Act X of 1882), ss. 109, 110, 112.*—Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet. *QUEEN-EMPRESS v. ISWAR CHANDRA SUR*

[I. L. R., 11 Cal., 13]

10. — Right to be heard by pleader—*Accused person liable to imprisonment in default of giving security—Notice—Code of Criminal Procedure (Act V of 1898), ss. 110, 123, and 340.*—Where a reference is made to the Sessions Judge under s. 123 of the Code of Criminal Procedure, he is bound to give notice to the person concerned and also to hear his pleader, if he should be so represented. The term "accused" in s. 340 of the Code of Criminal Procedure applies to a person who is liable under s. 123 of that Code to imprisonment in default of giving security. *NAKHI LAL JHA v. QUEEN-EMPRESS*. I. L. R., 27 Cal., 656

11. — Requisites for order—*Evidence satisfying Magistrate of bad character of accused—Criminal Procedure Code, 1861, s. 296.*—To justify a Magistrate in taking action under s. 296 of the Criminal Procedure Code, it was held that there must be evidence before him legally sufficient to establish the fact that the person charged is a person of the character described in the section. *QUEEN-EMPRESS v. BUDIA*. 2 N. W., 455

12. — Information on which Magistrate may act—*Information showing that a breach of the peace is imminent—Order to furnish security for good behaviour for three years—Arrest of accused—Inquiry as to truth of information—Proof of information—Statements of persons not called as witnesses—Criminal Procedure Code, 1882, ss. 112, 114, 117.*—Conversations out of Court with persons, however respectable, are not legal or proper material upon which Magistrate should adopt proceedings under s. 107 or s. 110 of the Criminal Procedure Code. The information to be required by a Magistrate, before issuing an order under s. 112, may to some extent be of a hearsay and general description; but when the party to whom the order is directed appears in Court in obedience thereto, the inquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour.

## SECURITY FOR GOOD BEHAVIOUR

—continued.

same to have been stolen, or of notoriously bad livelihood or was a dangerous character. But when the evidence was entirely in a person's favour, and showed him to be of excellent character and in every respect contrary to the sort of person against whom the section was directed, to apply its provisions to him on a weak and unsupported charge of mischief by fire was foreign to the intentions of the Legislature, and not only illegal, but oppressive. IN THE MATTER OF THE PETITION OF HAMIDOODIN AHMED

[24 W. R., Cr., 37]

16. — Evidence of general bad character—*Criminal Procedure Code, 1872, s. 505.*—

P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. Held, with some hesitation, that there was evidence as to general character adduced before the Magistrate which justified him in dealing with P under s. 505 of Act X of 1872. EMPRESS v. PARTAB . I. L. R., 1 All., 666

17. — Evidence of bad character—*Criminal Procedure Code, 1861, ss. 296, 297.*—

Previous convictions for a simple breach of the peace were not sufficient to justify a Magistrate in demanding security under s. 296 of Act XXV of 1861. Nor was it reputed that a person was one of the leaders of a gang of petty bullies and extortioners sufficient to justify a conviction under s. 297 of the same Act, unless in addition it was shown that he was of a character so desperate and dangerous as to render his release, without security for one year, hazardous to the community. QUEEN v. MISREE LAIL

[4 N. W., 117]

18. — Record of previous convictions—*Criminal Procedure Code, 1852, ss. 110, 117, and 118.*—

The object of taking security for good behaviour from a person is solely to secure his good behaviour in future. The mere record of previous convictions, on account of which the person has undergone punishment, does not satisfy the requirements of ss. 110, 117, and 118 of the Code of Criminal Procedure (Act X of 1852), and it is wrong to use these provisions so as to add to the punishment for past offences. IN RE RAJA VADAN HESSIN SAHED

[I. L. R., 10 Bom., 174]

19. — *Criminal Procedure Code (Act X of 1852), ss. 110, 112.*—

The mere fact that a person from whom security is required has been previously convicted of offences against property, is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life. IN THE MATTER OF THE PETITION OF HAIDAR ALI . I. L. R., 12 Cal., 520

20. — Person guilty only of acts of violence—*Criminal Procedure Code, 1872, s. 506.*—

Held that s. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous,"

## SECURITY FOR GOOD BEHAVIOUR

—continued.

to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised. Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen," but showed only that he had been guilty of acts of violence, Held that the Magistrate could not, under s. 506 of Act X of 1872, order such person to furnish security. Observations regarding the evidence on which the procedure of s. 506 should be enforced. EMPRESS v. NAWAB . I. L. R., 2 All., 835

21. — Person convicted and punished for theft—*Form of order—Code of Criminal Procedure (Act X of 1872), ss. 504, 505.*—

An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizance for Rs 50 and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year. Held that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure. EMPRESS v. PARTAB, I. L. R., 1 All., 666, followed. TAMIZ MANDAL v. UMID KAHIGAR I. L. R., 8 Cal., 215

22. — Inquiry as to necessity for security—*Criminal Procedure Code, 1872, s. 504.*—

*Power of Sessions Judge—Jurisdiction of Magistrate.*—A Sessions Judge had no power under Act X of 1872, s. 504, or any of the preceding sections, to decide as to the necessity for taking security for good behaviour, or, without inquiry, to pass orders as to the nature of the security to be furnished, or as to the time it is to remain in force. The jurisdiction as to the necessity was in the Magistrate, and after sending the accused to the Magistrate under s. 504 the Sessions Judge was *functus officio*. QUEEN v. GUNGARAM POTDAR . 24 W. R., Cr., 10

23. — Form of order—*Criminal Procedure Code, 1872, s. 297—Sureties—Order for deposit in cash.*—

Where a person, under s. 297 of the Criminal Procedure Code, is ordered to provide security for his good behaviour, the order should, under s. 300, state the number of sureties required from the defendant. The object of the law as to security for good behaviour is that sureties shall be responsible for the good behaviour of the person called upon to provide security, not that a deposit be made in cash. QUEEN v. SHEO BEESH . 2 N. W., 295

24. — Order for deposit in cash—*Security-bond.*—

An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour is bad in law. EMPRESS v. KALA CHAND DASS

[I. L. R., 6 Cal., 14; 6 C. L. R., 125]

Contra, QUEEN v. KRISTENDRO ROY

[7 W. R., Cr., 30]

## SECURITY FOR GOOD BEHAVIOUR

—continued

25. — Statement of grounds for order—*Oppportunity to comply with order—Criminal Procedure Code (Act V of 1872) s. 510*.—On a requisition from the High Court, a Magistrate is bound to state the grounds upon which he fixed the amount of security. A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security. *EMPRIS v. DEKAR BIKAR*

[I. L. R., 2 Cal., 384 1 C. L. R., 85]

26. — Order for surety to pledge rights in land—*Illegal order*.—An order by a Magistrate requiring security for good behaviour which directed that the surety should pledge all his proprietary rights in land worth Rs 200 was held to be illegal. *QUEEN v. GANAI* . . . 7 N. W., 249

27. — Reference to Sessions Judge for confirmation of order when person is unable to give security—*Criminal Procedure Code (Act V of 1872) s. 110 123*.—Statement of grounds for order. The Sessions Judge, in confirming the order of a Magistrate under s. 123 of the Code of Criminal Procedure in regard to the imprisonment of a person in consequence of his being unable to furnish the necessary securities is bound to find a special ground on which the order is passed, having special reference to s. 110 of that Code. It is not sufficient where he only finds in general terms that it is for the interests of the community at large that such person should be bound once to be of good behaviour. *NAKHI LAL JHA v. QUEEN EMPRES*

[I. L. R., 27 Cal., 658]

28. — Order with arbitrary condition imposed—*Criminal Procedure Code 1872 s. 510 516—Sureties*.—In making an order for security to keep the peace under s. 510 Criminal Procedure Code 1872, a Magistrate had no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, e.g., a condition requiring the accused to furnish two sureties, being persons of respectability and substance, not related to him, and residing within one mile of his house. The ground on which a Magistrate has power to refuse to accept any surety under s. 516 must be a valid and reasonable ground. *IN THE MATTER OF THE PETITION OF NARAIN SOODODHRE*

[22 W. R., Cr., 37]

29. — No conditions and limitations can be imposed upon persons ordered to give security under s. 118 of the Code. *IN THE MATTER OF JHONNA SINGH v. QUEEN EMPRES*

[I. L. R., 24 Cal., 155]

30. — Ground for refusing surety—*Criminal Procedure Code (Act V of 1872), s. 123 cl. (2)*.—Pleader whether he may be heard in a reference under that section.—A Sessions Judge is bound to hear a pleader who may appeal on behalf of a person in a case referred to him under s. 123, cl. (2) of the Criminal Procedure Code. *Jhanna Singh v. Queen Empress* 1 L. R., 23 Cal., 433 referred to. A Magistrate cannot refuse to accept a surety on the

## SECURITY FOR GOOD BEHAVIOUR

—continued.

ground that he lives at a distance from the accused. *ANVASH MALAKAR v. EMPRES* 4 C. W. N., 787

31. — Object of demanding security—*Criminal Procedure Code (Act V of 1872), s. 110 et seq.*—Discretion of Magistrate in accepting or refusing sureties tendered.—The object of requiring security to be of good behaviour is not to obtain money for the Crown by the forfeiture of recognizances but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they would exercise any control over the man for whom they were willing to stand surety. *In the matter of the petition of Narain Soododhree* 22 W. R., Cr., 37, not followed. *QUEEN EMPRES v. RAKIM BAKHSH*

[I. L. R., 20 All., 206]

32. — Order for security and imprisonment in default—*Illegal order—Criminal Procedure Code 1872 s. 296 301*.—Where a Magistrate required security from persons for their good behaviour, under s. 296 of the Criminal Procedure Code, and in default sentenced them to six months' rigorous imprisonment,—*Held* that the order was illegal, s. 301 requiring that they should be committed to prison until they furnish the security demanded. In fixing the amount of security the Magistrate should not go beyond a sum for which there is a fair probability of the defendants being able to find security. *ANONIMOUS*

[4 Mad., Ap., 47]

33. — *Criminal Procedure Code (Act V of 1872) s. 119*.—High Court's power of interference when the amount of security is excessive—*Magistrate's discretion, Exercise of*.—A Magistrate ordered the accused to execute a bond for Rs 500 for his good behaviour for one year and to furnish two sureties for the like amount. The accused failed to furnish the required security and was sent to prison. The High Court, being of opinion that the amount of the required security was excessive and that the Magistrate had not exercised a proper discretion in the matter interfered in the exercise of its revisional jurisdiction, and reduced the amount. *QUEEN EMPRES v. RAMA*

[I. L. R., 16 Bom., 373]

34. — Power of Magistrate to cancel security bond once accepted—*Criminal Procedure Code (Act V of 1872), s. 109, 122 123*.—When a surety offered by a person for good behaviour has once been accepted, a Magistrate has no power subsequently to cancel the security-bond, though he might be of opinion that such surety is an unfit person. *EMPRES v. RAM LAL AGARWALA*

[1 C. W. N., 394]

35. — Second order for security without further proof—*Criminal Procedure Code 1872, Ch. XIX*.—Where a person is confined, in default of giving security for his good behaviour, under Ch. XIX of the Code of Criminal Procedure,

**SECURITY FOR GOOD BEHAVIOUR***—continued.*

a second security cannot be demanded after the expiration of the first term of confinement, except on some new proof of bad livelihood, or that the person is not capable of following an honest calling. **IN RE JUSWUNT SINGH**

[1 Ind. Jur., N. S., 301; 6 W. R., Cr., 18

See **MAHOMED ABDUL BARI v. EMPRESS**

[4 C. W. N., 121

36. — Further proceedings under s. 110 of Code of Criminal Procedure—*Fresh information—Accused person—“Discharge”*—*Criminal Procedure Code, s. 437*.—A further inquiry cannot be made into the case of a person against whom proceedings under s. 110 of the Code of Criminal Procedure have been taken and who has been discharged. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received. Proceedings under s. 110 cannot be regarded as on a complaint, nor can they be regarded as a case in which any “accused” person has been discharged; for the terms “accused person” and “discharge” in s. 437 of the Code clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Ch. XIX of the Code. **QUEEN-EMPRESS v. IMAN MUNDAL**

[I. L. R., 27 Cal., 662

37. — Form of security-bond—*Criminal Procedure Code, 1861, ss. 305, 306—Forfeiture of bond*.—Where sureties who were required to show cause, under s. 305 of the Code of Criminal Procedure, why the bond executed by them should not be put in force, failed to establish by evidence the statements which they made, it was held that the order putting the bond in force was a proper one. *PER PHEAR, J.*—Although the form of security-bond given in form (F) of the appendix combines two bonds, namely, one for the principal and one on the part of the sureties, the provisions even of s. 300 would be complied with if these two bonds were upon two pieces of paper instead of one. **IN THE MATTER OF THE PETITION OF BRINDABAN CHUNDER DASS. IN THE MATTER OF THE PETITION OF TARINEE CHURN MOZOOMDAR**

19 W. R., Cr., 29

38. — Procedure—*Power of Sessions Judge after acquittal—Information to Magistrate as to taking security from accused*.—If a Sessions Judge be of opinion that a person acquitted by him ought to give security for future good behaviour, he should discharge him, and inform the Magistrate of his opinion that security should be taken, leaving the Magistrate to take the necessary steps for that purpose, and the Sessions Judge should not send the party in custody to the Magistrate. **REG. v. BYHA VALAD SURJIM**

1 Bom., 91

39. — Suspicion—*Production of witnesses—Bail*.—A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion. He should be

**SECURITY FOR GOOD BEHAVIOUR***—continued.*

asked to produce his witnesses or offered assistance to procure their attendance. He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal. **IN THE MATTER OF KOOKOR SING**

1 C. L. R., 130

40. —

*Criminal Procedure Code, 1861, s. 296—Examination of witnesses*.—In proceedings taken against a person to obtain security for good behaviour under s. 296 of the Criminal Procedure Code, the examination of the witnesses must be taken in the presence of the accused person, who should be permitted to cross-examine them. **QUEEN v. SHUNKUR**

2 N. W., 406

**QUEEN v. NURSINGH NARAIN**

[2 B. L. R., A. Cr., 7 note; 10 W. R., Cr., 1

**MAGHAN MIRA v. CHAMMAN TELI**

[2 B. L. R., A. Cr., 7; 10 W. R., 46

41. —

*Opportunity to accused of cross-examining witnesses and calling witnesses*.—In an inquiry under Ch. XIX of the Criminal Procedure Code, 1861, it was held that the defendant should have an opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses on his own behalf. **ANONIMOUS**

4 Mad., Ap., 23

42. —

*Evidence—Previous trial for dacoity—Criminal Procedure Code, 1861, s. 296*.—Where a person was adjudicated to be a person of notorious bad character, under s. 296, Code of Criminal Procedure, after having been tried for dacoity, it was held that the evidence taken in the trial for dacoity should not be used against the accused with reference to the accusation under s. 296, which evidence should be taken immediately. **IN THE MATTER OF ROJONI KANT BROOMICK**

[13 W. R., Cr., 24

43. —

*Criminal Procedure Code (1882), ss. 118 and 123—Power of Sessions Judge to remand—Taking further evidence—Conditions and limitations imposed upon persons required to give security*.—Under s. 123 of the Criminal Procedure Code, a Sessions Judge is not competent to remand a case for further inquiry. Such evidence as he may require he must take himself. **IN THE MATTER OF JHOJHA SINGH v. QUEEN-EMPRESS**

I. L. R., 24 Cal., 155

44. —

*Criminal Procedure Code (1882), ss. 110 and 117—Transfer of criminal case—Criminal Procedure Code, s. 526*.—Where a Magistrate instituting proceedings against a person under s. 110 of the Code of Criminal Procedure has “acted” within the meaning of s. 117 of the Code, no order can be made subsequently under s. 526 of the Code transferring the case from his Court. **IN THE MATTER OF THE PETITION OF GURDAR SINGH**

I. L. R., 19 All., 291

45. —

*Sentence of imprisonment—Criminal Procedure Code, 1861, s. 296—Illegal direction*.—A direction annexed to a sentence of imprisonment, under s. 448 of the Penal Code, that the convict be brought up at the expiration of

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the sentence in order that he may give security for good behaviour for the period of one year reversed as not being authorized by s. 20 of the Criminal Procedure Code. **120 C. KRISHNAJI BAPUJI GAIKAVAD** 3 Bom., Cr., 39

48 — *Criminal Procedure Code 1852* as 118 121 514 *sch V form No XLII—Security for good behaviour—Cancellation of bail—Effecture of bond—Mode of proving a bond—Where a person has given a security bond under s. 114 of the Code of Criminal Procedure for the good behaviour of another and the principal during the term for which the bond is in force is convicted of an offence punishable with imprisonment the production of the conviction and if necessary of proof of identity of the principal is sufficient evidence upon which the Magistrate is authorized to set aside the security under s. 514 of the Code and award the penalty of the bond as if it were paid. In such a case it is for the surety to show what cause he can. It is not incumbent on the Magistrate to re-summon the witnesses on whose evidence the principal was convicted and practically to re-trial the case against the principal. **QUEEN EMPRESS v. MAN MOHAN LAL***

[I L R., 21 All., 86]

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3 Mad., Ap., 23

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## Enhancement of—

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5 Mad., Ap., 1  
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## of death, Confirmation of—

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2 C. W. N., 49]

## 1. GENERAL CASES.

1. ——— Obligation to pass sentence on conviction—*Duty of Magistrate*.—Where a Magistrate convicts a person of an offence, he is bound to pass some sentence, if only a nominal one. ANONYMOUS . . . 4 Mad., Ap., 66

2. ——— The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. DEWAN SINGH v. QUEEN-EMPRESS . . . I. L. R., 22 Calc., 805

3. ——— Principals and abettors—*Abetment of same offence committed as principal*.—Persons punished as principals cannot also be punished for abetment of the same offence. QUEEN v. JEETOO CHOWDRY . . . 4 W. R., Cr., 23

QUEEN v. RAMNARAIN JOSH . 4 W. R., Cr., 37

4. ——— *Registration Act, 1866, s. 94, Abatement of offence under*.—Under s. 94, Act XX of 1866, an abettor could be punished more severely than his principal could be. QUEEN v. GOPAL PROSAUD SEIN . . . 8 W. R., Cr., 16

5. ——— Ground for passing lighter sentence—*Difference between opinions of Judge and jury*.—A difference of opinion between the

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## 1. GENERAL CASES—continued.

Judge and the jury is no ground for the Judge passing a lighter sentence than he would otherwise have done. (Per JACKSON, J.) QUEEN v. GHOLAM MUSTUFFA . . . 3 W. R., Cr., 29

6. ——— Ground for mitigation of sentence—*False evidence*.—Discussion as to the extent of punishment to be passed on certain raiyats who, in a case of criminal trespass brought by an indigo planter, falsely swore that cotton, and not indigo, had been raised on the land in question during the past year. Punishment reduced. SETON-KARR, J., would have reduced the punishment still more for reasons given. QUEEN v. DHUBRANI DUTT RAI [8 W. R., Cr., 7

7. ——— Punishment for escape from custody—*Penal Code, s. 224—Additional punishment*.—The punishment for escape from lawful custody (s. 224) in a case in which that is one of the offences of which the prisoner is convicted, must be "in addition" to any punishment awarded for the substantive offence. QUEEN v. DHONDIA BHOORA [8 W. R., Cr., 85

8. ——— False evidence—*Simple misstatement*.—A deliberate misstatement made in a Court of justice, whether it tends to endanger the life and property of others or to defeat and impede the progress of justice, is not an offence which should be lightly passed over; but for a simple misstatement from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty, and throws himself on the mercy of the Court. QUEEN v. GURJOON AHEER . . . 7 W. R., Cr., 37

9. ——— Voluntarily causing hurt—*Sentence by Subordinate Magistrate—Causing grievous hurt*.—Where a District Magistrate annulled a conviction passed by a Subordinate Magistrate (first class) of voluntarily causing hurt by means of an instrument for stabbing, cutting, etc., under s. 324 of the Penal Code (an offence cognizable by the Subordinate Magistrate), and directed the Subordinate Magistrate to commit the accused to the Court of Session for trial on the charge of voluntarily causing grievous hurt by means, etc. (a charge cognizable by the Court of Session), the High Court annulled the order of the District Magistrate, and restored the conviction and sentence of the Subordinate Magistrate. REG. v. HANMAPA BIN MALAPA [7 Bom., Cr., 37

10. ——— Taking illegal gratification—*Order to refund money*.—In a conviction of taking illegal gratification, a simple order to refund the money taken is not a sufficient punishment. IN THE MATTER OF MUTTY LALL CHUTTOPADHYA [16 W. R., Cr., 74

11. ——— Kidnapping—*Maximum sentence*.—The maximum sentence prescribed for the offence of kidnapping should only be awarded in a case of the most aggravated nature. QUEEN v. BHOODBEA . . . 8 W. R., Cr., 3

## SENTENCE—continued.

## 1 GENERAL CASES—continued

13 ——— Measure of punishment—*Murder—Severity of sentence—Mitigation of*—Where a prisoner convicted of murder against the opinion of the assessors was sentenced to transportation for life the High Court reduced the sentence to ten years' rigorous imprisonment, remarking on the severity of the Penal Code and on the necessity of administering it so as to make it apply to the various gradations and degrees of crime in this country. *QUEEN v HOSEIN ALLY* 7 W R., Cr., 47

13 ——— *Rape—Circumstances for consideration*—The measure of punishment in a case of rape should not depend on the social position of the party injured but on the greater or less atrocity of the crime the conduct of the criminal and the defenceless and unprotected state of the injured female. *QUEEN v JHANTAN LOSHIO* [8 W R., Cr., 59]

14. ——— *Rioting with deadly weapons*—In a case of rioting with deadly weapons, the one side found guilty of using them and causing grievous hurt are properly punishable more severely than the men of the other side. *QUEEN v MOORUT MAHTOV* 8 W R., Cr., 3

15 ——— *Rioting and an lawful assembly—Affray*—Where the evidence in a case failed to establish anything like an unlawful assembly the conviction was reduced from rioting and being members of an unlawful assembly to one for affray although grievous hurt from which death resulted was caused to one of the persons. The insufficiency of the punishment allowed by the law in cases of affray pointed out. *QUEEN v PROOLIES MISSEK* 12 W R., Cr., 72

16 ——— Sentence on alternative finding—*Penal Code s 72*—An alternative finding is perfectly legal. The sentence should be as provided by s 72 Penal Code. *QUEEN v TARINER MITER* 7 W R., Cr., 13

17 ——— Contemporaneous sentences.—Contemporaneous sentences are not justified by the Penal Code. *QUEEN v MONHER CHANDER SIRCAR* 3 W R., Cr., 13

18 ——— *Sentence under Penal Code and under special law*—A sentence under the Penal Code and also under a special law in respect of one and the same offence is illegal. *QUEEN v HIRSH ALI* 6 N W., 49

19 ——— *Simultaneous conviction for offence, and order for security for good behaviour*—When a convict on of an offence is contemporaneous with an order for taking security for good behaviour the sentence for the substantive offence is to be first carried out and the person to be bound then brought up for the purpose of being bound. *QUEEN v SHOWA DAGES* [24 W R., Cr., 13]

20 ——— Sentence running from period prior to conviction—*Illegal sentence*—

## SENTENCE—continued

## 1 GENERAL CASES—continued

A Sessions Judge has no power to declare that a sentence shall run from a period prior to the conviction. *QUEEN v BUL SIN II* 4 N. W., 8

21. ——— Commencement of sentence where appeal is brought—*Date of committal to jail*—Where on the appeal of Government an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail and not from the date of their arrest or of the sentence on the appeal. *EMRESS v MAHUTDI* 6 C. L. R., 349

22. ——— Sentence to commence at future date—*Conviction and admission to bail to give means of appeal*—Where a Magistrate after sentencing two prisoners to separate terms of imprisonment, admitted them to bail, in order that they might have the means of appealing—Held that such admission to bail did not make the previous sentence one to commence at a future time and consequently illegal. The case of *Lassen Chander Bhattacharyya*, 3 B L R., A Cr. 50 12 B R., Cr., 47, distinguished. *IN THE MATTER OF OKHOT KUMAR* [7 C L R., 383]

23 ——— Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore—*Criminal Procedure Code (1892), s 11—Power of Magistrate*—It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore. *QUEEN EMRESS v VYKATA RAM JETTI* I. L. R., 20 Mad., 444

24 ——— Order for punishment on contingent failure to perform work—*Act XIII of 1859, s 2*—An order of a Magistrate passed under s. 2 of Act XIII of 1859 "that the prisoner should work for a certain period, and in case he failed to do so should suffer rigorous imprisonment for one month," annulled as to the latter part, the Magistrate having no power to make such an order until the failure had occurred and been proved before him. *PAG v JOKA BIN BALU* 4 Bom., Cr., 37

25 ——— Sentence under repealed Act—*Cattle Trespass Acts, III of 1857 and I of 1871—Conviction under wrong Act*—Where a prisoner was properly convicted on the evidence of illegally seized cattle but was sentenced under the old law (Act III of 1857) when the Act had been repealed by Act I of 1871, the High Court declined to interfere with the sentence as the latter Act was in force at the time of the conviction and sentence and no injustice had been done. *MONHER NATH v HIRSH MOHUN GHOSAL* 16 W. R., Cr., 12

26 ——— Sentence of penal servitude—The punishment of penal servitude is only applicable to Europeans and Americans. *QUEEN EMRESS v DUMA BAIDYA* I. L. R., 18 Mad., 483

27 ——— Passing sentence before judgment—*Criminal Procedure Code (Act I of 1892) ss 366 367*—A sentence which has been passed or a direction that an accused be set at liberty

## SENTENCE—continued.

## 1. GENERAL CASES—concluded.

which has been given at a sessions trial before the judgment required by s. 367 of the Code of Criminal Procedure, 1882, has been written, is illegal. *QUEEN-EMPRESS v. HARGOBIND SINGH*

[I. L. R., 14 All., 242]

28. ——— Imposition of non appealable sentences.—The imposition by Magistrates of non-appealable sentences in cases in which the facts are such as to render it very desirable that an appealable sentence should be passed, disapproved of. *JATBA SHEKH v. REAZAT SHEKH*

[I. L. R., 20 Calc., 483]

## 2 CAPITAL SENTENCE.

29. ——— Sentence on conviction of murder.—*Sentence of death or transportation.*—On a conviction for murder, the only punishments that can legally be awarded are death or transportation for life. *QUEEN v. BANI DOSS*

[14 W. R., Cr., 2]

*QUEEN v. JAMAL* . . . 16 W. R., Cr., 75

30. ——— Discretion of Court as to punishment after conviction of murder.—The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. When convicting of murder, the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case. *DEWAN SINGH v. QUEEN-EMPRESS* . . . I. L. R., 22 Calc., 805

31. ——— Duty of Magistrates.—Judges must not shrink from doing their duty, and they are bound to pass a capital sentence in a case of murder when they believe the evidence. *QUEEN v. SHIB NARAIN PALODHEE*

[7 W. R., Cr., 33]

32. ——— Justification for sentence of death.—*Convict undergoing transportation.*—The fact that except death no punishment more severe than that which the prisoner is undergoing at the time of the commission of the offence can be inflicted, is not of itself sufficient to justify the Court in condemning the convict to death. *QUEEN v. NGA SHOAY-DE* . . . [19 W. R., Cr., 68]

33. ——— Conviction of person under transportation of murder.—*Penal Code, s. 303.*—Where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him under s. 303 of the Penal Code is death. *QUEEN v. DOORJODHUN SHAMONTO alias DEBJODOR* . . . 19 W. R., Cr., 45

34. ——— Pregnancy of accused convicted of murder.—*Suspension of sentence.*—Capital sentence should be pronounced on a conviction for murder even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery. *QUEEN v. PANHEE ACHUT*

[15 W. R., Cr., 66]

## SENTENCE—continued.

## 2 CAPITAL SENTENCE—concluded.

35. ——— *Suspension of sentence.*—When a prisoner was pregnant, the sentence of death passed upon her was ordered not to be carried out until after her delivery. *QUEEN v. GHURBHURNEE* . . . W. R., 1864, Cr., 1

*QUEEN v. TEPOO* . . . 3 W. R., Cr., 15

Since expressly provided for by s 303, Criminal Procedure Code, 1872, and s 382 of Act X of 1892.

## 3. CUMULATIVE SENTENCES.

36. ——— Sentencing twice for same offence.—*Conviction for two offences, one of which is integral portion of another.*—The conviction of prisoners for two offences, when the one offence formed an integral portion of the other, held to be in effect punishing twice for the same offence, and therefore illegal. *GOVERNMENT v. LALAWUN SINGH*

[1 Agra, Cr., 31]

37. ——— Cases where same acts are the basis of two charges and convictions.—*Sentence on each charge.*—Where substantially only one offence has been committed, and the acts which are the basis of a prisoner's conviction on one charge are the same as the acts which are the basis of his conviction on another charge, cumulative sentences on each charge should not be passed. *QUEEN v. RADHAKANTH PAUL* . . . 9 W. R., Cr., 12

*QUEEN v. CHUNDER KANT LAHOREE*

[12 W. R., Cr., 2]

38. ——— Conviction on several charges forming substantially one offence.—*Criminal Procedure Code, 1861, s. 46.*—Where a person, though charged under different sections of the Penal Code, was convicted of what was substantially but a single offence,—*Held* that it was not lawful for the Magistrate who tried him to pass a sentence of imprisonment as for separate offences, under s. 46 of the Code of Criminal Procedure, exceeding in the aggregate the punishment which it was competent for the Court to inflict on conviction of a single offence. *REG. v. GANU LADU*

[2 Bom., 132; 2nd Ed., 126]

39. ——— *Improper sentence.*—Where a person, though charged under two heads, was found guilty of what was substantially but one offence,—*Held* that it was improper for the Sessions Judge to record a conviction under two sections of the Penal Code, and thereupon to award a punishment of two years' imprisonment in excess of what the law prescribed for the offence committed. *REG. v. ZORA KARUBNG* . . . 4 Bom., Cr., 12

40. ——— Acts constituting offence founded on one continuous transaction.—*Sentence for principal offence.*—Where the acts constituting the offence are founded on one single continuous transaction, sentence should only be passed for the principal offence. *ANONIMOVS*

[8 Mad., App., 47]



## SENTENCE—continued

## 3. CUMULATIVE SENTENCES—continued

41. — Act coupled with intention — *Same act constituting a less grave offence* — Where the act of an accused person, coupled with his intention or knowledge, constitutes a praver offence, the circumstance that the same act also answers to the definition of another less grave offence does not render him liable to a cumulative punishment. Case where different statutes provide separate punishments for the same act, distinguished. *REG v DOD BAHAYA* 11 Bom, 13

42. — Conviction of separate offences — *Criminal Procedure Code, 1872, s. 45* — *Separate sentences to take effect successively* — Where prisoners are convicted of separate offences, a separate sentence should be passed in each case, with a direction that the imprisonment in the second case should commence on the expiration of that in the first, and so on. *AKOYIMOTOS* 4 Mad., Ap., 27

43. — *Separate sentence to take effect successively* — In a case of several offences under one section of the Penal Code, the proper way is to try the accused under separate charges for each of the several distinct offences under the section which have been clearly proved against them. On conviction on each of these separate charges a separate sentence on each conviction should be passed with a direction (under s. 317 of the Criminal Procedure Code 1872) that each should take effect on the expiry of the next prior sentence. *QUEEN v SOBRAI GOWDAH*

[20 W. R., Cr., 70

44. — *Maximum term of punishment* — *Joinder of charges* — Where a person who is accused of several offences of the same kind is tried for each of such offences separately by a Magistrate the aggregate punishment which such Magistrate can inflict on him in respect of such offences is not limited to twice the amount which he is by his ordinary jurisdiction competent to inflict but such Magistrate can inflict on him for each offence the punishment which he is by his ordinary jurisdiction competent to inflict. *IN THE MASTER OF DATTATIA*

[11 L. R., 3 All, 305

45. — Conviction of several instances of same offence — *Aggregate sentence for purpose of appeal* — *Separate sentence on each offence* — For purposes of appeal, the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence. *Sentile* — That where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed. But if a separate sentence be passed on each head, — *Held* that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court. *LEO v GRIMAZAS* 12 Bom., 147

46. — Simultaneous convictions — *Sentence for purposes of appeal* — *Criminal Procedure Code 1872 s. 314* — The aggregate of the

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued

sentences passed under s. 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences must be considered a single sentence for the purposes of confirmation or appeal. *REG v RAMA LINGOWDA*

[1 L. R., 1 Bom., 233

47. — Separate sentences — *Act of abduction and wrongful confinement* — *Penal Code ss. 343 & 348* — The prisoners having been sentenced for abetment of abduction of a woman under ss. 169 and 493 of the Penal Code, and for wrongful confinement of her under s. 343, — *Held* that both sentences could not stand, and that, as the essence of the case was abduction, the prisoner as abettor thereof, should be punished for it alone. *QUEEN v ISHWAR CHANDRA JOSEPH*

[W. R., 1884, Cr., 21

48. — *Abduction of child to get property from its person* — *Theft after preparation to cause death* — *Penal Code, ss. 369, 372* — Separate sentences cannot be awarded in one case for abducting a child in order to take property from its person (s. 369) and theft after preparation to cause death etc (s. 372), where the evidence shows that the act is one and the same. The sentence under the latter section was cancelled, there being no evidence of any preparation having been made to cause death etc., within the meaning of that section. *QUEEN v HASHEE NATH CHUGGO*

[8 W. R., Cr., 84

49. — *Abduction with intent to take movable property* — *Second punishment for theft* — A prisoner tried, convicted, and punished under s. 369 of the Penal Code of abducting a child with intent dishonestly to take movable property, cannot also be punished for the theft of a part of the movable property which he intended dishonestly to take through means of the abduction; and the second punishment for a theft is by the present Code of Criminal Procedure illegal. *QUEEN v MOTJAN MOTJAN v QUEEN* 7 Mad., 375

50. — *Penal Code, ss. 71, 153, and 303* — *Resisting taking of property by public servant* — *Using criminal force to deter public servant from doing his duty* — *Held* on the facts of this case that a party (A) who objected to accompany a constable who had been directed to produce him before the Court, and also seized the constable by the arm, and resisted his carrying away a pony which A was charged with having misappropriated, was guilty of separate offences under ss. 303 and 153 of the Penal Code, and the infliction of separate sentences for each offence was not prevented by s. 71 of that Code. *QUEEN v JOYAN MONT'S CHUDRA*

[14 W. R., Cr., 19

51. — *Threatening witnesses* — *Sentence for each offence* — An accused who threatened three witnesses was convicted and sentenced to four months' imprisonment for the threat to each witness, in all to one year. It was held that, if a person at one time criminally intimidates three

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

different persons, and each of those persons brings a separate charge against him, the accused may be convicted for an offence as against each person, and be punished separately for each offence. The facts and evidence in this case, however, were considered insufficient to support the sentence, which was reversed as extremely harsh and unjust. *IN THE MATTER OF GOOLZAR KHAN* 9 W. R., Cr., 30

52. — *Culpable homicide and being member of unlawful assembly.*—The prisoner was convicted and sentenced separately for culpable homicide not amounting to murder and for being a member of an unlawful assembly. The two offences, however, being held to be one (the latter being only part of the evidence of the former), the conviction and sentence for the second offence were quashed. *QUEEN v. RUBBEOOLAH*

[7 W. R., Cr., 13]

53. — *Dacoity with murder.*—*Penal Code, s. 396.*—If a person concerned in a dacoity unintentionally commits murder, he is liable to punishment under s. 396 of the Penal Code. But he cannot be separately convicted of murder under s. 302 and of committing dacoity under s. 395. *QUEEN v. RUGHOO*

[W. R., 1864, Cr., 30]

54. — *Dacoity and receiving stolen property.*—A person convicted of and sentenced for dacoity cannot also be convicted of and sentenced for receiving or retaining the stolen property thereby acquired (*dissentiente LOCH, J.*) *BHIRUB SEAL v. QUEEN. QUEEN v. BHIRUB SEAL*

[W. R., 1864, Cr., 27]

*QUEEN v. ABDOL HOSSEIN* 1 W. R., Cr., 48

55. — *Rescuing from lawful custody and using criminal force.*—*Penal Code, ss. 224, 225, and 353.*—Where substantially but one offence has been committed, and the acts which are the basis of one charge are the same which form the basis of another charge on which the prisoner has also been convicted, cumulative sentences on each charge should not be passed. Where prisoners were convicted under s. 224 for escape, s. 225 for rescuing from lawful custody, and under s. 353 for using criminal force in so doing, and sentenced to separate punishments under each section, *Held* that the prisoners had only done one act, and were guilty of only one offence, and should have been found guilty under ss. 224 and 225 of "escape" and "rescuing," respectively, and sentenced accordingly. *QUEEN v. KALISANKAR SANDYAL* 3 B. L. R., A. Cr., 14

*QUEEN v. DINA SHEIKH*

[3 B. L. R., A. Cr., 15 note; 10 W. R., Cr., 63]

So where prisoners were accused of rioting and using criminal force, it was held only one offence. *IN THE MATTER OF NIDRUTTON SEN*

[16 W. R., Cr., 45]

56. — *Making false charge.*—*Giving false evidence.*—*Separate offences.*—

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

The offence of making a false charge and the offence of intentionally giving false evidence are not cognate offences or parts of the same offence, but may be punished separately. *QUEEN v. ABDOL AZEEZ*

[7 W. R., Cr., 59]

57. — *Penal Code, ss. 71, 193, 211.*—*Concurrent sentences.*—*Criminal Procedure Code (Act X of 1882), s. 35.*—*Enhancement of sentence.*—Where the accused, who was a head constable, was found guilty of making a false charge under s. 211, and of giving false evidence under s. 193 of the Penal Code (Act XLV of 1860), and the Sessions Judge passed sentences of three months' simple imprisonment for each offence, and, taking into consideration the accused's past conduct, directed that the sentences should run concurrently. *Held* that the sentences were inadequate and illegal. Accordingly, the sentences were enhanced to three months' rigorous imprisonment for each offence; and as the two offences were distinct, the High Court directed, under s. 35 of the Criminal Procedure Code (Act X of 1882), one sentence to commence after the expiration of the other. *QUEEN v. ABDOL AZEEZ*, 7 W. R., Cr., 59, followed. *QUEEN-EMPRESS v. PIR MAHOMED*

[I. L. R., 10 Bom., 254]

58. — *Conviction of several offences.*—Two prisoners, having been convicted of forgery and other offences, were sentenced each to an aggregate amount of punishment. *Held* that it was an irregularity not to pass a separate sentence under each independent head of the charge. *REG. v. VINAYAK TRIMBAK*

[2 Bom., 414; 2nd Ed., 391]

*REG. v. MRAR TRIBKAN* 5 Bom., Cr., 3

59. — *Distinct offences.*—*Simultaneous sentence.*—Three prisoners were charged with five distinct offences of house-breaking by night, and were sentenced to two years' rigorous imprisonment in each case. *Held* that the Magistrate had power only to pass sentence of four years' imprisonment upon each prisoner, but according to the sentence all the punishments inflicted would be going on simultaneously. *ANONYMOUS*

[5 Mad., Ap., 42]

60. — *Criminal Procedure Code, s. 35.*—*"Distinct offences."*—*Penal Code, ss. 75, 411.*—A person convicted under ss. 75 and 411 of the Penal Code is not convicted of "distinct offences" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress v. Zor Singh, I. L. R., 10 All., 146*, explained. Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session. *QUEEN-EMPRESS v. KHALAK*

[I. L. R., 11 All., 393]

61. — *House-breaking and theft.*—If a man break into a dwelling-house at night and steal property therefrom, the crime is in

## SENTENCE—continued

## 3. CUMULATIVE SENTENCES—continued

its nature one single and entire offence, and should be treated accordingly. *QUEEN v. TONAKOOCH*

[3 W. R., Cr., 63]

Under s. 457 of the Penal Code. *QUEEN v. CHITRY BOWRA*

5 W. R., Cr., 49

*JOSEPH PULLEN v. NORD PULLEN*

[6 W. R., Cr., 49]

*IN RE MURRAY DAUGHTER*

6 W. R., Cr., 92

62. *House-breaking*

*by night and theft*—A prisoner may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though if the Judge considers the punishment for the first offence sufficient he need not award any additional sentence for the second. *QUEEN v. TINDORRE*

[W. R., 1864, Cr., 31]

63. *House-breaking*

*and theft—Joinder of charges—Limit of conviction—Criminal Procedure Code (Act A of 1872), ss. 452 453 454—Held that where in the course of one and the same transaction an accused person appears to have committed several acts directed to one end and by which together amount to a more serious offence than each of them taken individually by itself would constitute although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved. Where therefore a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457 of the Penal Code and was convicted of both those offences and punished for each with rigorous imprisonment for eighteen months, the Court convicted him of the offence under s. 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s. 380. *EMPRESS v. AJUDEHA**

[I. L. R., 2 All., 644]

64. *Offence made up*

*of parts—House-breaking and theft—Penal Code, ss. 71 350, 457—s. 71 of the Penal Code applies to the case of a person charged with house-breaking under s. 457 and theft committed on the same occasion under s. 380 of the Penal Code. *IN RE ARJUN**

1 Bom., 87

65. *Conversion of*

*several offences—House-breaking to commit theft—Compound offence—It is competent to a Magistrate to pass a separate sentence in respect of each of the two charges of house-breaking in order to commit theft and of theft in a human dwelling of which a prisoner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided further such aggregate punishment does not exceed the*

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued

jurisdiction of the Court passing the sentence. *IN RE ANVAREKHAN VALAD GULKHAN*

[0 Bom., 172]

66. *House-breaking*

*and theft—Penal Code, ss. 380 and 457—Simultaneous convictions for separate offences—In a case of conviction of house-breaking by night, in order to commit theft under s. 457 and theft, under s. 380 of the Penal Code, there may either be one sentence for both offences, or separate sentences for each offence, provided that the total punishment awarded does not exceed that which may be given for the graver offence. *IN RE TEJATA BIN TAMANA**

[I. L. R., 1 Bom., 214]

67. *Criminal Procedure*

*Code, ss. 33, 235—Penal Code, ss. 379 380 454—House-breaking in order to the commission of theft—Theft—Separate convictions and sentences—Under ss. 33 and 235 of the Criminal Procedure Code a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the ss. 379 or 380 and 344 of the Penal Code for house-breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case where the prisoner had been three times previously convicted.—Held that the better course would have been to commit him to the Court of Session under ss. 454 and 71 of the Code. But a Sessions Judge trying such a case under s. 379 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit, but had actually committed, theft. *QUEEN-EMPRESS v. AJUDEHA*, I. L. R., 2 All., 641, and *Queen-Empress v. Satharam Bhow*, I. L. R., 10 Bom., 493, referred to. *QUEEN-EMPRESS v. ZOR SINGH**

[I. L. R., 10 All., 146]

68. *Criminal Procedure*

*Code, s. 35—Penal Code, ss. 71, 72, 352 426, 457—Separate convictions for different offences in the same transaction—An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. These offences formed parts of one transaction. Held that the sentences were legal. *QUEEN-EMPRESS v. NARICHAN**

[I. L. R., 12 Mad., 36]

69. *Criminal Procedure*

*Code, ss. 35 and 235—Penal Code (Act XLV of 1860 and VIII of 1889), ss. 71, 380, 457—Simultaneous convictions for several offences—The accused was convicted at one trial by a Magistrate of the first class of the offences of house-breaking by night with intent to commit theft punishable under s. 457, and of theft in a dwelling-house punishable under s. 380 of the Penal Code (Act XLV of*

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

1860),—the two offences being part of the same transaction, the theft following the house-breaking. The prisoner was sentenced to two years' rigorous imprisonment under s. 457, and to six months' rigorous imprisonment and a fine of ₹100, or, in default of payment, three months' further rigorous imprisonment, under s. 380. The District Magistrate referred the case to the High Court, on the ground that the aggregate of punishment awarded on the two heads of charge exceeded the powers of the First Class Magistrate who tried the case. The Sessions Judge, to whom an appeal had been preferred, was of the same opinion, and reduced the sentence to two years' rigorous imprisonment. *Held* that, as the accused committed two distinct offences which did not "constitute, when combined, a different offence" punishable under any section of the Penal Code (Act XLV of 1860), s. 71 of the Code did not apply, and as the aggregate punishment did not exceed twice the amount of punishment which the trying Magistrate was competent to inflict, the sentences were legal under s. 35 of the Criminal Procedure Code (Act X of 1882). *Per JARDINE, J.*—The rules for assessment of punishment, contained in s. 454 of the Criminal Procedure Code of 1872, having been omitted in s. 235 of the Criminal Procedure Code of 1882, must now be sought for in s. 71 of the Penal Code (Act XLV of 1860) and in s. 35 of the Criminal Procedure Code (Act X of 1882). *QUEEN-EMPRESS v. SAKHA-BAM BHAI* . . . I. L. R., 10 Bom., 493

70. ——— *Lurking house-trespass and theft*—Penal Code, ss. 380 and 454.—Discussion as to whether cumulative punishment under ss. 454 and 380 is legal for lurking house-trespass and theft. *QUEEN v. MINA NUGGERBHATIN* [3 W. R., Cr., 19]

71. ——— *Penal Code (Act XLV of 1860), s. 71—Criminal Procedure Code (Act V of 1898), s. 35—Conviction of several offences at one trial*—Where a person commits house-offences in order to commit theft and theft, he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of s. 71 of the Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence. If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court of appeal or revision. *QUEEN-EMPRESS v. MALU. QUEEN-EMPRESS v. NAGU* . . . I. L. R., 23 Bom., 706

72. ——— *House-trespass and grievous hurt*.—The prisoner entered a house for the purpose of committing an assault, and in carrying out that intention, caused grievous hurt. In convicting and punishing him for the substantive offence (grievous hurt),—*Held* that it was not necessary to pass a separate sentence for the offence of house-trespass. *QUEEN v. BASSOO RANNAH* [2 W. R., Cr., 29]

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

73. ——— *Kidnapping—Taking property from child*—Penal Code, ss. 363, 369.—The offence described in s. 363 of the Penal Code is included in that described in s. 369, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter section. *QUEEN v. SHAMA SHEIKH* [8 W. R., Cr., 35]

74. ——— *Kidnapping—Selling for purpose of prostitution*.—There is nothing illegal in passing separate sentences for kidnapping and for selling for purposes of prostitution. *QUEEN v. DOORGA DOSS* . . . 7 W. R., 104

75. ——— *Rioting—Unlawful assembly*.—There cannot be a conviction both of "rioting" and of "being members of an illegal assembly." The greater charge includes the less, and to punish under both sections of the Penal Code would be cumulative and illegal. *MEELAN KHALIFA v. DWARKANATH GOPTO* . . . 1 W. R., Cr., 7

76. ——— *Joining unlawful assembly and rioting with deadly weapon*.—Penal Code, ss. 144, 148.—There is nothing illegal in sentencing a prisoner for both offences of joining an unlawful assembly armed with a deadly weapon (s. 144), and rioting armed with a deadly weapon, though the former is almost merged in the latter offence. *SREEKISSEN v. JUGLAL* [9 W. R., Cr., 5]

77. ——— *Rioting armed with deadly weapon—Causing hurt by shooting*.—Where prisoners are charged both with rioting, being armed with deadly weapons, and with causing hurt by shooting, and their conviction of the latter offence rests solely on the fact of their belonging to a party by one of whom (not one of the prisoners) fire-arms were used, it is wrong to pass a cumulative sentence, and to punish the prisoner both for the rioting and for the causing hurt. The punishment should be for either one or other of those offences. *QUEEN v. DURZOOLLA* . . . 9 W. R., Cr., 33

78. ——— *Rioting with deadly weapon—Grievous hurt*—Penal Code, ss. 148, 149, and 324.—The offence of rioting, armed with deadly weapons, and stabbing a person on whose premises the riot takes place, are distinct offences and punishable as separate offences under ss. 148, 149, and 324 of the Penal Code, s. 149 being read as a proviso to s. 148. *QUEEN v. CALLACHAND* [7 W. R., Cr., 60]

79. ——— *Conviction of rioting and causing hurt by dangerous weapons—Distinct offences—Separate charges*—Penal Code, ss. 71, 148, 149, 324—Act X of 1882 (Criminal Procedure Code), ss. 35, 235—Act X of 1872 (Criminal Procedure Code), ss. 314, 454—Act VIII of 1882, s. 4.—The offences of rioting armed with a deadly weapon and voluntarily causing hurt with a dangerous weapon to two persons are distinct offences, and a person charged with such offences can be convicted and sentenced in respect of the rioting and of

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued

the hurt caused to each of the persons injured *A* and *B* were charged with rioting armed with deadly weapons under s. 143 of the Penal Code, and they were also charged under s. 34, coupled with s. 149, with causing hurt by a dangerous weapon to *X*, and *B* was further charged under s. 324 with causing a like hurt to *Y*. *A* being also charged under s. 321, coupled with s. 149, in respect of the hurt caused by *B* to *Y*. *A* and *B* were convicted on all charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 321 were committed during the riot. *Held* that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that consequently under s. 230 of the Criminal Procedure Code the several sentences passed were strictly legal. *LOKE NATH SIEGAR v QUEEN EMPRESS* I. L. R., 11 Cal., 349

80

## Separate convictions for more than one offence where acts combined form one offence—Penal Code (Act XLV of 1860), ss. 143, 147, 324, 323—Act VIII of 1882, s. 4—Criminal Procedure Code (Act X of 1882), s. 230

Four persons were charged with being members of an unlawful assembly consisting of themselves and others, the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment-debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, *A* and *B*, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon, and another by means of a dangerous weapon on *A*. The Deputy Magistrate convicted all the accused of offences under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324 in respect of the assault on *A* and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry of the other. *Held* that the offence of rioting was completed by the assault on *A* and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure. *Held* further that, even if *A* had not been assaulted, the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused, taken separately, constituted offences under ss. 143 and 253 of the Penal Code, and, combined, an offence under s. 147, and under s. 235, sub-s. (3), of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 253, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code.

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued.

as amended by s. 4 of Act VIII of 1882, which has not been exceeded in the present case. *IN THE MATTER OF CHANDRA KANT BHATTACHARJEE (CHANDRA KANT BHATTACHARJEE v QUEEN EMPRESS)* I. L. R., 12 Cal., 495

81

Penal Code (Act XLV of 1860), ss. 147, 353 and 321. Cumulative sentences under—Legality of sentence—Criminal Procedure Code (Act X of 1882), ss. 35, 230—Held that a double sentence under ss. 147 and 353, Penal Code, is illegal where the force which was used and which formed one of the component elements of the offence of rioting, was the criminal force used to the public servants. *Held* also that a sentence under s. 253, Penal Code, for actually committing an offence under that section, and a further sentence under s. 353 read with s. 149 for committing the same offence constructively, is illegal. The High Court set aside the cumulative sentences under ss. 353 and 321 respectively, but upheld the sentence under s. 147. *RAKHIAL v. QUEEN EMPRESS* 13 C. W. N., 174

82

Penal Code Amendment Act (VIII of 1882), s. 4—Offences made up of several offences—Rioting—Grievous hurt—Criminal Procedure Code, 1882, s. 235—Penal Code, ss. 146, 147, 149, 325—A member of an unlawful assembly, some members of which have caused grievous hurt, cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt. *EMPRESS v. RAM PARTAP* [I. L. R., 6 All., 121]

83

Separate charges—Criminal Procedure Code (Act X of 1882), s. 4—illus. (f)—Penal Code (Act XLV of 1860), ss. 147, 148, and 324—Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence. *Quare*—Whether separate convictions under ss. 147 and 324 of the Penal Code are legal. *IN THE MATTER OF THE PETITION OF JEDDER KAZI* *EMPRESS v. JEDDER KAZI* I. L. R., 6 Cal., 718

S. C. IN RE JEDDER KAZI

8 C. L. R., 390

84.

Rioting—Grievous hurt—Criminal Procedure Code, 1882, s. 235—Penal Code, ss. 146, 147, 149, 325—Three persons who were convicted (i) of the riot under s. 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 325. *Held* by PETHERAM, C.J., and STRAIGHT and TYRRELL, JJ., that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from and independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

establish their legal responsibility under s. 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Ram Parthab, I. L. R., 6 All., 121*, distinguished. *Per BRODHURST, J.*, that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code, but that the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress v. Dunga Singh, I. L. R., 7 All., 29*, followed. Also *per BRODHURST, J.*—illus. (g) of s. 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grievous hurt, and of assaulting a public servant when engaged in suppressing a riot; and the convictions referred to in the illustration relate especially to convictions obtained under the provisions of s. 149 of the Penal Code. *QUEEN-EMPRESS v. RAM SARUP*

[I. L. R., 7 All., 757]

85. ————— *Criminal Procedure Code, 1882, s. 35 and s. 235—Conviction of rioting and causing grievous hurt—Offences distinct—Penal Code (Act VIII of 1882), s. 4—Penal Code, ss. 147, 325.*—The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code. Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and under s. 35 a separate sentence may be passed in respect of each. *Queen-Empress v. Ram Parthab, I. L. R., 6 All., 121*, dissented from. *QUEEN-EMPRESS v. DUNGAR SINGH, I. L. R., 7 All., 29*

86. ————— *Penal Code, s. 71—Criminal Procedure Code, ss. 39, 235—Rioting, grievous hurt, and hurt—Punishment for more than one of several offences.*—On the 8th August 1884 a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and on the 10th September convicted the accused of all the charges, passing upon each of them, in respect of each charge, sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71, paragraphs 2 and 4; and he accordingly reduced the sentences of imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 118. *Held* by the Full Bench (*PETHERAM, C.J.*, and *BRODHURST, J.*, dissenting) that the sentences passed by the Magistrate were legal. *Per OLDFIELD and DUTHOIT, JJ.*, that the provisions of s. 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting. *Per BRODHURST, J.*, that the sentences passed by the Magistrate were, as a whole, illegal, that if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal, and that a member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of causing grievous hurt. *Empress v. Dunga Singh, I. L. R., 7 All., 29*, referred to. *QUEEN-EMPRESS v. PERSHAD*

[I. L. R., 7 All., 414]

87. ————— *Penal Code, s. 71 and ss. 147, 149, and 325—Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act VIII of 1882, s. 4—Criminal Procedure Code, s. 235.*—S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment, which was *M*'s, was six years' rigorous imprisonment, being one year for rioting and five years for causing grievous hurt. *Held* that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal, as the combined periods of imprisonment did not, in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325. *Held* also that the riot could not in any of the cases be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal. *Queen-Empress v. Ram Parthab, I. L. R., 6 All., 121*, dissented from. *Queen-Empress v. Dunga Singh, I. L. R., 7 All., 29*; *Queen-Empress v. Ram Sarup, I. L. R., 7 All., 767*; *Queen v. Rubbee-oolah, 7 W. R., Cr., 13*, *Loke Nath Sarkar v. Queen-Empress, I. L. R., 11 Calc., 349*; *Queen-Empress v. Pershad*

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued

*I L R 7 All 414 Chandra Kant Bhattacharyee v Queen Empress I L R 12 Cal. 498 and Reg v Takaya & Tamara I L R 1 Bom. 214, refer red to QUEEN EMPRESS v BISHKSHAB*

[I L R, 9 All., 645

88 ——— *Separate sentences for rioting and grievous hurt—Penal Code ss 71 para 1) 144 147 148 334—Act VIII of 1882 & Criminal Procedure Code (Act X of 1882) s 30—1er curiam (TOTTEHAM J discussing)—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt but were guilty of that offence under s 143 of the Penal Code. *Empress v Ram Parbati I L R 6 All 121 approved Lake Nath Sirkar v Queen Empress I L R, 11 Cal., 549 overruled. NIRMONEY PODDAR v QUEEN EMPRESS**

[I L R, 16 Cal. 442

89 ——— *Separate sentences should not be passed for rioting and assaulting a public servant in execution of his duty when practically the offence of assaulting the public servant was the common object of the unlawful assembly the members of which committed such rioting. Nirmoney Poddar v Queen Empress I L R 16 Cal., 422 followed. HARDOY MONDAL v JAGARANDA DAS*

[4 C W N., 245

90 ——— *Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV of 1860) ss 147 323 325—Six accused persons were charged with and convicted of rioting the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of respectively causing hurt during the riot to the two men and a woman and were sentenced to separate terms of imprisonment under ss 147 and 323 of the Penal Code. Held that the sentences were legal. During the course of a riot, in which X was attacked and beaten by several of the rioters, one of them A inflicted grievous hurt on X by breaking his ribs with a blow struck with a lathi. X and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code and K was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on K and also on the other three for each of the offences. Held that the sentences on K were legal but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt although they had each of them assaulted X, the conviction of them under s. 325 read with s. 109, could not be supported. IN THE MATTER OF THE PETITION OF MOHUR MIB v QUEEN EMPRESS IN THE MATTER OF THE PETITION OF KALI ROY v QUEEN EMPRESS*

[I L R., 16 Cal., 725

## SENTENCE—continued

## 3 CUMULATIVE SENTENCES—continued.

91. ——— *Rioting and theft—Common object of unlawful assembly being theft—Separate sentences. Legality of—Penal Code (Act XLV of 1860), ss 71 147, 149, 379—When persons are charged with rioting and theft and the common object of the unlawful assembly by which the rioting was caused is theft and they are convicted both for rioting and theft without any finding by the Court that any one of the accused persons individually committed theft—Held that, under s. 71 of the Indian Penal Code it is improper to pass separate sentences upon accused persons both for rioting and theft when the former offence is but an element of the latter and that they are under that section liable to punishment only in respect of one or other of those offences. *Nilmoney Poddar v Queen Empress I L R., 16 Cal., 442, followed. MITRHO SINGH v GORAL LAL**

3 C W N., 761

92. ——— *Rioting armed with deadly weapons—Separate and distinct offences—Causing hurt and grievous hurt—Resistance and obstruction to police—Penal Code ss 71 143, 102, 330 333—Eight persons, who were charged with a number of others were tried on various charges consisting of rioting armed with deadly weapons (s. 148, Penal Code) assaulting or obstructing a public servant when suppressing a riot (s. 15\*) and voluntarily causing hurt and grievous hurt to deter a public servant from his duty (ss. 332 and 333). The common object set out in the charge was "to resist the execution of a decree obtained by A against B in the Court of the Second Subordinate Judge of Alipore, dated 10th April 1891 and also by means of criminal force or show of criminal force to overawe the members of the police force in the execution of their lawful powers as police-officers," and it was held that resistance to the police was one of the component parts of the offence of rioting charged. At the trial in the Court of Session all eight accused were convicted of the offence charged under s. 148, and each was sentenced to the maximum punishment allowed under that section viz., three years' rigorous imprisonment. Seven out of the eight were convicted of offences under s. 152, and sentenced each to an additional term of two years' rigorous imprisonment for those offences. Two out of the seven accused were further convicted of offences under s. 332 of the Penal Code, the hurt therein charged being caused to police officers engaged in suppressing the riot, and each sentenced to a further additional term of two years' rigorous imprisonment for that offence. The eighth accused who was not convicted of an offence under s. 15\* was convicted of an offence under s. 333, the grievous hurt being similarly caused to a police officer, and for that offence was sentenced to five years' rigorous imprisonment in addition to the sentence of three years passed on him under s. 148. It was contended on appeal—(1) that the sentences passed under s. 152 in addition to those under s. 148 were illegal; (2) that separate sentences under s. 152 and ss 332 and 333 were illegal (3) that the cumulative sentences under s. 148 and ss. 332 and 333 were illegal in so far as they exceeded the maximum*

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—continued.

sentence provided for either of the offences. *Held*, as regards (1), that as resistance to the police was one of the component parts of the offence of rioting of which the accused were convicted and sentenced to the maximum punishment provided by s. 148, and having regard to the provisions of s. 71, the additional sentences under s. 152 were illegal. *Held*, as regards (2), that separate sentences under s. 152 and ss. 332 and 333 were illegal, as the hurt inflicted on the police officers was the violence towards them which constituted the essence of the offence under s. 152. *Held*, as regards (3), that the separate sentences passed under s. 148 and ss. 332 and 333 were not illegal, there being nothing in s. 71 of the Penal Code which limits the amount of punishment that may be imposed for these offences. *PERASAT v. QUEEN-EMPRESS*

[I. L. R., 19 Calc., 105]

93. ———— *Penal Code, ss. 71, 148, 149, 326—Separate sentences for rioting and grievous hurt.*—When a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of s. 149 of the Penal Code, it is illegal to pass two sentences, one for riot and one for hurt. But in such a case the two sentences would be legal, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences. When, however, the accused is guilty of rioting and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt. In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences. *Queen-Empress v. Ram Sarup*, I. L. R., 7 All., 757, approved. *QUEEN-EMPRESS v. BANU PUNJAI*. I. L. R., 17 Bom., 260

94. ———— *Personating public servant—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Penal Code (Act XLV of 1860), ss. 71, 170, 333—Criminal Procedure Code, ss. 35, 235*—Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction. Under s. 25 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently. In a trial for offences under ss. 170 and 333 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of. *Held* that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 333; that in the present case the former offence was completed before the latter had begun; and that separate sentences for

## SENTENCE—continued.

## 3. CUMULATIVE SENTENCES—concluded.

each offence were therefore not illegal. *QUEEN-EMPRESS v. WAZIR JAN*. I. L. R., 10 All., 58

95. ———— *Receiving stolen property and assisting in concealment of it—Penal Code, ss. 411, 414—Criminal Procedure Code, 1861, s. 46.*—The offences specified in ss. 411 and 414 of the Penal Code cannot be considered as two distinct offences, so as to allow of the procedure of s. 46 of the Criminal Procedure Code being adopted. *ANONYMOUS* [4 Mad., Ap., 14]

96. ———— *Theft from two persons in same room.*—Where the accused stole property at night belonging to two different persons from the same room of a house, it was held that he could not be sentenced separately as for two offences of theft. *QUEEN v. MONEEAH* 11 W. R., Cr., 38

97. ———— *Theft—Receiving stolen property.*—A person convicted of robbery or theft cannot be also convicted of dishonestly receiving in respect of the same property. *QUEEN v. MUD-DUN ALLY*. 1 W. R., Cr., 27

*QUEEN v. SREEMUNT ADUP*. 2 W. R., Cr., 63

*QUEEN v. SEERCHURN HAREE* 11 W. R., Cr., 12

*QUEEN v. SHEEB CHUNDER HAREE* [11 W. R., Cr., 12 note]

98. ———— *Theft and mischief—Double sentence.*—A double sentence for theft and mischief is illegal and improper. *BICHUK AHEER v. AHHUK BROONEEA*. 6 W. R., Cr., 5

99. ———— *Mischief and theft—House-breaking and theft.*—Separate convictions and sentences under ss. 429 and 379 and under ss. 457 and 380 of the Penal Code were set aside; and the convictions under s. 429 in the former case, and under s. 457 in the latter, allowed to stand. *QUEEN v. SAHRAE*. 8 W. R., Cr., 31

100. ———— *Criminal trespass—Mischief—Criminal Procedure Code, 1872, s. 454.*—Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *Held* that such person could not, under cl. iii of s. 451 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established. *EMPRESS v. BUDH SINGH*. I. L. R., 2 All., 101

101. ———— *Separate offences—Penal Code, ss. 143, 253.*—A cumulative sentence under s. 143 of the Penal Code (being a member of an unlawful assembly), and under s. 253 (using criminal force against a public servant), was upheld by the High Court in this case. *IN THE MATTER OF GOBIND CHUNDER ROY*. 16 W. R., Cr., 70

## 4. FINE.

102. ———— *Specific fine on each prisoner—Trial of several prisoners.*—A sentence



## SENTENCE—continued

## 4 FINE—continued

of fine must impose a specific fine on each prisoner  
ANONYMOUS 5 Mad., Ap., 5

103. Wrongful confinement—  
Penal Code s 344—He alone is not a legal sen-  
tence for a prisoner convicted under s 344 of the  
Penal Code. PRASAD BHARADWAJ KRISHNAJI  
[1 Bom., 39]

104. — Separate offences—Alternative  
sentence allowed only in one—Where a conviction  
has been had under two sections of the Penal  
Code, in one of which only an alternative sentence of  
imprisonment or fine is allowed, a sentence of fine  
cannot be passed. QUEEN v PROBERT MURPHY  
[11 W. R., Cr., 39]

105. Offence under Act XIX of  
1838, s 13—Omission of owner of harbour craft  
to produce certificate of registry—The Legislature  
when it enacted in s 13 of Act XIX of 1838 that  
persons who committed certain acts should be "subject  
to a fine of ten times the fee" or "subject to a fine  
of ten rupees" intended that the penalties so specified  
should be inflicted in full. The owner of a harbour  
craft having been fined Rs 2 for omission to produce a  
certificate of registry when demanded by the customs  
authorities the High Court annulled the sentence as  
being illegal and inflicted the full penalty of ten  
rupees. EMPRESS v MHAJIA RAMA  
[I. L. R., 7 Bom., 280]

106. Theft in dwelling house—  
Penal Code, s 380—Imprisonment—On conviction  
for theft in a dwelling under s 380 of the Penal  
Code, fine cannot be substituted in lieu of imprison-  
ment though it may be added to imprisonment.  
DILLON v ZAISAR BEVER 18 W. R., Cr., 17

107. Offence under Act XVIII of  
1854 (Railway Act), s 34—Imprisonment—  
S 34 of Act XVIII of 1854 prescribes the mode in  
which fines levied under that Act are to be recovered.  
It is only on the return of the warrant of distress  
unsatisfied, or on the Magistrate being otherwise  
satisfied that no sufficient distress exists, that im-  
prisonment can be imposed. ANONYMOUS  
[3 Mad., Ap., 37]

108. Transportation with fine—  
Lay of portion of fine—When a fine is imposed  
in addition to transportation, and the whole or part  
of the fine is levied, it is the duty of the Sessions  
Judges to inform the authorities at Port Blair of the  
fact. ANONYMOUS 5 Mad., Ap., 44

109. Imposition of additional fine  
under Court Fees Act (VII of 1870), s 31.  
—An Assistant Magistrate, having convicted the  
accused persons, sentenced them to pay a fine, out of  
which Rs 2 was to be paid to the complainant for his  
expenses; the Deputy Magistrate, on appeal having  
confirmed the conviction, passed an order under Court  
Fees Act s 31 directing the accused to pay a further  
sum to the complainant. Held that the order was  
illegal, and should be set aside. QUEEN v EMPRESS  
v. TANGAYAT CHETTI. I. L. R., 22 Mad., 153

## SENTENCE—continued.

## 5 IMPRISONMENT.

## a) IMPRISONMENT GENERALLY.

110. False statement on oath  
to public servant—Penal Code, s 191—Illegal  
sentence—A sentence under s 191 of the Penal  
Code which awards no term of imprisonment is illegal.  
ANONYMOUS 4 Mad., Ap., 18

111. Accumulation of sentences  
of imprisonment—Criminal Procedure Code,  
1861, s 45—Sentences not simultaneous—Term of  
imprisonment might be accumulated beyond the  
period of fourteen years notwithstanding s 45 of  
the Criminal Procedure Code, which limit had  
reference only to sentences passed simultaneously, or  
passed upon charges tried simultaneously. QUEEN  
v PRIN 7 W. R., Cr., 1

112. Concurrent sentences—  
Criminal Procedure Code, 1892, s 33—Under s 33  
of the Criminal Procedure Code sentences of im-  
prisonment cannot be passed so as to run concurrently.  
QUEEN v EMPRESS v WAZIR JAW  
[I. L. R., 10 All., 58]

113. Criminal Procedure  
Code (Act X of 1892), s 35—Sentence—Con-  
current sentences of imprisonment—Penal Code  
(Act XLV of 1860), s 409—Sentences of im-  
prisonment passed for distinct offences to run concurrently  
are not warranted by law. QUEEN v EMPRESS v WAZIR  
JAW, I. L. R., 10 All., 58, referred to. DATTAR  
DAS v QUEEN v EMPRESS. I. L. R., 25 Cal., 537

114. Criminal Procedure  
Code (Act V of 1892), ss 15 and 397—Con-  
current sentences not allowed by the Code.—There  
is no provision in the Code of Criminal Procedure by  
which a Court is empowered on convicting an  
accused person of two or more offences at the same  
time, to direct that the sentences imposed in respect  
of such offences shall run concurrently. QUEEN  
v EMPRESS v ISHNI I. L. R., 20 All., 1

115. Criminal Procedure Code,  
1872, s. 309—Penal Code, s 65—s 309 of the  
Criminal Procedure Code did not extend the period  
of imprisonment which might be awarded by a  
Magistrate under s 65 of the Penal Code; it only  
regulated the proceedings of Magistrates whose  
powers were limited. EMPRESS v DABDA  
[I. L. R., 1 All., 461]

116. Commencement of sentence  
of imprisonment—Postponement of sentence—  
Criminal Procedure Code (Act XXI of 1861),  
ss 46, 47, 48, and 421—A sentence of imprisonment  
ought to commence from the time that the sentence  
is passed, unless there is some lawful reason for  
ordering it to commence at some future period.  
Except as in the cases provided for by ss 46, 47, and  
48 of the Criminal Procedure Code, a Magistrate  
cannot authorize a sentence passed by him to take  
place from some future date, nor, except as provided  
for by s 421 of the Code of Criminal Procedure, can  
a sentence, which is to take place immediately, be  
suspended. IN THE MATTER OF KRISHNAIAH  
BRUTACHARJEE 3 B. L. R., A. Cr., 50

## SENTENCE—continued.

## 3. IMPRISONMENT—continued.

S. C. IN THE MATTER OF KISHEN SOONDER BHUTTACHARJEE . . . 12 W. R., Cr., 47

117. — Imprisonment in lieu of whipping—*Criminal Procedure Code, s. 395*—Infliction of fine in lieu of whipping.—A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, etc. The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. QUEEN v. SNEODIN . . . I L R., 11 All, 308

118. — Confirmation of sentence—*Criminal Procedure Code, 1872, s. 36*—S. 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, referred to cases in which the sentence of imprisonment was a sentence of upwards of three years, without including any additional sentence as to fine or whipping. IN THE MATTER OF THE PETITION OF DUSSEH KHAN, EMPRESS v. SUMSHER KHAN . . . I L R., 6 Cal., 624

119. — Attempt to commit offence—*Penal Code, s. 511*.—The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of a judicial proceeding cannot extend beyond one half of seven years. QUEEN v. SOONDER PUTNAICK . . . 3 W. R., Cr., 58

120. — Offence under Act XIII of 1859, s. 2—*Form of sentence*.—A sentence of imprisonment should not be announced beforehand in the order directing performance of the contract in a case under Act XIII of 1859, s. 2, but should follow on a complaint of non-compliance. ANONYMOUS . . . 6 Mad., Ap., 24

121. — Interruption of public servant in course of judicial proceeding—*Penal Code, s. 228*—*Criminal Procedure Code, 1861, s. 163*.—In a case of interruption to a public servant in a stage of a judicial proceeding, under s. 228, Penal Code, a sentence of imprisonment cannot be passed under s. 163 of the Code of Criminal Procedure. IN THE MATTER OF BUHRAH KHAN . . . [10 W. R., Cr., 47]

122. — Dacoity—*Penal Code, s. 395*.—A sentence of fourteen years' imprisonment cannot be passed for dacoity under s. 395 of the Penal Code. QUEEN v. HAROO RUJWAR . . . [13 W. R., Cr., 27]

123. — Disobedience to order of public servant—*Rigorous imprisonment—Penal Code, s. 188*.—A sentence of rigorous imprisonment passed by a Magistrate, under s. 188 of the Penal Code, for disobedience to an order duly promulgated by a public servant, altered to one of simple imprisonment, as the Magistrate's finding did not show

## SENTENCE—continued.

## 5. IMPRISONMENT—continued.

that the case came within the latter part of the section, in which case alone the infliction of rigorous imprisonment was authorized. RFG. v. KATANKAV DIN MAHADEVRAI CHAVAN . . . 3 Bom., Cr., 32

124. — Giving false evidence—*Penal Code, s. 193*—*Duty of Court*.—Under s. 193 of the Penal Code, it is obligatory upon the Court, in every case of conviction under that section, to pass some sentence of imprisonment. EMPRESS v. KHODAI SINGH . . . 3 C. L. R., 527

125. — False evidence to procure acquittal of guilty person—*Measure of sentence*.—Held by the majority of the Court that a sentence of five years' imprisonment was not excessive in the case of a man convicted of making a false statement in a judicial proceeding, with the intention of defeating the ends of justice by procuring the acquittal of a guilty person. QUEEN v. ANOO . . . [W. R., 1864, Cr., 16]

126. — Deliberately fabricating false evidence—*Measure of sentence*.—A sentence of three years' imprisonment is not too severe a punishment for a deliberate attempt to pervert justice by fabricating in one office false statements to be designedly and corruptly used in another. QUEEN v. KALACHAND BORDYO . . . 8 W. R., Cr., 18

127. — Grievous hurt—*Penal Code, s. 325*—*Fine*.—The offence of voluntarily causing grievous hurt is punishable, not by fine alone, but by imprisonment, the offender being also liable to fine. QUEEN v. SHARODA PESHAGUR . . . 2 W. R., Cr., 32  
QUEEN v. MENAZOODIN . . . 2 W. R., Cr., 33

128. — House-breaking—*Whipping—Rigorous imprisonment—Commutation of punishment*.—Upon conviction of the offence of house-breaking, the accused was sentenced by the Deputy Magistrate to six months' rigorous imprisonment, and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and, setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment, in addition to the six months' rigorous imprisonment passed by the Deputy Magistrate. Held that the commutation of the punishment was illegal. QUEEN v. BANDA ALI . . . [6 B. L. R., Ap., 95: 15 W. R., Cr., 7]

129. — Offence under Madras Police Act, 1859, s. 48—*Rigorous imprisonment—Measure of sentence*.—A sentence of rigorous imprisonment under conviction for an offence under s. 48, Act XXIV of 1859, was illegal. ANONYMOUS . . . [5 Mad., Ap., 35]

130. — Offence under Registration Act (VIII of 1871), s. 80—*General Clauses Consolidation Act (I of 1869), s. 2, cl. 18*—*Rigorous and simple imprisonment*.—Held that under Act I of 1868, s. 2, cl. 18, the Sessions Judge should have specified in his warrant whether the imprisonment awarded to a person convicted under s. 80, Act VIII of 1871, should be simple or rigorous, but that, as he

## SENTENCE—continued

## 5 IMPRISONMENT—continued

had omitted this at the proper time simple imprisonment should now be set forth in the sentence and warrant. **LEGAL MEMORANDUM & MADHOO CHURN ASH GOVERNMENT & MADHOO CHURN ASH**

[18 W. R., Cr., 3

131. Indefinite period of imprisonment in default of security, Order for.—An order directing an accused "to be imprisoned until he gives security" is bad, a definite period for such imprisonment not exceeding one year should be stated in the order. **MALLABU FAKIR & TARIKULLA PRASANNI**  
[I. L. R., 8 Cal., 844

132. Imprisonment in default of giving security for good behaviour.—*Criminal Procedure Code 1861 s. 206*—Where a prisoner in addition to a sentence passed upon him is required to furnish security for his good behaviour under s. 206 of the Criminal Procedure Code for a period of one year his imprisonment in default of providing such security must commence to run from the date of the order to furnish security and cannot be directed to run from the expiry of the sentence passed upon the prisoner. **QUEEN & TRIBAL GUJAR 3 N W., 128**

133. Receiving stolen property.—*Criminal Procedure Code 1872 s. 503—Addition to sentence of order for security for good behaviour*—P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned and on the expiration of the term of imprisonment to furnish security for good behaviour. Held that the order requiring security should not have formed part of the sentence for the offence of which P was convicted. A proceeding should have been drawn out representing that the Magistrate was satisfied from the evidence as to general character adduced before him in the case that P was by repute an offender within the terms of s. 503 of Act X of 1872 and therefore security would be required from him and an order should have been recorded to the effect that on the expiry of imprisonment P should be brought up for the purpose of being bound. **EMPRESS & PARTAB**  
[I. L. R., 1 All., 888

134. Addition to sentence of further imprisonment in default of engagement to keep the peace.—*Criminal Procedure Code 1869 s. 289*—The prisoner was convicted of an offence punishable under s. 307 of the Penal Code. In addition to the sentence passed upon him under that section the Sessions Judge directed under s. 289 of the Code of Criminal Procedure that at the expiration of the term of imprisonment imposed the prisoner do execute a formal engagement to the prosecutor for a period of one year and in default to undergo simple imprisonment for that period. The High Court set aside so much of the sentence as directed the imprisonment of the prisoner in default of entering into the required engagement. **QUEEN & SHILAM**  
8 Ma.

## SENTENCE—continued

## 5 IMPRISONMENT—continued.

135. Imprisonment for allowance remaining unpaid after execution of warrant.—*Criminal Procedure Code s. 458—Maintenance—Wife—Breach of order for monthly allowance—Warrant for laying arrears for several months Act I of 1869 s. 2 cl. 18—"Imprisonment"*—Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant the Magistrate acting under s. 458 of the Criminal Procedure Code has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant only related to a single breach of the order. *See BOON C'J—s. 458* contemplates that a separate warrant should issue for each separate monthly breach of the order. *Per STRAIGHT, J*—The third paragraph of s. 458 ought to be strictly construed and as far as possible, construed in favour of the subject. Under the section a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant and one punishment and not a cumulative warrant and cumulative punishment. Also *per STRAIGHT, J*—With reference to s. 2 cl. (18) of the General Clauses Act (I of 1863), "imprisonment" in s. 458 of the Criminal Procedure Code may be either simple or rigorous. *Per OLDFIELD, J*—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding and arrears levied under a single warrant. **QUEEN & EXPRESS & NARAIN**  
[I. L. R., 9 All., 240

## (5) IMPRISONMENT AND FINE

136. Case under s. 21, Cattle Trespass Act, 1871.—*Sentence of fine or imprisonment—Default in payment of compensation*—It is not lawful to pass a sentence of fine or imprisonment in default of payment of the compensation awarded in a matter under s. 21 of the Cattle Trespass Act 1871. **IN THE MATTER OF HETABAI MENDEL**  
2 C. L. R., 507

137. Contempt of Court.—*Imprisonment added to fine—Trial of case of contempt*—Where in punishing for contempt of Court, the summary procedure sanctioned by s. 163 of the Code of Criminal Procedure 1861 is followed, the Court must sit as the Court before which the offence was committed, and not in any other capacity and is bound to take cognizance of the contempt on the day on which it was committed. In such a case imprisonment cannot be added to fine as a punishment. In a case in which it was dealt with in a summary manner, the offence must, under s. 163 be tried by an officer other than the person before whom the contempt was committed. **QUEEN & CHANDER SEKHAR ROY**  
[12 W. R., Cr., 18

138. Making false charge.—*Penal Code, s. 211—Imprisonment with or without*

## SENTENCE—continued.

## 5. IMPRISONMENT—continued.

*fine*.—A prisoner convicted under the second clause of s. 211 of the Penal Code should be sentenced to imprisonment, with or without *fine*, and not to *fine* alone. REG. v. RAMA BIN RAHMAN. 1 Bom., 34

139. — Conviction under Military Cantonment Act (Bom. Act III of 1867)—*Simultaneous sentence of fine and imprisonment*.—In cases of convictions under ss. 11 and 12 of the Military Cantonment Act (Bom. Act III of 1867), a simultaneous sentence of fine and imprisonment in default of the payment of the fine can only be awarded, under s. 14 of the Act, in the event of no property sufficient for the payment of the fine being found. REG. v. LADU. 7 Bom., Cr., 87

140. — Conviction under s. 48, Act XXIV of 1859—*Mad. Act I of 1865—Procedure to enforce fine*.—Persons convicted under s. 48 of the Police Act (XXIV of 1859) are not liable to both fine and imprisonment in default of payment. The procedure to be followed in enforcing the fine is that laid down in Madras Act V of 1865. ANONYMOUS. 3 Mad., Ap., 9

ANONYMOUS. 7 Mad., Ap., 22

141. — Attempt to commit suicide—*Penal Code, s. 309*.—A prisoner found guilty, under s. 309 of the Penal Code, of an attempt to commit suicide, must be sentenced to some imprisonment, and not merely to payment of a fine. REG. v. CHANNIOVA. 1 Bom., 4

## (c) IMPRISONMENT IN DEFAULT OF FINE

142. — Additional imprisonment—*Rigorous imprisonment*.—Additional imprisonment in default of payment of fine for the offence of dacoity must be rigorous. QUEEN v. SELMONT KOTAL. 7 W. R., Cr., 31

143. — Limitation of imprisonment in summary trials—*Fine—Criminal Procedure Code, 1882, ss. 32, 33, 262—Penal Code, s. 67—Act VIII of 1892*.—In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the rule of s. 262 of the Criminal Procedure Code limiting the period of imprisonment in summary trials does not apply, as that section only refers to substantive sentences of imprisonment. EMPRESS v. ASGHAR ALI. I. L. R., 6 All., 61

144. — Presidency Magistrates' Act, 1877, s. 167—*Award of substantive sentence of imprisonment*.—The words "to imprisonment for a term exceeding six months or to fine exceeding R200" in s. 167 of the Presidency Magistrates' Act (IV of 1877) are confined in their meaning to substantive sentences, and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. IN THE MATTER OF JOTHARAM DAYA. I. L. R., 2 Mad., 30

145. — Committing affray—*Penal Code, s. 160—Criminal Procedure Code, 1872,*

## SENTENCE—continued.

## 5. IMPRISONMENT—continued.

s. 309.—Prisoners were convicted of having committed an offence punishable under s. 160 of the Penal Code, and were sentenced to pay a fine of R25 each, or in default to be rigorously imprisoned for thirty days, the full term of imprisonment under the section. Held by a majority of the High Court (KINDERSLEX, J., dissenting) that having regard to the provisions of s. 309 of the Criminal Procedure Code (Act X of 1872), the sentence was legal. REG. v. MUHAMMAD SAIB. I. L. R., 1 Mad., 277

146. — Criminal Procedure Code, s. 33—*Penal Code, s. 65*.—S. 33 of the Code of Criminal Procedure, 1882, does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. REG. v. MUHAMMAD SAIB, I. L. R., 1 Mad., 277, was overruled in 1881. QUEEN-EMPRESS v. VENKATESAGADU [I. L. R., 10 Mad., 165

ANONYMOUS. I. L. R., 10 Mad., 166 note

147. — Assault—*Penal Code, ss. 65 and 352*.—In a case of assault, a sentence inflicting a fine of R50 and awarding imprisonment for one month in default of payment of the fine is illegal, with reference to ss. 65 and 352 of the Penal Code. IN THE MATTER OF JEHAN BUKSH [16 W. R., Cr., 42

148. — Sentence under Bom. Act VII of 1867, s. 31—*Simple imprisonment*.—Imprisonment in default of payment of a fine inflicted under Act (Bombay) VII of 1867, s. 31, ought to be simple, not rigorous. REG. v. BECHAR KRUSHAL. 5 Bom., Cr., 43

149. — Conviction under Cattle Trespass Act (III of 1857)—*Fine and imprisonment*.—Certain persons were convicted under s. 13, Act III of 1857, and sentenced to fifteen days' imprisonment and a fine, or in default imprisonment for the term of seven days. No provision was made in the Act for awarding imprisonment in default of payment of fine, but the prisoners were liable under the section to six months' imprisonment and a fine of R500. The High Court refused to interfere with the sentence passed. ANONYMOUS [5 Mad., Ap., 21

But see ANONYMOUS. 7 Mad., Ap., 22

150. — Contempt of Court—*Criminal Procedure Code, 1861, s. 163—Power of Magistrate*.—The Magistrate convicted the defendant of contempt of Court under s. 163 of the Code of Criminal Procedure, and sentenced him to pay a fine of R10, or in default two days' imprisonment. Held that the Magistrate had not exceeded his powers. ANONYMOUS. 6 Mad., Ap., 16

151. — Offence under Income Tax Act (IX of 1869)—*Power of Magistrate*.—A Magistrate has no power under s. 25, Act IX of 1869, to sentence to imprisonment in default of the payment of the fine imposed for not paying income tax. QUEEN v. NODIAR CHAND KOONDOD [14 W. R., Cr., 70

## SENTENCE—continued

## 5. IMPRISONMENT—continued.

152. — Offence under Income Tax Acts (IX of 1869 and XXIII of 1869)—*General Clauses Consolidation Act (I of 1858), s. 5*—The Income Tax Act (Act IX of 1869, supplemented by Act XXIII of 1869) having been passed subsequently to the General Clauses Act (I of 1858), s. 5 of the latter authorized the award of imprisonment in default of payment of the fine imposed under s. 25 of the former. *REG. v. SANGARA 3D BARRIAPA* . 7 Bom., Cr., 78

153. — Offences under Madras Abkari Act (III of 1864), ss. 21, 22, 30, 32—*Penal Code, s. 64*.—Prisoners were sentenced to fines under ss. 21 and 22 of Madras Act III of 1864, and in default of payment of fine to rigorous imprisonment. *Held* that, as fine in these cases was the only assumable punishment, and by ss. 30, 31, and 32 a specified procedure is laid down for the levy of the penalty, s. 64 of the Penal Code had no application. *ANONYMOUS* . 8 Mad., Ap., 40

154. — Offence under License Acts (XXI of 1867, s. 15, and XXIX of 1867, s. 3)—*Power of Magistrate*—Where a Magistrate sentenced a person, who had neglected to take out a license, under Act XXI of 1867, s. 15, and Act XXIX of 1867, s. 3, to pay a fine of Rs. 10, and in default of payment to suffer seven days' simple imprisonment, the High Court reversed so much of the sentence as awarded imprisonment, as the trying Magistrate had under the Act no power to make such an order. *REG. v. CHEVAPPA VALAD NAGAPPA* [5 Bom., Cr., 44

155. — Neglect to comply with order for maintenance—*Criminal Procedure Code, 1852, s. 498*—*Subsequent offer to pay, Effect of, on sentence*—A sentence of imprisonment awarded under s. 498 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute, and the defaulter is not entitled to release upon payment of the arrears due. *BITACHA v. MOIDIN KUTTI* . I. L. R., 8 Mad., 70

156. — Committing public nuisance—*Penal Code, s. 290*—The sentence of imprisonment passed in default of the payment of a fine inflicted under s. 290 of the Penal Code (for committing a public nuisance) should be one of simple, not rigorous, imprisonment. *REG. v. SANTU KIN LAKHAPPA KORE* . 5 Bom., Cr., 45

157. — *Penal Code, s. 290*.—A sentence of rigorous imprisonment in default of payment of fine for the offence of nuisance under s. 290 of the Penal Code is legal. *QUEEN v. YELLAMASUDU* . I. L. R., 5 Mad., 157

*Contra, see REG. v. SANTU KIN LAKHAPPA KORE* [5 Bom., Cr., 45

158. — Salt Act (XVII of 1840), Breach of—*Mad. Reg. I of 1895*.—A sentence of imprisonment in default of payment of a fine imposed under the provisions of Act XVII of 1840 is illegal. *QUEEN v. AMBAYAM*

[I. L. R., 4 Mad., 335

## SENTENCE—continued.

## 5. IMPRISONMENT—continued.

159. — *Substantive sentence—Mad. Reg. I of 1895*.—Act XVII of 1940 authorizes a substantive sentence of imprisonment. *ANONYMOUS CASE* . I. L. R., 4 Mad., 335 note

160. — Offence under Salt Revenue Act (XXXI of 1850)—*Criminal Procedure Code, 1851, ss. 21 and 45—Penal Code, s. 65*.—S. 45 of the Criminal Procedure Code made applicable the provisions of s. 65 of the Penal Code not only to offences falling under that Code as defined in its 40th section, but to every case in which a Magistrate had jurisdiction under s. 21 of the Criminal Procedure Code. Imprisonment for one month awarded in default of payment of a fine under s. 3 of the Salt Revenue Act (XXXI of 1850) was accordingly reduced to three weeks' simple imprisonment. *REG. v. VITHOBA BIN SOMA*

[5 Bom., Cr., 61

161. — Non-payment of taxes—*Bombay District Municipal Act (Bom. Act VI of 1873), s. 84, as amended by Bombay District Municipal Act (Bom. Act II of 1884), s. 42—Penal Code (Act XLV of 1860), s. 40 and s. 64—Penalty, "Fine"—Imprisonment in default of payment of penalty*.—There is no distinction between the word "penalty" as used in the Bombay District Municipal Act (Bombay Act VI of 1873) and the word "fine" as used in s. 64 of the Indian Penal Code (Act XLV of 1860). Imprisonment can therefore be awarded in default of any penalty inflicted under s. 84 of the Municipal Act as amended by Bombay Act II of 1884. *IN RE LAKHIA*

[I. L. R., 18 Bom., 400

162. — Excess charge and fare, Non-payment of—*Railways Act (IX of 1890), s. 113—Power of Magistrate to impose imprisonment in default—Fine*.—S. 113, sub-s. (4), of the Indian Railways Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, do not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such. *QUEEN-EMPEROR v. KUTIAFA*

[I. L. R., 18 Bom., 440

163. — Penal Code (Act XLV of 1860), ss. 40 and 64—*Madras Towns Nuisances Act (Mad. Act III of 1899), ss. 3 and 11—Magistrate, Jurisdiction of*.—Where a conviction has taken place under the Towns Nuisances Act (Madras), 1899, s. 8, a Magistrate has jurisdiction to impose a fine and also to pronounce a sentence of imprisonment in default of payment of the fine. *QUEEN-EMPEROR v. RAFFEL*

[I. L. R., 18 Mad., 480

164. — ss. 65, 67—*Imprisonment in default of fine—Madras Towns Nuisances Act (Mad. Act III of 1899), s. 3, cl. 10*.—An accused having been convicted of an offence under s. 3, cl. 10, of the Towns Nuisances Act

**SENTENCE—continued.****5. IMPRISONMENT—continued.**

(Madras), 1889, and sentenced to pay a fine of Rs and in default of payment to undergo simple imprisonment for a week.—*Held* (1) that s. 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only; has no application to offences punishable either with imprisonment or with fine, but not with both; such sentences are governed by s. 65 of the Indian Penal Code; and (2) that the sentence of imprisonment in default should not exceed one fourth of the maximum term of imprisonment provided for the offence. **QUEEN-EMPRESS v. YAKOOB SAHIB**

[I. L. R., 22 Mad., 233]

**165.** ——— *Sentences, Powers of Appellate Court in respect of—Magistrate, Jurisdiction—Criminal Procedure Code (1892), s. 423—Enhancement of sentence*—Where a District Magistrate acting as an Appellate Court in a criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of Rs10, or in default a further term of six weeks' rigorous imprisonment.—*Held* that, as the latter sentence might involve an enhancement of the former, such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure. **QUEEN-EMPRESS v. ISHRI**

[I. L. R., 17 All., 67]

**166.** ——— *Powers of Appellate Court as to alteration of sentence—Alteration so as to enhance sentence—Criminal Procedure Code (1892), s. 423.*—The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of Rs1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sentence beyond the powers of the Appellate Court under s. 423 of the Code of Criminal Procedure (Act X of 1892). *Held* that there was no enhancement of the sentence. **Queen-Emress v. Ishri, I. L. R., 17 All., 67, distinguished. QUEEN-EMPRESS v. CHAGAN JAGANNATH** . . . I. L. R., 23 Bom., 439

**167.** ——— *Criminal Procedure Code (Act V of 1898), s. 423—Alteration of sentence on appeal—Effect of alteration—Enhancement of sentence.*—A sentence of three months' imprisonment was on appeal altered by the Sessions Judge to one month's imprisonment with a fine of Rs20, or in default of payment to 15 days' rigorous imprisonment. This alteration of sentence was held not to amount to an enhancement of the sentence such as was contrary to the terms of s. 423 of the Criminal Procedure Code. No general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of a sentence is altered to a punishment of a lesser degree of severity. In each case the Court has to

**SENTENCE—continued.****5. IMPRISONMENT—concluded.**

consider what is the effect of the alteration. **Queen-Emress v. Chagan Jagannath, I. L. R., 23 Bom., 439, dissented from. RAKHAL RAJA v. KHIRODE PERSHAD DUTT** . . . I. L. R., 27 Calc., 175

**6 SENTENCE AFTER PREVIOUS CONVICTION.**

**168.** ——— *Penal Code, s. 75—Receiving stolen property acquired by dacoity.*—Where soon after his release on expiry of a sentence of seven years' imprisonment on conviction of "receiving stolen property acquired by dacoity" a person is convicted of house-breaking and theft, he is sufficiently punished by a sentence of seven years' transportation; a sentence of transportation for life is too severe. It is not the intention of the Legislature that a previous conviction should so enormously enhance the heinousness of petty offences. **IN THE MATTER OF SHAMJEE NASHYO** 1 C. L. R., 481

**169.** ——— *Previous convictions of offence before Penal Code came into operation*—*Held* by the majority of the Court (CAMPBELL, J., dissenting) that s. 75 of the Penal Code only applies to conviction of offences committed after the Code came into operation. **QUEEN v. HURPAUL** . . . 4 W. R., Cr., 9

REG. v. KUSHYA BIN YESU . 4 Bom., Cr., 11

**170.** ——— *Previous conviction not under Penal Code.*—An accused person can only be punished under s. 75 of the Penal Code where the previous conviction has been under that Code. **BUDHON RUJWAR v. EMPRESS**

[10 C. L. R., 302]

**171.** ——— *Evidence of previous conviction*—To warrant a sentence awarding an additional punishment under s. 75 of the Penal Code, as on a second conviction, the evidence that there was a previous conviction against the accused under the Penal Code must be clear and precise. **QUEEN v. NAIMUDDI SHEIKH alias ABBAS SHEIKH** . . . 14 W. R., Cr., 7

**172.** ——— *Amalgamation of sentence—Transportation*—Sentence of transportation for fourteen years under s. 392 of the Penal Code annulled, as the offence for which such sentence was passed was not committed subsequently to any conviction; and s. 75 had therefore been improperly applied. *Semble*—That a Sessions Judge cannot (under s. 75 of the Penal Code or otherwise) by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted. **REG. v. SAKYA TALAD KATJI**

[5 Bom., Cr., 38]

**173.** ——— *Attempt to commit offence—Penal Code, Ch. XXIII—S. 75 of the Penal Code is restricted to offences under*

**SENTENCE—continued****6 SENTENCE AFTER PREVIOUS CONVICTION—continued**

Chs. XII and XVII of the Penal Code when the term of imprisonment awardable is three years' imprisonment and upwards, and does not refer to an attempt to commit any of those offences (Ch. XXIII) nor can any case be brought within it merely because the punishment that may be given for it extends to three years and upwards. **QUEEN v. DAMR HAREE** 21 W R., Cr., 35

174. — *Previous conviction of offence not under Ch. XVII of Penal Code*—An offender is only liable to enhanced punishment under s. 70 of the Penal Code for an offence punishable under Ch. XVII after having been punished with imprisonment for the same offence or for an offence punishable under the same chapter. **QUEEN v. PUNOS** 5 W R., Cr., 66

175. — *Previous offence under Ch. XII or Ch. XVII of the Penal Code*—Held that where a person commits an offence punishable under Ch. XII or Ch. XVII of the Penal Code punishable with three years' imprisonment, and previously to his being convicted of such offence commits another such offence punishable under either of such chapters he is not subject, on being convicted of the second offence to the enhanced punishment provided in s. 70 of the Penal Code. **EMPRESS v. MEGHA** I L R., 1 All. 637

176. — *Addition of sentence*—The object of s. 75 of the Penal Code is to provide for an additional sentence not a less severe sentence on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient. **SURO SARAN TATO v. EMPRESS** [I L R., 9 Calc., 877

177. — *Enhanced punishment—Transportation for seven years—Imprisonment*—The accused having been previously convicted of offences punishable under Ch. XII or Ch. XVII of the Penal Code, with imprisonment for a term of three years or upwards was subsequently convicted of an offence under one of those chapters punishable with imprisonment which may extend to three years, and sentenced to imprisonment for seven years. Held that a sentence of imprisonment for seven years was illegal. Under s. 70 of the Penal Code the accused might be transported for life but he could not be imprisoned for a longer period than six years. **EMPRESS v. MAHARU** [I L R., 8 Bom., 690

178. — *Further sentence after actual sentence—Penal Code s. 46*—Where a first class Subordinate Magistrate sentenced a prisoner to six months' imprisonment under s. 457 of the Penal Code and finding that the prisoner was liable to enhanced punishment under s. 75 of the Penal Code sentenced the prisoner to six months' further imprisonment under s. 46 of the Code of Criminal Procedure, the latter sentence was set aside by the High Court. **ANONYMOUS** 5 Mad., Ap., 3

**SENTENCE—continued****6 SENTENCE AFTER PREVIOUS CONVICTION—continued**

179. — *Prisoner having had several previous convictions*—Where the prisoner had already been several times convicted of similar offences, the Magistrate should have committed him to the Court of Session, with a view to his being punished as after previous conviction under s. 75 of the Penal Code. **PUN v. GAVU LADU** 2 Bom., 132 2nd Ed., 129

180. — *Imprisonment—Power of Magistrate—Counterfeits & marks on documents*—The prisoner was convicted under s. 475 of the Penal Code and having been previously convicted of an offence punishable under Ch. XVII of the Code the Magistrate sentenced him to four years' rigorous imprisonment. Held that the Magistrate had power to pass sentence of two years' imprisonment only under s. 75 Penal Code. **ANONYMOUS** 6 Mad., Ap., 3

181. — *Attempt to commit offence—Penal Code Ch. XVII, s. 457—Lark sing house (trespass)*—A person having been convicted of an offence punishable under s. 457 (Ch. XVII) of the Penal Code was subsequently guilty of an attempt to commit such an offence. Held that the provisions of s. 75 of the Penal Code were not applicable to such person. **EMPRESS v. PAM DAYAL** [I L R., 3 All., 773

182. — *Conviction of an attempt to commit theft—Previous conviction of theft*—(MEWILL, J., dissenting)—If a person who has been convicted of an offence punishable under Ch. XII or Ch. XVII of the Penal Code with imprisonment for a term of three years or upwards is convicted of an attempt to commit any such offence, he does not thereby become liable to the enhanced punishment allowed by s. 75 of the Code. **EMPRESS v. NANA RAHIM** I L R., 5 Bom., 140

183. — *and ss. 179, 511—Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction*—A person who has been convicted of the offence of theft (an offence punishable under Ch. XVII of the Penal Code) does not on being convicted of an attempt to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code. **QUEEN EMPRESS v. SRI CHARAN BAURI** I L R., 14 Calc., 357

184. — *and ss. 457 and 511—Attempt to commit house-breaking by a thief after previous conviction*—S. 75 of Act XLV of 1850 does not apply to the case of an attempt to commit the offence punishable under s. 557 of the Code after previous convictions of offences falling within Ch. XII or Ch. XVII such offence being punishable under s. 511. **Sheo Saran Tato v. Empress** I L R., 9 Calc., 877 **Empress of India v. Ram Dayal**, I L R., 3 All., 778 **Empress v. Nana Rahim**, I L R., 5 Bom., 140 **Queen Empress v. Sreekarun Bauri**, I L R., 14 Calc., 357, referred to. **QUEEN EMPRESS v. ANUDEHA** I L R., 17 All., 120

## SENTENCE—continued.

## 6. SENTENCE AFTER PREVIOUS CONVICTION—concluded.

185. ————— and s. 511—*Attempt to commit an offence after previous conviction.*—S. 75 of the Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress v. Ajitha, I. L. R., 17 All., 120*, approved. *QUEEN-EMPRESS v. BHAROSA* . I. L. R., 17 All., 123

## 7. SOLITARY CONFINEMENT.

186. ————— s. 74—*Duration of solitary confinement.*—Solitary confinement must not be imposed for the whole term of a person's imprisonment. Under s. 74 of the Penal Code, it is to be imposed at intervals. *IN THE MATTER OF NYAN SUK METHER* . . . 3 B. L. R., A. Cr., 49

187. ————— s. 73—*Criminal Procedure Code, ss. 32 (a), 262—Summary trial.*—It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily. *EMPRESS v. ANNU KHAN* . . . I. L. R., 6 All., 83

## 8. TRANSPORTATION.

188. ————— Measure of punishment—*Murder.*—A sentence of transportation other than for life is illegal in the case of a prisoner convicted of murder. *QUEEN v. BHODHO MULICK* [8 W. R., Cr., 85

189. ————— *Reasons for sentence.*—*Criminal Procedure Code, 1861, s. 350.*—S. 380 of the Code of Criminal Procedure, 1861, did not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life, and it required the Judge, if he sentence such prisoner to transportation for life instead of capital, to assign his reasons for so doing. *QUEEN v. DABEE* . W. R., 1864, Cr., 27

190. ————— *Unpremeditated murder.*—Where murder is not premeditated, transportation for life is a sufficient punishment. *QUEEN v. RAM CHURN KURNOKAR*

[24 W. R., Cr., 28

191. ————— *Penal Code, ss. 307 and 394—Attempt to murder—Causing hurt in committing robbery.*—Neither under s. 307 nor under s. 394 of the Penal Code can a prisoner be sentenced to fourteen years' transportation, the punishment awardable under those sections being transportation for life, or rigorous imprisonment for ten years, with fine. *QUEEN v. BHANOUR DOOSADH* [7 W. R., Cr., 41

192. ————— *Waging war with Power in alliance with the Queen.*—The punishment for a prisoner convicted of waging war with an Asiatic Power in alliance with the Queen must, under the Penal Code, be either transportation for life or imprisonment of either description which may extend to seven years. Where such a prisoner was

## SENTENCE—continued.

## 8 TRANSPORTATION—continued.

sentenced to ten years' transportation, the sentence was held to be illegal. *QUEEN v. KRIPA SINGH* [3 W. R., Cr., 16

193. ————— *Killing a wizard.*—A sentence of death was commuted into one of transportation for life in the case of a prisoner who committed murder in the belief that the deceased was a wizard and the cause of his child's illness, and that by killing the deceased the child's life might be saved. *QUEEN v. OGRAM SUNGRA*

[6 W. R., Cr., 82

194. ————— *Murder by way of retaliation.*—The sentence of death reduced to transportation for life in a case of murder committed rather by way of retaliation for injury than under the influence of any worse passion. *QUEEN v. TONOO* [6 W. R., Cr., 46

195. ————— *Reckless assault with deadly weapon.*—The punishment of transportation for life was inflicted instead of capital punishment in a case where there was no intention to cause death, but a reckless assault with a deadly weapon which inflicted an injury likely in the ordinary course of nature to cause death. *QUEEN v. KHOAZ SHEIKH* . . . 5 W. R., Cr., 20

196. ————— Commutation of capital sentence—*Likelihood of accident at execution.*—Where the condition of the convict rendered it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one for transportation for life. *BOODHO JOHAHA v. EMPRESS* . . . 2 C. L. R., 215

197. ————— Penal Code, s. 59—*Measure of punishment—Penal Code, s. 412.*—A sentence of transportation under ss. 412 and 59 of the Penal Code cannot exceed ten years. *QUEEN v. MOHANUNDO BHUNDARY* . . . 5 W. R., Cr., 16

198. ————— *Measure of punishment—False evidence and forgery.*—Under s. 59 of the Penal Code, no sentence of transportation for a shorter period than seven years can be passed on any charge. Therefore where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under s. 193, and of forgery under s. 467, and sentenced to seven years' transportation for the first offence and a further period of transportation for three years for the second offence, the second sentence was quashed as illegal. *QUEEN v. GOUR CHUNDER ROY* . 8 W. R., Cr., 2

199. ————— *Criminal Procedure Code, 1861, s. 59—Power to commute punishment after sentence of imprisonment.*—Under s. 59 of the Penal Code, a Court can sentence to transportation only in a case in which the offence is punishable with imprisonment for seven years or upwards. It may, in passing sentence for the offence, commute the imprisonment to transportation, but it cannot commute the sentence after the sentence of imprisonment has been passed. *QUEEN v. PREM CHUND OUSOWAL* [W. R., 1864, Cr., 35



## SENTENCE—continued

## 8. TRANSPORTATION—continued

200 ———— *Commutation of sentence after amalgamating two sentences*—To bring a 59 of the Penal Code into operation, the punishment awarded on one offence alone must be seven years' imprisonment and cannot be made up by adding two sentences together and then commutating the amalgamated period to transportation. *QUEEN v. MOOTKEE KORA* 2 W R., Cr., 1

*QUEEN v. TOVGOORAM* 3 W R., Cr., 44

*QUEEN v. SHOSAVILLAH* 5 W R., Cr., 44

201 ———— *Commutation of sentence—Imprisonment in default of payment of fine*—S. 59 of the Penal Code does not authorize the substitution of transportation for the imprisonment to which a Court can sentence an offender in default of payment of fine. *KUSHUSSA v. QUEEN* [I. L. R., 5 Mad., 28]

202. ———— *Imprisonment—Penal Code s. 37—Unnatural offence*—When an offence is punishable either with transportation for life or imprisonment for a term of years if a sentence of transportation for a term less than life is awarded such term cannot exceed the term of imprisonment. *QUEEN v. NAJADA* I L. R., 1 All., 43

203 ———— *Commutation of sentence—Powers under Act XV of 1862 s. 1—Imprisonment or transportation*—An officer who in the exercise of the powers described in s. 1 Act XV of 1862 had passed a sentence of imprisonment for seven years, had power under s. 59 of the Penal Code, to commute this sentence into one of transportation for the like period. *JACKSON J.*, dissented. *QUEEN v. BOWENBOA*

[I. L. R., Sup. Vol., 839 9 W R., Cr., 6]

204. ———— *Commutation of sentence—Penal Code ss 376-511—Attempt to rape*—A was convicted of an attempt to commit rape and was sentenced by the Judge to rigorous imprisonment for seven years, which he commuted under s. 59 of the Penal Code to transportation for the same term. Held that under ss 376 and 511 of the Penal Code a sentence of imprisonment for the offence committed could not be for a longer term than five years and such sentence could not be commuted, under s. 59 to transportation for a longer term. *QUEEN v. MIRIAM* I L. R., A. Cr., 5 10 W R., Cr., 10

205 ———— *Commutation of sentence—Imprisonment*—When the law gives the alternative punishments of death, transportation for life, or rigorous imprisonment extending to ten years, a sentence of fourteen years' transportation is illegal. If the Judge thinks it proper to pass a sentence of transportation short of life, he should pass a sentence of imprisonment for the term fixed by law, and then, under s. 59 change it to transportation for that period. *QUEEN v. REGHOO*

[W. R., 1884, Cr., 30]

206 ———— *Successive sentences of transportation—Criminal Procedure Code 1851,*

## SENTENCE—continued.

## 8. TRANSPORTATION—continued

s. 43—A sentence of transportation for two periods each of seven years, one sentence to commence after the expiration of the other, was not warranted by s. 46 of the Code of Criminal Procedure, that section allowing such sentences only when the penalties consist of imprisonment. *QUEEN v. KASSIM ALLY*

[11 W. R., Cr., 10]

## 9 WHIPPING

207 ———— *Sentence giving both whipping and imprisonment—Power of Magistrate—Act VIII of 1836, s. 27—Act XIII of 1836, s. 27, gave a Magistrate power to award either imprisonment or whipping but not both, and a sentence which gave both was illegal. *QUEEN v. FITZ* Bourke, O. C., 239*

208 ———— *Person convicted of two or more offences under Penal Code—Imprisonment and whipping*—When a person is convicted at one time of two or more offences punishable under the Penal Code, the Court is empowered to sentence the prisoner in the one case to rigorous imprisonment and in the other case to whipping under Act VI of 18-4. *ANONIMO* 5 Mad., Ap., 18

209 ———— *Imprisonment in lieu of whipping—Criminal Procedure Code, s. 395—Court not authorized to inflict fine in lieu of whipping*—A Court has no power, under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, etc. The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. *QUEEN EMPRESS v. SHRODIX*

[I. L. R., 11 All., 308]

210 ———— *Ground for sentence—Statement of grounds a judgment*—When whipping is imposed as a punishment, the grounds for that form of punishment should be set out in the judgment. *BADIYA v. QUEEN* I. L. R., 5 Mad., 158

211 ———— *Sentence of imprisonment in lieu of whipping—Criminal Procedure Code (1852), s. 393—Powers of Magistrate*—Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence, and such sentence is accordingly commuted to one of imprisonment such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict. *Queen-Empress v. Shrodx* I L. R. 11 All., 309 referred to. *QUEEN EMPRESS v. RAM HARAY SINGH* I. L. R., 21 All., 25

## SENTENCE—continued.

## 10. POWER OF HIGH COURT AS TO SENTENCES.

## (a) GENERALLY.

212. ——— Power of High Court to interfere with sentence.—After a sentence has once been passed by a competent authority, the High Court has no more power to interfere with it than a private individual, except upon appeal, or on a reference, or by way of revision, as provided by the Code of Criminal Procedure. *QUEEN v. PUBAN*  
[7 W. R., Cr., 1

213. ——— Consolidation by High Court of sentences passed by lower Court—*Separate sentences, Illegality of.*—When the circumstances of the case justify, the High Court may substitute one aggregate or consolidated sentence for separate sentences passed by the Court below sufficient to meet the offence of which the accused has been convicted. *HEIDOR MONDAL v. JAGANANDA DAS*  
[4 C. W. N., 245

## (b) ENHANCEMENT.

214. ——— Power to enhance—*Criminal Procedure Code, 1861, s. 419—Sessions Judge.*—A Sessions Judge had, under s. 419 of the Criminal Procedure Code, 1861, no authority to enhance a sentence on appeal. *QUEEN v. BILORAM DOSS*  
[4 W. R., Cr., 20

215. ——— *Acquittal by Sessions Judge and assessors.*—Where a Sessions Judge and assessors acquit in a case of murder, but find the prisoner guilty of a minor charge, the Appellate Court has no power to interfere to enhance the punishment awarded. *IN THE MATTER OF TOYAB SHAIKH*  
1 Ind. Jur., N. S., 53

216. ——— *Appellate Court—Criminal Procedure Code, 1872, s. 280.*—S. 280 of the Code of Criminal Procedure, 1872, authorized an Appellate Court, subject to the proviso in the final sentence, to enhance any punishment that had been awarded. *ANONYMOUS*  
I. L. R., 1 Mad., 54

217. ——— *Criminal Procedure Code, 1872, s. 18—"Modify."*—The word "modify" in s. 18, cl. 2, of the Code of Criminal Procedure did not include the power to enhance a sentence; consequently, where an Assistant Sessions Judge passed a sentence of more than three years' imprisonment, the Sessions Judge could not enhance it. *IMPERATRIZ v. RAMA PREMA*  
[I. L. R., 4 Bom., 239

218. ——— *Criminal Procedure Code, 1872, s. 280—Enhancement without notice.*—Where a District Magistrate on appeal made an order under the Code of Criminal Procedure, s. 280, enhancing the sentence appealed from, without having served notice on the appellant, the order of enhancement was quashed as illegal. *QUEEN v. HEENUT ALI*  
24 W. R., Cr., 72

## SENTENCE—continued.

## 10. POWER OF HIGH COURT AS TO SENTENCES—continued.

219. ——— Exercise of power—*Criminal Procedure Code, 1872, s. 250.*—Circumstances under which the High Court would, on appeal by the prisoner, enhance the punishment under s. 250, Act X of 1872. *QUEEN v. SOFFIBUDDI PALWAR*  
[13 B. L. R., Ap., 23; 22 W. R., Cr., 5

220. ——— *Criminal Procedure Code, 1872, s. 250 (1861—69, s. 419).*—The High Court on appeal, being of opinion that the case was one where no circumstances of mitigation were set forth, and where, without any sufficient reason, the Judge had awarded a punishment which in ordinary cases would be quite inadequate, enhanced the punishment under s. 250, Act X of 1872. *QUEEN v. GOOJREE PANDAY*  
[11 B. L. R., Ap., 3; 20 W. R., Cr., 21

221. ——— *Enhancement of sentence on appeal—Criminal Procedure Code (Act X of 1862), ss. 423, 429.*—A head constable was convicted under s. 330 of the Penal Code, and at a trial before a Sessions Judge sentenced to four months' simple imprisonment. The prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced. *METHER ALI v. QUEEN-EM-PRESS*  
I. L. R., 11 Cal., 530

222. ——— *Criminal Procedure Code, 1872, s. 250—Alteration of conviction from culpable homicide to murder.*—Under s. 250 of the Code of Criminal Procedure, the High Court altered the conviction in this case from culpable homicide into one for murder, and enhanced the sentence accordingly. *QUEEN v. ROHEEV*  
[21 W. R., Cr., 39

223. ——— *Enhancement of sentence on persons not appealing.*—Five persons were convicted of mischief; one prisoner appealed. Notice to attend the hearing of the appeal was sent to all five prisoners, of whom only three attended. The Head Assistant Magistrate, however, enhanced the sentence passed on all. *Held* that the enhanced sentence passed on the prisoners who did not appear and who did not appeal must be annulled. *ANONYMOUS*  
8 Mad., Ap., 8

## (c) MITIGATION.

224. ——— Power to mitigate sentence—*Criminal Procedure Code (Act XXV of 1861), ss. 405 and 428.*—The High Court could, under ss. 405 and 428 of the Criminal Procedure Code, mitigate a sentence passed by a Magistrate and confirmed or altered on appeal by the Sessions Judge, on the ground that the sentence was excessive. *IN THE MATTER OF THE PETITION OF BISSUMHAR SHAIKH*  
[B. L. R., Sup. Vol., 484; 6 W. R., Cr., 7

Overruling *QUEEN v. RANDHONE MENDUL*  
[4 W. R., Cr., 15

225. ——— *Criminal Procedure Code, 1861, s. 405.*—The High Court (like the Sessions Judge) could not, under s. 445, Criminal

## SENTENCE—continued

## 10 POWER OF HIGH COURT AS TO SENTENCE—continued

Procedure Code, 1861 nullify the verdict of a jury by interfering to lessen the punishment. *S. 405* referred to cases where the offence was proved, but where the punishment inflicted was held to be too severe and not to cases where the conviction itself was considered improper. *QUEEN v. BISSONATH MITTER* [8 W. R., Cr., 8]

228 — Exercise of powers—Case submitted for consideration of Government.—If there are circumstances which render expedient or advisable a mitigation of the sentence required by the law to be passed in cases of murder, the Judge may record these circumstances and submit them for the consideration of the Government, and the Government might, under s. 54 Criminal Procedure Code, 1861, act as to it seems proper. *QUEEN v. DABEE* [W. R., 1864, Cr., 27]

## (d) REVERSAL.

227 — "Reverse," Meaning of—Criminal Procedure Code (Act XXV of 1861), ss. 419-426.—The word "reverse" in ss. 419 and 426, Code of Criminal Procedure (Act XXV of 1861), ss. 250 a and 251 of Act X of 1872, meant to make void, to set aside, or annul and not merely to change or turn into the contrary. *QUEEN v. ELASHI BAY* [B. L. R., Sup. Vol., 459 5 W. R., Cr., 80]

228 — Power to reverse sentence—Criminal Procedure Code (Act XXV of 1861), s. 426.—A was charged with the offence of voluntarily causing hurt to C, and B was charged with the same offence and also with the offence of abetting A. The Magistrate found A guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B guilty of abetting of the offence of voluntarily causing hurt to C, and sentenced him to one month's rigorous imprisonment and a fine. On appeal, the Sessions Judge held that there was no evidence to convict A, and he accordingly released the prisoner. The appeal of B however, was rejected, on the ground that the evidence though it did not prove him guilty of abetting, proved him guilty of voluntarily causing hurt; and therefore, under s. 426 of the Code of Criminal Procedure, the sentence could not be reversed. No error or defect either in the charge or in the proceedings on trial was alleged. Held (by MITTER J.) that s. 426 of the Code of Criminal Procedure did not apply. *QUEEN v. MAURENDRA NATH CHATTERJEE* 6 B. L. R., Ap, 39

S. C. GOVT. MONTY GROSS v. MONIVIRO NATH CHATTERJEE. 13 W. R., Cr., 78

229 — Reversal of conviction—Description of evidence inadmissible—Criminal Procedure Code, 1872, s. 250.—If in a case tried by a jury the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court

## SENTENCE—concluded.

## 10 POWER OF HIGH COURT AS TO SENTENCES—concluded.

may reverse the conviction and sentence and order a new trial (s. 260 of the Code of Criminal Procedure). *REG v. AMRITA GOVINDA* 10 Bom., 487

## SEPARATE ACQUISITION.

See HINDU LAW—JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY—ACQUIRED PROPERTY

See CASES UNDER HINDU LAW—JOINT FAMILY—PRESCRIPTION AND OUS OF PROOF AS TO JOINT FAMILY

## SEPARATE CHARGES.

See CASES UNDER JOINDER OF CHARGES

## SEPARATE OFFENCES.

## Conviction of—

See REVISION—CRIMINAL CASES—SEE TRYCKER B. L. R., Sup. Vol., 459

See CASES UNDER SENTENCE—CUMULATIVE SENTENCES.

See STOLEN PROPERTY, OFFENCES RELATING TO I. L. R., 1 All., 379

## Trial of—

See CASES UNDER JOINDER OF CHARGES

## SEPARATE PROPERTY.

See CASES UNDER HINDU LAW—JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY—ACQUIRED PROPERTY.

See CASES UNDER HUSBAND AND WIFE.

See SUCCESSION ACT, s. 4. [13 B. L. R., 333]

## SEQUESTRATION.

1. — Writ of sequestration—Contempt of decree or order of Court.—Rule of Bombay Supreme Court, 389—"Fortnight"—The process of sequestration for contempt of a decree or order of Court, as it existed in the late Supreme Court, will, in a proper case, issue out of the High Court. The object of rule 389 of the Supreme Court Rules, which required a party who wished to enforce an order by sequestration to indorse upon the copy of the order served upon his opponent a memorandum to the effect that in default of performance of the order he would be liable to be arrested and to have his estate sequestered was to enable the party making such endorsement to apply *ex-parte* for the writ. In the absence of such a memorandum indorsed upon the copy order, a party desirous of enforcing an order by sequestration must give proper notice to his opponent of his intention to apply for the writ. An

**SEQUESTRATION—concluded.**

order commanding an act to be done "forthwith" is sufficiently in conformity with the rule that requires the time within which an act ordered to be done is to be performed to be specified in the order. *HARIVALLABHDAS KALLIANDAS v. UTAMCHAND MANIKCHAND* . . . . . 8 Bom., O. C., 135

2. ———— *Property out of jurisdiction of High Court—Power of High Court.*—The High Court will assert its jurisdiction for the purpose of preventing a writ of sequestration issued by it from becoming a mere form, and under proper circumstances will operate in *personam* where the property sought to be sequestered is outside its jurisdiction. *HARIVALLABHDAS KALLIANDAS v. UTAMCHAND MANIKCHAND*. *In re GOPALRAY MYRAL* [8 Bom., O. C., 236]

**SERVANT.**

See CASES UNDER LIMITATION ACT, 1877, ART. 7 (1859, s. 1, CL. 2).

See CASES UNDER MASTER AND SERVANT.

See CASES UNDER PUBLIC SERVANT.

**— Custody of—**

See ARMS ACT, 1878, s. 19.

[I. L. R., 20 Calc., 444  
I. L. R., 16 All., 276]

See CONTRACT ACT, s. 178.

[I. L. R., 4 Calc., 497]

**— Domestic—**

See ACT XIII OF 1859.

[2 B. L. R., A. Cr., 32]

See WILL—CONSTRUCTION.

[8 B. L. R., 244  
9 B. L. R., Ap., 4]

**— Liability of—**

See BENGAL EXCISE ACT, 1878, ss. 53, 59.

[1 C. L. R., 416  
I. L. R., 6 Calc., 207  
I. L. R., 9 Calc., 847  
I. L. R., 17 Calc., 566]

See BOMBAY ABKARI ACT, 1876, s. 45.

[I. L. R., 15 Bom., 45]

**SERVICE OF PROCESS.**

See CASES UNDER PROCESS.

**SERVICE OF SUMMONS.**

See CASES UNDER SUMMONS.

**SERVICE TENURE.**

See BENGAL CESS ACT, 1871, s. 3.

[7 C. L. R., 373]

See BOMBAY REVENUE JURISDICTION ACT, s. 4 . . . I. L. R., 18 Bom., 319

See CASES UNDER GHATWALI TENURE.

**SERVICE TENURE—continued.**

See GRANT—CONSTRUCTION OF GRANTS.

[4 Bom., A. C., 1  
I. L. R., 9 Bom., 561  
I. L. R., 15 Bom., 222  
I. R., 18 I. A., 22  
I. L. R., 10 Mad., 1]

See HEREDITARY OFFICES ACT.

[I. L. R., 19 Bom., 250  
I. L. R., 20 Bom., 423]

See LIMITATION ACT, 1877, ART. 130 (1871, ART. 130) . . . I. L. R., 1 Bom., 586

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—SUBJECTS OF ACQUISITION.

[I. L. R., 4 Calc., 67]

1. ———— *Creation of service tenure—Long possession—Presumption—Chakeran lands—Chowkidari duties—Onus probandi.*—Long possession of lands as chowkidari chakeran affords ground for the presumption that the lands were set apart as such at the decennial settlement. The onus of proof that the lands were the private lands of the zamindar, not set apart at the decennial settlement as chowkidari chakeran, is on the zamindar. *MOORTAKESHEE DEBIA CHOWDHRAIN v. COLLECTOR OF MOORSHEEDABAD* . . . . . 4 W. R., 30

2. ———— *Performance of services—Nature of grant.*—A grant to a man and his heirs on condition of performing service does not in general mean that the service is to be personally performed by the grantee or his heirs, but that the grantee is to be responsible for its performance. *SHIB LALL SINGH v. MOORAD KHAN* . . . 9 W. R., 126

3. ———— *Deshmukh, Services of—Hereditary offices—Bom. Act XI of 1842, s. 2.*—By s. 2 of Act XI of 1843 hereditary officers are bound to "render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Government." *Semble*—That the "usual services" of a deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mamlatdar or mohalkari; and that the deshmukh is bound to perform or get performed so much writing business as is necessary for the above purposes, and no more. But if by reason of the sub-division of the talukhs his duties in that respect are increased, he is bound either personally to perform such increased duties or to provide a karkun or karkuns to perform them for him. *RANGODA NAIK v. COLLECTOR OF RATTNAGIRI* [8 Bom., A. C., 107]

4. ———— *Right of female to inherit service tenure.*—The law in the Bombay Presidency recognizes the right of females to hold majumdari vatans, males being appointed by them to perform the service. *GOVERNMENT OF BOMBAY v. DAMODHAR PARMANANDAS* . 5 Bom., A. C., 202

5. ———— *Hereditary Offices Act (Bom. Act XI of 1843)—Right of females to inherit.*—Since the passing of Act XI of 1843 a

**SERVICE TENURE—continued**

female can inherit a majumdari vatan. The Collector can sue the whole proceeds of a vatan to the officiating person who is entitled to retain such proceeds as his remuneration. **BAT STRA v GOVERNMENT OF BOMBAY RAJENDRA KUTSHALDAS v BAT STRA** 8 Bom., A. C., 83

6 ——— **Right to officiate in proportion to shares held in vatan—Discretion of Collector.** *Act XI of 1943.*—The plaintiff had two shares and the defendant one in a patilki vatan. In an action brought by the plaintiff to establish his right to officiate twice as often as the defendant—*Held* that the plaintiff was not necessarily entitled to such right though the fact of his holding two shares in the vatan might be a reason for the Collector to exercise his discretion under Act XI of 1943 (when it was in force) in favour of the plaintiff by appointing him a longer period of management than to the defendant in the event of two shares not agreeing as to the person to officiate. **BHAVANI SADASHIV v BHAVANI MAHAI** 12 Bom., 232

7 ——— **Power of a vatandar to create a perpetual mutalik—Fission of successors from management of vatan—Kararpatra grant Construction of—Fission—Sasad Construction of.** The creation of a perpetual mutalik with a certain share of the vatan as writs on account of mutalik is within the powers of a holder of the vatan for the time being more especially when it is done for good and valual consideration passing to the vatan. But it is not competent to him to exclude his successors from the entire management of the vatan. In 1925 the ancestor of the plaintiff was a dhasi and the last proprietor of the dhasi vatan of Tegur granted to the ancestor of the defendants a kararpatra whereby in consideration of the services the latter was to render to the former in recovering the vatan, the defendants' ancestor was to enjoy one-third of the vatan as vatani mutalik from generation to generation. Subsequently the plaintiff's ancestor granted to the defendants' ancestor a sasad which referred to the kararpatra already executed and vested the entire management of the vatan in the defendants' ancestor from generation to generation after the said vatan was recovered. After protracted legal proceedings, in which the defendants' ancestor assisted the plaintiff's great-grandfather the vatan was recovered in 1939. In 1946 the defendants' ancestor actually entered into the management and continued to manage till 1950 in which year Government put the vatan under attachment. From 1950 to 1964 he remained out of possession in consequence of the attachment. In 1964 Government removed the attachment and restored the vatan to the plaintiff's father. On being asked by the Collector to appoint some one to take possession and management of the vatan the plaintiff's father wrote a reply on the 15th July 1965 that he had appointed the defendants' father to manage it and the defendants' father continued to manage it till his death in 1980. On his death a fresh mukhtearnama was executed to the defendants 1 and 4 by the mother of the plaintiff, who was then a minor.

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Under that mukhtearnama, the defendant's managed the vatan till 1969 in which year the plaintiff having attained his majority, wished to manage it himself, but was opposed by the defendants. The services in connection with the vatan had ceased in 1964. The plaintiff therefore brought the present suit in 1984 to recover the vatan with mesne profits. The defendants set up the kararpatra and the sasad by which they contended they had acquired the hereditary right to keep the whole vatan in their possession and management and to take one-third of the income derived from the same. The plaintiff impeached these documents as forgeries, and contended that in any case they were not binding on him as it was not competent to his ancestor to make a permanent alienation of the vatan or its management beyond his lifetime. The Court of first instance awarded the plaintiff a claim. On appeal by the defendants to the High Court—*Held* reversing the decree of the lower Court that the rights of the defendants under the kararpatra were in force and binding on the plaintiff notwithstanding that the services incidental to the vatan had ceased. That document had been executed not merely to create a permanent office for the services of which a certain share in the vatan was allotted as remuneration but it proceeded on the special service to be rendered to the family of the grantor by the recovery of the vatan itself. In other words, the performance of the service as mutalik was not the entire consideration or motive for the grant, nor did it expressly provide for the grant ceasing when the services should be no longer required. *Held* also that the sasad purported to exclude the grantor's successors in the vatan entirely from the management of the vatan, and to vest it in the permanent mutalik and whilst leaving them as the absolute owners of the two-thirds, to deprive them of all control over it. This was vitally to a touch an incident to the vatan inconsistent with its nature which the plaintiff's ancestor was not competent to do. The parties were entitled to the joint management of the vatan as tenants-in-common in respect of their undivided shares. **CHIMASI BALVANT v GENSAYA TIMAPA DESAI** I L. R., 14 Bom., 82

8 ——— **Appointment of deputy—Power of holder of tenure.** The holder of an hereditary office such as a dhasipade vatan, cannot create an hereditary deputy. The appointment of a deputy made by a particular incumbent cannot extend beyond the life of such incumbent. **RAVJI RAGHU SATHI v MAHADEVAY VISHVASATHI** 2 Bom., 237

9 ——— **Death of grantee without heirs—Custom—Reversion of jaghir to grantor.** Where the custom of the country was found to be that on the death of a service tenure holder without heirs a jaghir reverted to the grantor the right of the grantor to the land on the death of the grantee without heirs was recognized. **RAMSINGH SINGH v HUSO LAL SINGH** 8 W. R., 67

10 ——— **Abandonment of tenure—Mukhtaridar abandoning tenure—Forfeiture of property for rebellion.** A mukhtaridar having led

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and abandoned his tenure appertaining to a rebel's estate which was confiscated by Government, was held not entitled to recover the tenure on the ground that the mokumari was not an absolute tenure, but one on condition of service to be rendered to the former proprietor whose estate has been confiscated for rebellion. *NEPAL SINGH v. RAM SURUN SINGH* [W. R., 1864, 5

11. ———— *Alienation by holder—Crotiyam—Power of holder to alienate.*—Each holder of a crotiyam conferred for lives can only alienate his own life-interest. *SUNDARAMURTI MUDALI v. VALLINATAKKI ANVAL*. . . 1 Mad., 465

See *VISSAPPA v. RAMAJOGI*. . . 2 Mad., 341

12. ———— *Interest of one of co-parceners in service tenure—Nature of interest—Act XI of 1843.*—Held that the interest enjoyed by one of a body of co-parceners in possession of land attached by way of emolument to an hereditary office cannot be bequeathed to one or more of the other co-parceners, as the estate held by each sharer is only a life interest, subject to the right of the Collector, under Act XI of 1843, to assign a fit remuneration from the rent and profits for the maintenance of the person appointed to conduct the duties of the office. *BHIMAPPA v. MARIAPPA* [8 Bom., A. C., 128

13. ———— *Adverse possession against one holder how far a bar against a succeeding holder—Judgment against one holder how far res judicata against succeeding holder—Alienability of lands when services are abolished—Bom. Act II of 1865—Bom. Act VII of 1863.*—Held (1) that, in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service vatan lands is a bar to succeeding holders. (2) In the absence of fraud and collusion, judgment against one holder of service vatan lands is *res judicata* as regards a succeeding holder. (3) Such lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the vatan estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the lifetime of the alienor, the custom will operate equally after the patrimony has ceased to be a vatan, as before. Where, however, such a concurrent custom does not affect an estate, then when it is freed from its connection with the public office the reason arising from that connection for the preservation of the estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal. *PER WEST, J.*—(1) Lands with respect to which a summary settlement under Bombay Acts II and VII of 1863 has been effected are wholly exempt from official obligation. (2) Where service lands, or what were deemed service lands have been aliened, and at a later period the service has been disclaimed or abolished, this subsequent abolition or discharge

**SERVICE TENURE—continued.**

renders the title of the alienee in possession undisputable by the alienor's heirs, assuming that there is no special family custom operating apart from the law which preserves service lands for the intended uses. The alienation is, of course, subject to the terms on which family property can usually be alienated. *RADHABAI v. ANANTRAY BHAGVANT DESHPANDE*. . . I L. R., 9 Bom., 198

See *VASANJI HARIBHAI v. LALLU AKHU* [I L. R., 9 Bom., 285

14. ———— *Liability to sale in execution of decree—Police jaghir—Public services.*—A service tenure can be sold in execution of a decree for arrears of its own rent, provided that the service due from the holder be of a private kind, and personal to the plaintiff, but not where the service is of a public kind, as in the case of a police jaghir. *NILMONEE SINGH DEO v. KASHEE MAHTOON* [25 W. R., 206

15. ———— *Vatan—Mortgage of vatan property—Adverse possession—Limitation—Succession to vatan—Entry of vatan in name of trespasser—Effect of Gordon Settlement effected with trespasser—Right of redemption.*—*B D* died in 1847, leaving his two widows, *K* and *R*. The plaintiff *P* was born to *R* in 1848, i.e., the year after *B D*'s death. *B D*'s vatan had been attached by Government in 1844, but in 1849 or 1849 Government restored a small portion of it, entering it in the name of *K* and refusing to recognize the infant *P*. In 1865 the Government restored the rest of the vatan, again acknowledging *K* as the holder, the agreement with her being under "the Gordon Settlement." In 1865 *K* mortgaged two villages (part of the vatan) to one *S* (father of the defendants), who was the vatani karkun, for Rs. 9,000, which had been advanced by him to *K*, while the vatan was under sequestration. Possession was given to *S*, and the village officers were directed to pay him the revenues. Subsequently *K* repented of her bargain, and directed the village officers not to pay the revenues to *S*. He accordingly brought a suit against her for the revenues of 1869-70 and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Vatan Act (Bombay Act III of 1874). In 1873 *S* obtained a further decree against *K* for the revenue of two years (1870-72) and for possession as mortgagee. He got possession through the Court in 1875. *K* and *P*, who had been on good terms, quarrelled, and on the 16th March 1872 *K* adopted one *B* as a son to her deceased husband *B D*. In December 1872 *P* sued *K* and *B*, praying that he might be declared the son of *B D*, and that the adoption of *B* might be cancelled. In 1879 the High Court held that *P* was the legitimate son of *B D*, and that *K*'s adoption was invalid. The legitimacy of *P* being thus established, the Collector, in 1878, entered the vatan in his name. At that time and until 1880, *P* and *S* were on friendly terms, the two having joint possession of the mortgaged villages, *P* being subsequently to October 1878 the recognized occupant, and *S* taking some, if not

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all of the revenues of the two villages. In 1880 S died, and his sons, the defendants, quarrelled with P, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him, and not to the defendants. This order was subsequently set aside, and thereupon P in August 1887 filed the present suit to have the mortgage executed by K to S on the 15th September 1885 declared null and void and to recover possession of the two villages. In the alternative he prayed for redemption of the mortgage. The defendants pleaded (1) *inter alia* that the villages were not vatan; that they were entitled to the villages by reason of adverse possession; that the suit was barred by limitation; and that the plaintiff was estopped from disputing the mortgage etc. *Held* (1) on the evidence that the property in question was part of a *desai vatan*, and as such was held on service tenure. (2) That the property in question was subject to the rule which was in force in 1856 when the mortgage to S was executed, *i. e.*, that alienation by way of mortgage of any portion of vatan property had no force beyond the life of the vatanidar who mortgages it. (3) That the plaintiff having been declared to be the legitimate son of B D, he was from the date of his birth in 1848 the rightful standard and K, unless he was manager acting on his behalf was a trespasser. The fact that Government had entered the vatan in her name and that the "Gordon Settlement" was effected with her would not make her vatanidar as long as B D's son (the plaintiff) was alive. (4) That if K was a mere trespasser then the plaintiff's right to recover the lands free from encumbrance, on the ground that he was the vatanidar had been lost by limitation and the property had become K's by adverse possession. The plaintiff however as her step-son, was her heir. The mortgage was proved and was binding on him as heir and as such he had a right to redeem it. *WANTHIAO v. PADARA BIX BHAJANGRAH*

[I. L. R., 18 Bom., 22]

16 ——— *Vatan services land Alienation of—Gordon Settlement in the Southern Maratha Country—Effect of the application of to service vatan—Alienability of such vatan where services have been dispensed with—Vatanidars (Bombay) Act III of 1874—Bombay Reg. XVI of 1877—Bom. Acts II and VII of 1863—E and his sons were members of an undivided family. In execution of certain money decrees passed against E the lands in dispute were sold to various persons from whom they were afterwards bought by the defendant. In 1873 E died, and in 1887 his sons and grandson filed this suit against the defendant to recover the lands. They alleged that the lands were service vatan lands and inalienable and that the execution-sales affected nothing except E's life-interest, and that on E's death they (the plaintiffs) became entitled. They also contended that, even if the Court should find that the lands were not service vatan lands, they were at all events ancestral property, and that the plaintiffs' interests therein were not affected by execution-sales under decrees to which they were not parties. *Held*, on the evidence affirming the judg-*

**SERVICE TENURE—continued**

ment of the Court below, that, with the exception of two fields, none of the lands in question were service vatan lands. *Held* further that the two fields which were so excepted, and which had been the subject of a "Gordon Settlement" in 1864, remained inalienable vatan lands, although the services in respect of them had been dispensed with. The settlements made under Bombay Acts II and VII of 1863 made the lands thenceforth transferable as the property of the holder. *Raddhaka v. Asavars, I. L. R., 9 Bom., p. 215.* What is termed a "Gordon Settlement" was an arrangement, entered into in 1864 by a Committee of which Mr. Gordon, as Collector, was Chairman acting on behalf of Government, with the vatanidars in the Southern Maratha Country, by which the Government relieved certain vatanidars in perpetuity from liability to perform the services attached to their offices in consideration of a quit rent charged upon the vatan lands. These settlements were given binding legal effect by cl. 2 and 3 of a 15 of Bombay Act III of 1874. At the time when these settlements were made, lands were alienable by Bombay Regulation XVI of 1827 (as construed by the Courts) beyond the life of the actual incumbent and the Gordon Settlement of 1864 (unless where it was otherwise specially provided by a particular settlement) was not intended by either party to those settlements to convert the vatan lands into the private property of the vatanidar with the necessary incident of alienability but to leave them attached to the hereditary offices, which, although freed from the performance of services, remained intact, as shown by the definition of hereditary office in the declaratory Act III of 1874. *APPAJI BAPWAT v. KESHAU SHAMRAY KESHAU SHAMRAY v. APPAJI BAPWAT* I. L. R., 15 Bom., 13

17 ——— *Cessation of services—Land held on quit-rent—Waiver of performance—Lapse of tenure*—As an ordinary rule if land is given on a quit rent, or no rent at all, in consideration of service to be performed, the tenure would lapse when those services ceased. *Quere*—When no service has been required or performed for a long series of years, and the tenure has been allowed to be held at a quit-rent, or no rent at all, whether there has not been such a waiver of service as puts it out of the power of the grantor to resume the tenure simply on the ground that he has now no need of the service for which the tenure was originally created? *Quere*—Whether, when land is given at a quit-rent, on condition that the grantee shall aid the grantor in repelling the attacks of his enemies or for any other particular purpose while the grantee is willing to render those services, the grantor can put an end to the contract by saying that he has no enemies to repel, and therefore no need of the grantee's further services? *NIKHOSE SINGH DHO v. DHO TEWAR*

[W. R., 1894, 324]

18 ——— *Impartible vatan*—A cessation (even though sanctioned by the Government) of the performance of the duties attached to an impartible vatan does not alter the nature of the estate and make it partible. *SATYRIYA v. ANANDRAY* 12 Bom., 234

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19. ————— *Impartible ratan*  
*—Discontinuance of services.*—Discontinuance of services attached to an impartible ratan does not alter the nature of the estate and make it partible.  
 RAMRAO TRIMBAK v. YESHYANTRAO MADHAYRAO  
 [I. L. R., 10 Bom., 327]

20. ————— *Commutation of services—Desaigiri allowance—Right to hold as personal gratuity—Amin sukhdi—Suit to establish right to amin sukhdi.*—The parties, who were desais of Mahudhas, in addition to their "desaigiri" allowance enjoyed an allowance called "amin sukhdi." In 1847 the plaintiff sued the defendant's father and the Collector of Kaira for a share of the allowance; but as the whole of it had been reserved by the Collector to the defendant's father as the officiating desai, the suit was rejected under Act XI of 1843. In 1866 an arrangement was come to, under which a sum of Rs. 40-2-0 was to be annually available over and above the remuneration of the officiator. On the 9th of July 1867 the defendant received this sum for the first time. In 1873 a new arrangement was effected, under which the service was abolished, the Government resuming half of the allowance and giving up the other half freed from service unconditionally to the desais. On the 4th of October 1878 the plaintiff brought this suit to establish his right to a share of the moiety of the amin sukhdi allowance given to the desais by the Government and to recover his share of the amount received by the defendant. The defendant contended that the allowance was impartible and in the nature of a personal gratuity exclusively enjoyable by himself. *Held* that, independently of its origin and the light in which it was regarded by the Government and the parties, the amin sukhdi allowance having been actually included in and dealt with as part of the desaigiri ratan, and a moiety of it having been subsequently freed from the obligation of service, the desai who happened to officiate at the time the allowance was freed from service had no right to hold the moiety exclusively as a personal allowance to himself. *MANEKAL AMRATLAL v. SHIVLAL BHOGILAL*  
 [I. L. R., 8 Bom., 426]

21. ————— *Long possession*  
*—Liability for rent.*—The mere fact of a long prior possession or a service tenure on no rent at all gives the holder no exemption from the payment of rent when the service is no longer required or performed.  
 CHUNDER NATH ROY v. BHEEM SINGAR  
 [W. R., 1864, Act X, 37]

22. ————— *Commutation of services for rent*—Where the original donee of a service tenure ceases to do any service and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent. *MAHENDRA SINGH v. JOKHA SINGH*  
 [19 W. R., P. C., 211]

23. ————— *Resumption of tenure—Partition where service lands are all allotted to one co-sharer.*—The joint proprietors of a talukh assigned to the defendants a portion of land therein in consideration of chowkidari services rendered by him throughout the area of the talukh. A butwara

**SERVICE TENURE—continued.**

having been effected, the plaintiff obtained a fourth share within which fell the assigned land. Upon this the plaintiff sued the defendant to take back three-fourths of the service land on the ground that, being a one-fourth shareholder, he ought not to pay more than a one-fourth share of the consideration for the services rendered. *Held* that, as long as the defendant's services were required and rendered, the plaintiff could not, in equity or justice, withdraw from the defendant that land which had been given him by all the shareholders, when they were joint, as a consideration for those services. *BRECHOOK PASBAN v. KULAB SINGH*  
 20 W. R., 369

24. ————— *Bom. Act VII of 1863, s. 2—Jurisdiction of Civil Courts—Resumption of service tenures.*—(1. 4 of s. 2 of Bombay Act VII of 1863 (an Act for the summary settlement of claims to exemption from the payment of Government land revenue) enacted that no suit or action between Government and the holders of . . . any lands held for service in regard to the tenure of such lands should be entertained in any Court of Civil Judicature. *Held* that the phrase "lands held for service" meant lands declared by Government under s. 32 (d) of the Act to be so held, though the plaintiff might deny that the lands in respect of which he sues were service lands. The laying down of general rules by Government as to the resumption of service lands under art. 3, cl. 3 of s. 2 of the Act, was not a condition precedent to their protection from suits and actions in respect of such lands. *PREMSHANKAR RAGHUNATHJI v. GOVERNMENT OF BOMBAY*

[8 Bom., A. C., 195]

25. ————— *Suit for ejectment—Bengal Tenancy Act (VIII of 1855), ss. 89 and 181.*—Service tenures are excepted from the operation of s. 89 of the Bengal Tenancy Act. *MOEBUL HOSSAIN v. AMEER SHEIKH*

[I. L. R., 25 Calc., 131]

26. ————— *Resumption by the Government of estates held on political tenure—Mixed estate of saranjam and inam so held—Jurisdiction of the Civil Court.*—The engagements entered into by treaty between the British Government and the Raja of Satara in 1819, and the terms fixed separately with the several Satara jaghirdars in 1820, did not impart any greater fixity of tenure than had previously belonged to the latter under Maratha rule; and their jaghirs remained liable to resumption at the will of the Government. The question to whom a saranjam, or jaghir, shall be granted, upon the death of its holder, is one which belongs exclusively to the Government to be determined upon political considerations; and it is not within the competency of any legal tribunal to review the decision. Inam villages and lauds, with the mokassa, included originally in one saranjam granted under the Maratha rule for the support of troops, remained after 1820, when the rule of the Peshwa had ceased, a personal and military jaghir, forming a mixed estate of saranjam and inam. The tenure remained, under British rule, political; and no distinction could be drawn in this respect between the inam lands and the saranjam. The whole estate passed to the persons whom



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the Government at its discretion for political reasons  
see *guia* as the *part* without its being competent  
to any Court of law to question the decision of the  
executive authority: in the matter *SCITIAN SANTI* v.  
*AJMOLIN* v. *TAN SANTI* v. *BEGUMBI*

[I L R. 17 Bom., 431  
I L R. 20 I. A., 50

27 — *Bhoomi* or *tenures* *Bhoomis* are bound to render certain  
customary services but their lands are not resumable.  
*GOULATH TEWARER* v. *BHOOTAR ORANOO*

[8 W R, 137

28 — *Power of Govern-*  
*ment to resume majumdari vatan*—Government  
has no power to resume majumdari vatan where it  
dispenses with the services in respect of them, if the  
holders of such vatan are ready and willing to per-  
form such services. *GOVERNMENT OF POMBAY* v.  
*DANODRAB PARMASANDAS* 5 Bom., A C, 202

29 — *Services dispensed*  
*with—Right of zamindar to resume*—A zamindar  
has *prima facie* a right to resume lands of the  
zamindari granted subject to a quit rent to tenants  
upon condition of their rendering personal services  
when such service are dispensed with. *ANNIVASI*  
*RAJU* v. *ZAMINDAR OF SAIBER* *PAKIR RAJU* v.  
*ZAMINDAR OF SAIBER* I L R., 7 Mad., 268

30 — *Suit for enhance-*  
*ment of rent—Right to resume when services not*  
*required—Evidence*—I sued to recover instal-  
ments of quit due on the ground that S held a village  
on service tenure (granted on condition of paying  
quit and performing service), that the services of S  
were not at present required as the Court of Wards  
had assumed the management of the estate of R,  
that the assessment had accordingly been increased  
and that defendant had declined to accept a lease at  
an enhanced rate and to execute a counterpart. S  
denied that he held on service tenure, and set up a  
gift from one of the ancestors of B. Held, that, as S  
failed to prove the alleged gift and had not traversed  
R's allegation that he was entitled to resume the  
grant when the services were not required, and as it  
was proved that the quit had been enhanced on one  
occasion without objection from S, there was evidence  
to warrant the conclusion that the village was neither  
inam nor granted in perpetuity burdened with a  
certain service, and that R was entitled to the  
enhanced rate claimed. *SITARAMABAI* v. *JAGA-*  
*NADA NARAYANA* I L R., 3 Mad., 367

31 — *Landlord and*  
*tenant—Service tenure with rent—Enhancement of*  
*rent—Resumption—Onus probandi*—In a suit  
brought in 1866 by a zamindar to recover an estate  
granted by his predecessor to the predecessor of the  
defendant on a service tenure, a small inam rent  
being also reserved, it appeared that in 1664 the right  
of the plaintiff's predecessor to rent had been estab-  
lished by suit, but there was no evidence that the  
service was then dispensed with, but in 1855 it was  
intimated to the defendant that the service was dis-  
pensed with, and a notice to quit was given to him;  
the option of buying the estate at an enhanced rent

**SERVICE TENURE—continued**

was, however, given to him at the same time. Held  
that the plaintiff was not precluded by any implied  
contract from increasing the rent, and that the  
burden of proving the plea that the plaintiff was not  
entitled to eject lay on the defendants, and had not  
been discharged. *MAHADEV VIKRAMA*

[I L R., 14 Mad., 365

32 — *Grant of service*  
*tenure rent free—Assessment of rent by settlement*  
*officer when service no longer required*—Bom. Act  
I of 1862—The talukdars settlement officer having  
assessed rent-free land, on the ground that it had  
been granted for service, and that service was no  
longer required. Held, that this was not a sufficient  
defence to an action by the holder of the land, it not  
being shown that by the terms of the grant (assum-  
ing that there had been a grant of an estate burdened  
with service) the estate was determined by the remis-  
sion of the service. *KEVAL KUTER* v. *TALUKDAR*  
*SETTLEMENT OFFICER* I L R., 1 Bom., 558

33 — *Lands held on*  
*amaram tenure resumable at will on reasonable*  
*notice—Rent amounts to reasonable notice con-*  
*sidered*—A village and its hamlets had been given by a  
plaintiff's ancestors to the ancestors of the defendants  
on amaram service. Plaintiff now required the defen-  
dants to hand over the land, and had served two notices  
on them to that effect. The first of such notices had  
been served less than three months before the end of  
a fash, in the second suit was threatened in default  
of reply within ten days. Held, that lands held on  
amaram tenure are resumable, and that the defendants  
had no permanent right of tenure. Held further  
that, before such resumption of lands can take place,  
reasonable notice must be given; and that the notices  
which were served were insufficient. *NARASAYTA*  
v. *VENKATAGIRI RAJAH* I L R., 23 Mad., 262

See *UNDE RAJANA RAJE BOOMARANGE BAH-*  
*DUR* v. *PANDEASANY VENKATADRY NAIDOO*

[7 Moore's I. A., 123

34 — *Jagir granted*  
*to gaurat or village watchman—Resumption by*  
*zamindar—Liability to ejectment—Notice to quit*  
—A service tenure created for the performance of  
services, private or personal, to the zamindar may be  
resumed by the zamindar when the services are no  
longer required, or when the grantee of the tenure  
refuses to perform the services. The distinction  
between a grant of an estate burdened with a certain  
service and an office the performance of the duties of  
which is remunerated by the use of certain lands  
pointed out. *Sansoyan* v. *Solar Zamindar*,  
I L R., 7 Mad., 265; *Harrogotind Raja* v. *Ram-*  
*rao Dey*, I L R., 4 Cal., 67, *Sreeb Channer*  
*Rao* v. *Medhab Mooker*, 8 D. A. (1867), p. 1772;  
*Nirmaly Sing Deo* v. *Government*, 18 W. R., 321,  
*Cande Kojaka Peze Bannamraze Bahadur* v.  
*Pennamang Venkataray Naidoo*, 7 Moore's I. A.,  
129, *Forbes* v. *Moor Mahomed Tuker*, 13 Moore's  
I. A., 438; *Lilwanand Singh* v. *Bhannarajun Singh*,  
13 B. L. R., 124; I L R., 1 A., Sup. Vol., 151, and  
*Mahadevi* v. *Vikrama*, I L R., 14 Mad., 350,  
referred to. In a suit for resumption of jagir lands

**SERVICE TENURE—continued.**

granted by the zamindar to a gorait (village watchman), the lower Courts found that the grant was made in favour of the defendant's ancestor more than twelve years before suit and descended from father to son, who was allowed to retain possession without rendering services to the zamindar, and that the zamindar could not prove the terms of the grant. *Held* that the facts found did not legitimately lead to the inference drawn therefrom that the tenure was of a permanent character, but that the defendants could not be ejected without notice. *RADHA PERSHAD SINGH v. BUDHU DASHAD*. . . I. L. R., 22 Cal., 938

**35.** — *Resumption of service grant.*—The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure, and that he was entitled to resume them. *Held*, on the evidence that the plaintiff was not entitled to resume the villages. *VIZIANAGRAM MAHARAJAH v. SITTA RAMARAZU*. . . I. L. R., 19 Mad., 100

**36.** — *Resumption of land granted with condition of service—Land granted as remuneration for service—Service attached to grant of hereditary office—Adverse possession—Limitation.*—Land granted with a condition of service attached to the grant cannot be resumed when the service is no longer required. But land granted as remuneration for service may be resumed when the service is no longer required, except when there has been a grant of an hereditary office to those who are to perform the service. In that case, the land can only be resumed when the need of such service altogether ceases. Where the services are still required, and the grantee has a right to the hereditary office, he cannot be deprived of the land on the mere ground that the grantee prefers to appoint some one else to officiate. The ancestors of the plaintiff appointed the ancestors of the defendants as hereditary kulkarnis, and granted to them certain lands as remuneration for service as kulkarni and as karkun. The service required as karkun ceased in 1863-64. Members of defendants' family officiated as kulkarnis for more than two hundred years. They continued to officiate till 1887. Their services were then dispensed with, and a stranger was appointed kulkarni by the plaintiff. In 1894 the plaintiff sued to recover all the lands. *Held* (1) that the appointment of the defendants' family as hereditary kulkarni was valid. (2) That the claim to recover possession of part of the lands assigned for the remuneration of the defendants as karkun was time-barred by the defendants' adverse possession since 1863-64. (3) That the defendants' possession of the lands assigned for the remuneration of the defendants as kulkarni was not adverse to the plaintiff previously to 1887, but that, as the hereditary kulkarnis of the village, the defendants were entitled to enjoy the land so long as the services of a kulkarni were required, whether their services were accepted or were refused, provided they duly discharged the duties of the office should their services be required. *BRIMAPAIYA v. RAMCHANDRA BHIMRAO*. . . [I. L. R., 22 Bom., 422

**SERVICE TENURE—continued.**

**37.** — *Non-performance of service, Effect of—Adverse possession—Limitation, Liability to.*—Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse, there must be a refusal to perform service or a claim to hold the lands free of service. *KOMARGOWDA v. BHIMAJI KESHAV*. . . I. L. R., 23 Bom., 602

**38.** — *Non-performance of service—Payment of assessment by mortgagee—Change of title—Redemption.*—Plaintiff was the holder of certain inam lands, which were exempted from payment of assessment in consideration of his rendering certain services to Government. In 1873 the lands were mortgaged to defendant, on condition that he was to enjoy the usufruct in lieu of interest. In the famine of 1876 plaintiff left the village, and as no service was rendered, Government appointed another person to perform the service and demanded payment of the full assessment from defendant. Defendant paid the assessment and continued in possession. But Government did not forfeit the holding, and the lands continued, as before, in plaintiff's name in the vatan register. In 1896 plaintiff filed a suit to redeem the lands. *Held* that, in the absence of a declaration of forfeiture of the holding, the steps which Government took to recover the assessment in lieu of service had not the effect of creating any change of title, and that the plaintiff was therefore entitled to redeem. *BHIMA v. RAGHAVENDRA-CHARYA*. . . I. L. R., 24 Bom., 482

**39.** — *Chakeran lands—Chowkidari duties.*—In a suit for the resumption of certain chakeran lands on the appellant's talukh, Government contended that the lands were appropriated to the maintenance of a chowkidar, and that the holder of these lands was liable to the performance of none but police or chowkidari duties. The talukhdar (appellant) contended that the lands were gram surinjami lands not liable to the performance of any but personal services to him, and not legally appropriated for the performance of these services, but resumable by him. *Held* by the Privy Council that the lands in question were to be considered as appropriated to the maintenance of a chowkidar in the talukh; that the right of appointing such officer belonged to the talukhdar; and that such officer was liable to the performance of such services to the talukhdar as, by usage in the zamindari, chowkidars were accustomed to render to the zamindar. *FOY-KISHEN MOOKERJEE v. COLLECTOR OF EAST BENGAL*. . . 1 W. R., P. C., 26: 10 Moore's L. A., 16

**40.** — *Resumption of jagir—Proof of personal services—Grant of jagir to jagirdar.*—Where a sanad granted to the holder of a jagir was only a confirmation by the Government and the Rajah of the tenure under which the jagir was held, and authorized the jagirdar to remain in possession and in the performance of the services with his brothers, without describing the kind of service, — *Held* by the Privy Council that the Rajah could not resume the land without proof that the

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services to be performed by the jaidar were personal services only to the Rajah. *NILMOHAY SINGH DRO v. GOVERNMENT* 18 W. R. 321

S C in High Court 6 W. R. 121

41 ——— Forfeiture of tenure—*Alienation without grantor's consent*—In a suit to obtain khas possession of lands which were found to have been held of plaintiff and his ancestors by defendants and their ancestors upon a service tenure but which the grantees alienated to strangers without any acquiescence on the part of the grantor and then ceased to perform the services it was held that the defendants had forfeited their right to hold the land at all. *PANGOPAL CHUCKERBUTTY v. CHANDER NATH SAHAI* 10 W. R. 289

42 ——— Refusal to perform services—*Ejectment*—A distinct refusal by a tenant to perform services incidental to his holding renders him liable to ejectment. *HIRANMOHOND BAHAI v. RAMCHETNO DEY* I. L. R. 4 Calc. 67

43 ——— Tenure resumable at will to grantor—*Actio to surrender*—Where land held on service tenure is resumable at the will of the grantor the holder cannot be ejected before a reason is shown that he has been given notice to surrender the land has been given. *LAKSHMI v. CHENDRI* I. L. R. 8 Mad. 72

**SERVICE UNDER EAST INDIA COMPANY**

See DOMICILE I. L. R. 4 Calc. 108

**SESSIONS CASE.**

See CRIMINAL PROCEDURE CODES ss 436, 439

I. L. R. 1 All. 413

[I. L. R. 4 Calc. 18]

7 C. L. R. 188

I. L. R. 3 All. 570

21 W. R. 41

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[11 Bom. 98]

12 Bom. 1

**SESSIONS JUDGE.**

Case heard by—

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[I. L. R. 8 Calc. 98]

I. L. R. 20 Mad. 445

I. L. R. 22 Mad. 15

I. L. R. 17 All. 36

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7 N. W. 211

[20 W. R. Cr. 50]

I. L. R. 2 All. 771

14 W. R. Cr. 25

6 C. L. R. 245

I. L. R. 8 Calc. 875

I. L. R. 9 All. 382

I. L. R. 10 All. 148

I. L. R. 23 Bom. 698

I. L. R. 27 Calc. 235

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I. L. R. 23 Calc. 249, 250

**SESSIONS JUDGE—concluded**

See CASES UNDER VERDICT OF JURY—GENERAL CASES

See CASES UNDER VERDICT OF JURY—POWER TO INTERFERE WITH VERDICTS

Commitment to—

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[I. L. R. 3 All. 258]

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I. L. R. 18 Bom. 200

I. L. R. 17 Mad. 402

See CASES UNDER MAGISTRATE, JURISDICTION—COMMITMENT TO SESSIONS COURT

Duty of—

See PLEADER—APPOINTMENT AND APPEARANCE . . . I. L. R. 23 Calc. 493

See REFERENCE TO HIGH COURT—CRIMINAL CASES

10 W. R. Cr. 50

[I. L. R. 13 Mad. 343]

I. L. R. 25 Calc. 555

4 C. W. N. 683

See VERDICT OF JURY—GENERAL CASES

[I. L. R. 10 Bom. 735]

——— Obligation to form independent opinion on case—*Opinion of committing Magistrate*—*Reference to by Sessions Judge in his judgment*—On a case the decision of which is vested by law in him sitting with assessors, a Sessions Judge is bound to form his own opinion, aided by the assessors, indeed, but quite independent of any expression of opinion on the part of the committing Magistrate. The Judge's reference in his judgment to the opinion of the committing Magistrate was held to be wholly irrelevant and wrong. *DEWAN SINGH v. QUEEN EXPRESS* . . . I. L. R. 22 Calc. 805

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See BAIL . . . I. L. R. 1 All. 151

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See CHARGE—ALTERATION OR AMENDMENT OF CHARGE . . . 25 W. R. Cr. 8

[7 C. L. R. 143]

I. L. R. 8 All. 655

I. L. R. 12 All. 551

See COMMITMENT . . . 2 W. R. Cr. 44

[I. L. R. 13 Calc. 121]

I. L. R. 10 Bom. 319

I. L. R. 8 All. 14

I. L. R. 15 All. 205

I. L. R. 23 Calc. 350

See CASES UNDER CRIMINAL PROCEDURE CODES, ss 436, 438

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See CRIMINAL PROCEDURE CODES, s. 437.  
 [I. L. R., 12 Calc., 522  
 I. L. R., 9 All., 52  
 I. L. R., 12 All., 434  
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 I. L. R., 22 Calc., 573  
 I. L. R., 27 Calc., 658]

See CRIMINAL PROCEDURE CODES, s. 487.  
 [I. L. R., 14 All., 354]

See CRIMINAL PROCEEDINGS.  
 [I. L. R., 17 All., 36]

See CASES UNDER DISCHARGE OF ACCUSED.

See OFFENCE RELATING TO DOCUMENTS.  
 [I. L. R., 12 Mad., 54]

See REFORMATORY SCHOOLS ACT, 1897.  
 [4 C. W. N., 225]

See REGISTRATION ACT, 1877, s. 83 (1866, s. 95) . 6 B. L. R., 692, 693 note

See SANCTION FOR PROSECUTION—POWER TO GRANT SANCTION.

[8 Bom., Cr., 126  
 I. L. R., 2 Bom., 384  
 I. L. R., 2 All., 205  
 I. L. R., 10 All., 582]

See SECURITY FOR GOOD BEHAVIOUR.  
 [24 W. R., Cr., 10  
 I. L. R., 20 Calc., 155]

1. ——— Offence under Bom. Reg. XVII of 1827, s. 16—*Criminal Procedure Code, 1869*.—An offence under s. 16, Regulation XVII of 1827, being punishable by imprisonment for seven years, was triable exclusively by a Court of Session under the provisions of the schedule of the Code of Criminal Procedure Amendment Act (VIII of 1869). REG. v. AJAM DULLA . 8 Bom., Cr., 115

2. ——— Offence under Opium Regulation—Bom. Reg. XXI of 1827, s. 7—*Criminal Procedure Code, 1861, ss. 21 and 409*.—Although the effect of s. 21 of the Code of Criminal Procedure, 1861, was to give exclusive original jurisdiction to the Magistrate of the district in the trial of cases under s. 7 of Regulation XXI of 1827 for abetting the smuggling of opium, that s. 21 did not exclude the appellate jurisdiction vested in the Court of Session by s. 409 of the Code. REG. v. SADU DADABRAI . 9 Bom., 166

3. ——— Offence under s. 23, Railway Act (XVIII of 1854)—*Order for fresh trial*.—A railway watchman was charged before a Head Assistant Magistrate with an offence under s. 26 of Act XVIII of 1854. That charge was dismissed, but the Sessions Judge ordered a fresh trial. Held that in so doing the Sessions Judge acted without jurisdiction. ANONYMOUS . 6 Mad., Ap., 41

4. ——— Offence under Registration Act (XX of 1866), s. 95—*Abetment of false personation of witness before Registrar*.—The Sessions Judge had jurisdiction to try a case of abetting false

# SESSIONS JUDGE, JURISDICTION OF

—continued.

personation of a witness before a Registrar of Assurances under s. 95 of the Registration Act (XX of 1866). QUEEN v. SHEGOLAM DAS

[6 B. L. R., F. B., 692: 15 W. R., Cr., 58]

5. ——— Order of Magistrate attaching land—*Criminal Procedure Code, 1861, s. 319*.—A Sessions Judge had no power to interfere with an order of a Magistrate attaching disputed land under s. 319 of the Code of Criminal Procedure, 1861. HURRONATH CHOWDHRY v. RAJENDER CHUNDER ROY . 15 W. R., Cr., 1

6. ——— *Criminal Procedure Code, 1861, s. 319—Appeal from Magistrate*.—Held that the Sessions Judge had no jurisdiction to hear an appeal from the order of a Magistrate, under s. 319, Ch. XXII of the Criminal Procedure Code, 1861, and that the object of the chapter was to prevent breaches of the peace likely to be occasioned and not the adjudication of title. IN THE MATTER OF THE PETITION OF DUTT RAM MISR [1 Agra, Cr., 29]

7. ——— Appeals from sentences of Justice of the Peace acting under Act I of 1859—The Sessions Court has jurisdiction to hear appeals from the sentences of a Justice of the Peace acting under the Merchant Seamen's Act (I of 1859) IN THE MATTER OF THE PETITION OF EVANS [2 Mad., 473]

8. ——— Offence under Penal Code, s. 409, and under s. 29, Act V of 1861—*Power of Sessions Judge after acquittal on former charge*.—Where an accused was charged before the Sessions Judge under both s. 409, Penal Code, and under the special law, s. 29, Act V of 1861, and was acquitted under the former section, it was held that the Sessions Judge could not convict under the latter law, as the Magistrate alone had jurisdiction to convict under that law. QUEEN v. BHOOBUN SINGH. BHOOBUN SINGH v. QUEEN [9 W. R., Cr., 36]

9. ——— Power of Sessions Judge to add charge and try it—*Addition of charge triable by any Magistrate—Criminal Procedure Code, 1862, s. 23*.—Subject to the other provisions of the Criminal Procedure Code, s. 23 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of J and the third with abetment of the offence. At the trial the Sessions Judge added a charge against all the accused of causing hurt to C, and convicted them upon both the original charges and the added charge. The assault upon C took place either at the same time as or immediately after the attack which resulted in the death of J. Held that the Sessions Judge had power, under s. 23 of the Code to try the charge,

# SESSIONS JUDGE, JURISDICTION OF

—continued  
 assuming he had power to do so. *QUEEN*  
*EXPRESS & HARGREAVES* I L R, 8 All, 685

10 ——— *Crim and Proce-*  
*dures Code* 152, 231 — *Conviction on fresh charge*  
*in support of which there was no evidence before*  
*Magistrate* — Having been committed by a Magistrate for trial by a Sessions Court on a charge under s. 402 of the Penal Code of having intentionally omitted to give information which he was legally bound to give respect to a murder, pleaded guilty on trial to the charge on which he was committed. Upon the application of the Public Prosecutor the Sessions Judge, under protest on the part of the prisoner, added a charge under s. 109 and 231 of the Penal Code of abetting a female co-prisoner charged with having assisted in burying the body of the murdered person, required to plead to the charge and, having tendered a pardon to and examined C as a witness, convicted and sentenced him to two years rigorous imprisonment. *Held* that as there was no evidence before the Sessions Judge to support the charge against R framed by the Sessions Judge, the action of the Judge was *ultra vires* and the conviction on the added charge illegal. *Held* also that, inasmuch as the Sessions Judge considered R more culpable than C, the proper course would have been to have adjourned the trial so the record to the Magistrate and suggested an enquiry as to whether there was ground for a more serious charge against R. *Sent* — The object of restricting a Sessions Court from taking cognizance of any offence (except as provided in ss. 45, 47, 47A of the Criminal Procedure Code) unless the accused person has been committed by a Magistrate is to secure to the prisoner a preliminary enquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him and enable him to make his defence. *METRAKAL KOVILASATHA RAMA VARMA RAJA & QUEEN* I L R, 3 Mad, 351

11. Trial without committal  
 by Magistrate — *His case set up with conditional pardon* — *Crim and Procedure Code* 1851 s. 307 439 *Held* that a Sessions Judge acted irregularly in at once trying and convicting a person who had been granted a conditional pardon by the Magistrate, and who had been sent up to the Sessions Court as a witness for the Crown. Such a course was held to be a material irregularity under s. 439 of the Code and the Sessions Judge was directed to order the Magistrate to commit the accused to the Sessions for a fresh trial after hearing his defence and examining his witnesses. *QUEEN & BIRRO DAS* [19 W R, Cr, 43]

12. ——— Order for re trial on appeal  
*Crim and Procedure Code* 1872 s. 20 amended by s. 29 Act XI of 1874 — It is competent to a Court of Sessions under s. 250 of the Criminal Procedure Code as amended by s. 27 Act VI of 1874, to order a re trial of a case which is before it on appeal. *IN THE MATTER OF SHEH MAHOMED* 2 C L R, 511

# SESSIONS JUDGE, JURISDICTION OF

—continued  
 13. ——— Power to give judgment on evidence partly recorded by predecessor — *Crim and Procedure Code* 1872 s. 329 — The power given by the Criminal Procedure Code to a Magistrate to pronounce a judgment upon evidence partly recorded by his predecessor and partly by himself does not extend to a Sessions Judge. *TAKARA BISHAI & QUEEN* I L R, 3 Mad, 112

*QUEEN & LUDOVICUS DASS* [23 W R, Cr, 59]

14. Power in regular appeal — *Jury not evidence* — *Legal list* — If the evidence which comes before a Sessions Judge is a regular appeal from a Magistrate's order is not sufficient to reasonably satisfy him that the prisoners have been rightly convicted, he ought to acquit them. *IS THE MATTER OF THE PETITION OF ANNEAL McLELLAN, ANNEAL McLELLAN & JAMES McLELLAN* [11 I L R, 33 20 W R, Cr, 13]

15. ——— Power to suspend sentence. — A Sessions Judge is not authorized to suspend his own sentence. *ANONYMOUS* 4 Mad, Ap, 3

16. ——— A Sessions Judge has no power to suspend a sentence in any case on a further appeal. *ANONYMOUS* [5 Mad, Ap, 1]

He should state distinctly whether he agrees with the verdict of the jury or not. *QUEEN & CHAND BAGGER* 7 W R, Cr, 8

17. ——— Power to prevent prisoner from appealing — *Right to appeal* — It is within the province of the Sessions Judge to decide whether a prisoner has a right of appeal or not; he is bound to allow a prisoner whose conviction he has confirmed to exercise a valid claim to appeal. *QUEEN & VATTAPORI GANDAN* 1 Mad, 4

18. ——— Mitigation of sentence without appeal — *Held* that a Sessions Judge cannot power to mitigate a sentence passed upon a prisoner who has not appealed to him. *PEZ & MUTHA NAYAK* 5 Bom, Cr, 21

19. ——— Power to sentence on appeal from decision of Magistrate — *Committal of sentence* — A Sessions Judge cannot, on appeal from a Magistrate's decision, inflict a term of imprisonment in commutation of a fine lower than that which the Magistrate himself could have inflicted. *PEZ & HARI RAO VITHOBI* 1 Bom, 133

20. ——— Alteration of sentence in appeal — *Enhancement of sentence* — *Appeal etc* — *Comm's power to alter a sentence of fine into one of imprisonment* — *Criminal Procedure Code* (1859), s. 423 — A Sessions Judge has no power to enhance a sentence in appeal by altering a sentence of fine into one of imprisonment. *QUEEN EXPRESS & DASSAN DAS* I L R, 19 Bom, 751

*QUEEN EXPRESS & LACHMI KANT* [I L R, 19 All, 331]

## SESSIONS JUDGE, JURISDICTION OF —continued.

21. ——— Power to pass sentence of death—*Affray with murder—Offence before Penal Code came into operation.*—In a case of affray attended with murder, in which the offence was committed before the Penal Code came into force, it was held that a Sessions Judge had himself power, under s. 4, Act XVII of 1862, to pass sentence of death, instead of referring the matter for confirmation of the High Court. *QUEEN v. BUSTI SINGH* . . . 14 W. R., Cr., 76

22. ——— Amendment of sentence—*Alteration of conviction—Criminal Procedure Code, 1861, s. 22*—Held that an order of a Sessions Judge, by which he altered a conviction by the Assistant Sessions Judge of "dacoity" to one of "robbery," was illegal, not being an amendment of a sentence or order within the meaning of s. 22 of the Criminal Procedure Code. Held further that, if the accused were, in the opinion of the Sessions Judge, improperly convicted of "dacoity," he ought to have declined to confirm the sentence and to have left them to be charged with and tried for "robbery." *REG. v. THOMESIT* . . . 5 Bom., Cr., 22

23. ——— Concurrent jurisdiction with Magistrate—*Criminal Procedure Code, 1861, s. 434—Report to High Court.*—A full-power Magistrate was not immediately subordinate to the Sessions Court, and therefore a Sessions Judge had no concurrent jurisdiction with the Magistrate of the district, under s. 434 of the Code of Criminal Procedure. His proper course, if he thinks that an illegal sentence or order has been passed by a full-power Magistrate, is to make a report to the High Court, which will then, if it thinks fit, call for the proceedings. *REG. v. SHIVASAPA* . . . [7 Bom., Cr., 73]

24. ——— Power to call for and refer to the High Court proceedings of Magistrate—*Criminal Procedure Code, 1869, s. 23.*—Held that under the provisions of s. 23 of the Code of Criminal Procedure, 1869, a full-power Magistrate was, for the purposes of s. 434, immediately subordinate to the Magistrate of the district, and not to the Court of Session. The Sessions Judge therefore had no power to call for or refer to the High Court proceedings in a case before a full-power Magistrate. *REG. v. KESHAYSHET* . . . 6 Bom., Cr., 74

25. ——— Power to refer to High Court—*Unnecessary reference to High Court.*—Where an appeal is preferred to a Sessions Judge from the order of a Magistrate which he considers illegal, the Sessions Judge should himself deal with the case, instead of referring it to the High Court. *QUEEN v. NUSSUROODDEEN SHAZWAH* . . . [11 W. R., Cr., 24]

26. ——— Power to call for report from Magistrate—*Power to call for record and proceedings.*—A Sessions Judge ought not to call for a report from the Magistrate of the district in any case in which it is not competent to such Sessions Judge to call for the record and proceedings, e.g., in the case of a person tried by a Subordinate Magistrate

## SESSIONS JUDGE, JURISDICTION OF —continued.

who has appealed to the District Magistrate. In trials by the Magistrate of the district, or full-power Magistrate, in which the Sessions Judge can call for the record and proceedings, he has power also to call for a report. *REG. v. GIRDHAR DHARAMDAS* [6 Bom., Cr., 33]

27. ——— Power to call for and examine record—*Absence of order by Magistrate.*—There was no provision in the Criminal Procedure Code, 1861, which made it lawful for a Court of Session to call for and examine the record of a case tried by a Subordinate Magistrate where no sentence or order had been passed thereon by the immediately subordinate Court of the Magistrate. *REG. v. BHASKAR KHARKAR* . . . 3 Bom., Cr., 1

28. ——— Trial in case committed by Magistrate—*Objection that case was tried without complaint.*—A Court of Session cannot treat as a nullity the commitment of a full-power Magistrate, on the ground that he investigated the case, and committed the prisoner, without a formal complaint being made to him, but should proceed with the trial in the usual course. *REG. v. RANCHODDAS NATHUBHAI* [4 Bom., Cr., 35]

29. ——— Objection to irregularity of proceedings.—The fact of a commitment being made by a Joint Magistrate, who is an officer exercising the powers of a Magistrate, was sufficient, under s. 359, Code of Criminal Procedure, to enable the Sessions Judge to proceed with the trial; and it lay with the party impugning the correctness of the proceedings to show that there was no jurisdiction. *QUEEN v. KOMU OODDEE SIKHDAR* [13 W. R., Cr., 17]

30. ——— Power to quash sentence of Assistant Sessions Judge—*Sentence submitted for confirmation.*—Held that a Sessions Judge had no power to quash a sentence passed by an Assistant Judge, and by him submitted for confirmation, and to direct a new sentence to be passed, even supposing the sentence of the Assistant Sessions Judge to be illegal. *REG. v. MUNAR THAKAR* [5 Bom., Cr., 3]

31. ——— Power to quash commitment for illegality—*Duty to report proceedings to High Court.*—The Criminal Procedure Code, 1861, did not authorize the Sessions Judge to quash a commitment on the ground of illegality. If the Sessions Judge is of opinion that the order of commitment should be annulled as illegal, he should move the High Court to annul the same under s. 104 of the Criminal Procedure Code. *QUEEN v. MATA DEAL* [4 N. W., 6]

32. ——— Power to annul conviction and sentence—*Offence beyond jurisdiction of subordinate Court.*—It is only when a Court subordinate to a Court of Session convicts a person of an offence not triable by such Court that the Court of Session can annul the conviction and sentence. If the prisoner is guilty of an offence beyond the jurisdiction of the subordinate Court, the Court of Session

## SESSIONS JUDGE, JURISDICTION OF

—continued

should refer the case to the High Court. **QUEEN v. ICHABU DOREY** 4 W. R., Cr., 11

33. — Power to quash proceedings of Magistrate.—The order of a Sessions Judge to quash proceedings held before a full power Magistrate is null and void having been made without jurisdiction. **REG v. GOVINDA BHAJI**

[5 Bom., Cr., 15]

**REG v. GOPAL LAKSHMAN** 5 Bom., Cr., 25

34. — Power to quash illegal conviction.—*Giving false evidence in judicial proceeding*—The offence of giving false evidence in a stage of a judicial proceeding is not cognizable by an Assistant Magistrate. A Sessions Judge on appeal can quash an illegal conviction by an Assistant Magistrate in such a case. **QUEEN v. HERABAI SINGH** 8 W. R., Cr., 30

35. — Power to annul conviction and order commitment.—*Offences triable by Magistrate*—Criminal Procedure Code (Act VIII of 1869) s. 435.—The Sessions Judge had no jurisdiction to annul a conviction and order a commitment for an offence triable by a Magistrate. s. 435, Act VIII of 1869 related to offences triable by the Sessions Judge. **IN THE CASE OF WAHIB SINGH**

[3 B. L. R., A. Cr., 65 12 W. R., Cr., 48]

**QUEEN v. JESUDH KHAN** 11 W. R., Cr., 45

36. — Illegal conviction by Magistrate.—Criminal Procedure Code, 1861, s. 435.—Where the Sessions Judge was of opinion that a subordinate Magistrate had convicted the defendant of an offence which the subordinate Magistrate had no power to try the Sessions Judge might, under s. 435 of the Code of Criminal Procedure 1861, annul the conviction and direct the commitment of the accused for trial. **ANONYMOUS**

[5 Mad., Ap., 32]

37. — Order to cancel proceedings of Divisional Magistrate.—*Proceedings reviewing the calendars of subordinate Magistrates*—A Sessions Judge has no power to direct a Divisional Magistrate to cancel his proceedings reviewing the calendars of Magistrates subordinate to him. **ANONYMOUS**

[7 Mad., Ap., 27]

38. — Power to direct Magistrate to commit to Sessions.—*Conviction by Magistrate without jurisdiction*—Where a Magistrate has convicted and sentenced a prisoner of an offence which such Magistrate was competent to try, and the Sessions Judge considered the case so grave that it should not have been disposed of summarily, *Held* that such Sessions Judge was not competent to direct the Magistrate to commit the prisoner to the Sessions Court for trial upon the same charge. **QUEEN v. HINDU KHAN**

[2 N. W., 285]

39. — Power to reverse order of Magistrate as to stolen property.—A Deputy Magistrate restored to an accused money found in his house along with stolen property, the prosecutor having failed to prove that the money was his. The

## SESSIONS JUDGE, JURISDICTION OF

—continued

Sessions Judge on appeal reversed that order, and directed the money to be made over to the prosecutor. *Held* that the order of the Sessions Judge was made without jurisdiction. **QUEEN v. SURE CHITRA LAL** 9 W. R., Cr., 57

40. — Conviction on confession before Magistrate after plea of not guilty.—A Sessions Judge, after a prisoner upon his trial has pleaded what in effect amounts to a plea of not guilty, is not justified in convicting the prisoner solely upon a confession made before the committing Magistrate. **QUEEN v. HIRASOORN** 2 N. W., 479

41. — Power to interfere with order of acquittal.—*Acquittal by Magistrate*—Criminal Procedure Code, 1861, s. 435.—After an accused person had been acquitted under s. 235 of the Code of Criminal Procedure it was not competent to the Sessions Judge to interfere under s. 435 of the same Act. **LIO v. VENET NARSA** 9 Bom., 170

42. — Power to order commitment.—*Cases exclusively triable by Court of Session*—The Court of Session can only order the commitment of an accused person in cases exclusively triable by it. **QUEEN v. KENTIL PERASAH**

[5 N. W., 188]

43. — Power to commit to itself cases not triable exclusively by Court of Session.—Criminal Procedure Code (Act X of 1872), ss. 231, 471, and 472.—A Court of Session had no power to commit to itself for trial a case not triable exclusively by such Sessions Court. The words "commit the case itself" in s. 471 of the Code of Criminal Procedure cannot (when read in connection with s. 231) be held to empower a Sessions Court to commit such a case to itself. **IN THE MATTER OF EXPRESS v. PUTTEN JIA KHAN**

[1 L. R., 4 Calc., 570]

**S. C. IN EX PARTE ITAN KHAN** 3 C. L. R., 599

44. — Criminal Procedure Code, 1861, s. 435.—Where a Judge under s. 435 of the Criminal Procedure Code had directed the Magistrate to commit certain accused persons, as also to take their defence, *Held* that, as the Magistrate could not require the accused to produce evidence nor to make a defence, the Judge should not have included such instructions in his order of commitment, but that the order was not therefore invalid. **QUEEN v. GHASEN**

[4 N. W., 50]

45. — False evidence.—The Sessions Judge has no power to commit a man for having given false evidence before the Magistrate, but he can commit him for having given false evidence in his own Court. **QUEEN v. HIRADIAL**

[3 B. L. R., A. Cr., 35]

46. — Criminal Procedure Code, 1872, s. 472.—L made a complaint against S by petition, in which he only charged S with having committed offences punishable under ss. 193 and 218 of the Penal Code, but in which he also accused S of acts which, if the accusation had been true, would have amounted to an offence

# SESSIONS JUDGE, JURISDICTION OF —continued.

punishable under s. 466 of that Code with seven years' imprisonment. The Magistrate inquired into the charges against S under ss. 193 and 218 of the Penal Code, and directed his discharge. L then applied to the Court of Session to direct S to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and S was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session. The Court of Session then, under s. 472 of Act X of 1872, charged L with offences punishable under ss. 193, 195, 211, and 211 and 109 of the Penal Code, and committed him for trial. Held that such commitment was not bad by reason that an offence under s. 193 of the Penal Code is not exclusively triable by a Court of Session. Held also per SPANKIE, J., that the Court of Session was competent, notwithstanding that L had only charged S with offences under ss. 193 and 218 of the Penal Code, to charge L with offences under ss. 195 and 211, if such offences had come under its cognizance. *EMPRESS v. LACHMAN SINGH* . . . I L. R., 2 All., 398

47. ————— *Criminal Procedure Code, 1861, s. 435 and s. 359.*—A Sessions Judge was competent, under s. 435, Code of Criminal Procedure, to order the committal of a person accused of giving false evidence after the discharge of such person by the Magistrate, s. 359 notwithstanding (*dissentiente KEMP, J.*). *QUEEN v. BROHISAN MAHATOON* . . . W. R., 1864, Cr., 3

48. ————— *Person discharged by Magistrate.*—A Sessions Judge has discretion to order the commitment to the Court of Session of any accused person discharged by the Magistrate. The non-exercise of such discretion cannot be interfered with by the High Court. *QUEEN v. SHEETARAM CHOWDHRY* . . . 2 W. R., Cr., 44

49. ————— *Discharge of accused on inquiry before Magistrate—Further inquiry.*—When an inquiry has been made and the accused discharged, the Sessions Court may order the commitment of the accused, but cannot merely direct further inquiry. *QUEEN v. GHASSEERAM* [3 N. W., 90

50. ————— *"Acquittal and release" of accused by Magistrate—Criminal Procedure Code, 1861, s. 435.*—Where a Magistrate used the words "acquittal and release," when he intended only to discharge a person accused of an offence not triable by him,—Held that the Court of Session was competent, under s. 435, Code of Criminal Procedure, to order a commitment of such accused person. *QUEEN v. NETTIE DELAL*

[8 W. R., Cr., 41

51. ————— *Discharge by Magistrate—Criminal Procedure Code, 1861, s. 435.*—A Sessions Judge might, under s. 435 of the Code of Criminal Procedure, after a Magistrate has discharged an accused person, order the Magistrate to commit the accused person to the Sessions. In THE MATTER OF THE PETITION OF MUSMUN ALI CHOWDHRY alias MOOCHEE MEAN . . . 7 W. R., Cr., 38

# SESSIONS JUDGE, JURISDICTION OF —continued.

52. ————— *Conviction under Penal Code, ss. 323, 352.*—A Sessions Judge has no authority to interfere and direct a committal in the case of a conviction for assault under s. 352 or of hurt under s. 323 of the Penal Code, both of them being offences triable by the subordinate Court. *QUEEN v. RAMSOHUL SINGH* . . . 5 W. R., Cr., 12

53. ————— *Power of Joint Sessions Judge—Criminal Procedure Code (Act X of 1872, s. 17, and Act X of 1882, ss. 9 and 195, and Ch. XXXII)—Discharge by a Magistrate—Power of Joint Sessions Judge to direct committal.*—A Joint Sessions Judge cannot exercise the powers of the Sessions Judge under Ch. XXXII of the Criminal Procedure Code (Act X of 1882). Accordingly, where a Magistrate had discharged certain accused persons, and the Joint Sessions Judge had subsequently, on the application of the complainant, ordered their committal to the Sessions Court, the High Court set aside the proceedings of the Joint Sessions Judge, leaving it to the Sessions Judge of the district, if a proper case was made out to order a committal, or dispose of the application as he might think fit. In THE MATTER OF THE PETITION OF MUSA ASMAL [I L. R., 9 Bom., 164

54. ————— *Applications under Criminal Procedure Code, 1882, Ch. XXXII—Sessions Judge, Power of, to direct disposal by Joint Sessions Judge of such applications as cases transferred—Criminal Procedure Code, 1882, s. 193, and Ch. XXXII.*—Applications under Ch. XXXII of the Code of Criminal Procedure (Act X of 1882) cannot be referred to a Joint Sessions Judge under s. 193, cl. 2, of the Criminal Procedure Code, so as to make it competent for a Joint Sessions Judge to dispose of them, a Joint Sessions Judge being strictly precluded from exercising any of the powers under Ch. XXXII of the Criminal Procedure Code, and s. 193, cl. 2, contemplating only cases for trial. *REFERENCE BY THE SESSIONS JUDGE OF SURAT* . . . I L. R., 9 Bom., 352

55. ————— *Criminal Procedure Code, s. 289—"No evidence"—Acquit.* S. . . accused without taking opinions of assessors. venue Court. words "there is no evidence" in s. 289 of Act X of Criminal Procedure, 1882, cannot be set off for any mean no satisfactory, trustworthy, or have paid to his dence; but the third paragraph for the benefit of his that, if at a certain stage of a Sand authority. *MONIMA* is satisfied that there is not or v. *NORO COOMAR MISSEN* which, even if it were perfect [18 W. R., 339

to legal proof of the offence, statement of set-off has power, without consulting. 121—Under s. 121, Act a finding of not guilty. adant, desirous of setting off only because it considers the plaintiff the amount of any cution unsatisfactory, upon on plaintiff's account, was it acts without jurisdiction, written statement containing the the accused is illegal demand. *POORNA CHANDER ROY* of jurisdiction, such *MOOKERJEE* . . . 14 W. R., 473 which may or per Character in which claim is justice within the Criminal Procedure Code, s. 111—Written



# SESSIONS JUDGE, JURISDICTION OF —continued.

of Narain Dass I L.R., 1 All., 610, referred to  
QUEEN EMPRESS v. MANA LALL

[I.L.R., 10 All., 414]

50. — *Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882) ss 193, 437—Penal Code, s. 196—* A Sessions Judge is not debarred by s. 437 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has as District Judge given sanction for the prosecution under the provisions of s. 196 of the Code of Criminal Procedure. *Madhub Chander Moosundar v. Dorodeep Chander Panat*, I L.R., 16 Cal., 121 overruled. *Empress v. D'Silva* I L.R., 6 Bom., 479 referred to. *QUEEN EMPRESS v. SARAT CHANDRA BAKSHI* I L.R., 18 Cal., 760

51. — *Criminal Procedure Code ss 193, 257, 259—Cancellation of conditional pardon to prisoner—Approver, Trial of—Proof of confessional statements of accused—* Several persons were charged with dacoity. While the case was pending two of the accused made confessional statements afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate but not their confessional statements to be read to the jury. *Held* that the trial of the two persons, who had not been committed to the Sessions Court, was *ultra vires*. The proper course was to have treated the evidence given by them before the committing Magistrate as evidence in the case under s. 258 of the Code and to have allowed the other accused to cross-examine them. *Per curiam*—The Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as approvers. *QUEEN EMPRESS v. RAMA TEYAN* s. 110. [I.L.R., 15 Mad., 352]

52. — *Conditional pardon to come—Withdrawal of pardon and trial by Magistrate without approver—Power of Sessions Judge to commit—Criminal Procedure Code ss 193, 437—* A Sessions Judge committed an offence which such Magistrate persons, J and U, were and the Sessions Judge of U's husband, and in previous that it about inquiry made certain state of seemingly. *Held* they were then sent up by was not competent to direct Magistrate for inquiry J the prisoner to the Sessions s. 25th of February, the same charge. *QUEEN EMPRESS v. NIDARCH* 1894 respectively, s. the third being a

53. — *Power to commit—* U also made two Magistrate as to stolen property March, the first Magistrate restored to an accused no second a with-house along with stolen property. April U was having failed to prove that the money was treated as

# SESSIONS JUDGE, JURISDICTION OF —continued

an approver, in which capacity she gave evidence against J. J was then committed to the Court of Sessions to take his trial, U being sent up as an approver. In the Sessions Court U relied from her deposition before the committing Magistrate, and was then and there treated as an accused person, and placed on her trial with the other accused and the deposition aforesaid was put in as evidence. Both accused were convicted mainly on their confessions. J of murder and U of abettment of murder. *Held* that the conviction of U was bad the Court of Sessions having had no jurisdiction to try her as she was never committed to that Court by any competent Magistrate. *QUEEN EMPRESS v. JAGAT CHANDRA MALI*

[I.L.R., 23 Cal., 50]

54. — *Power of Sessions Judge on revision—Further enquiry—Power of Sessions Judge to direct—Criminal Procedure Code (Act X of 1882), ss 423, 431, 436, 439—* A complaint was made before a Magistrate, which involved a charge of dacoity against the accused person and others. The Magistrate, in dealing with the case, proceeded under s. 209 of the Code of Criminal Procedure, and, finding no case of dacoity *prima facie* established, proceeded to frame charges under s. 254 of the Code charging the accused with offences under ss 350 and 443 of the Penal Code, viz., theft in a building and criminal trespass. Having heard the whole of the evidence he then acquitted the accused under s. 255 of the Code, and gave him sanction under s. 193 to prosecute the complainant under s. 211 of the Penal Code. The complainant then applied to the Sessions Judge to revoke that sanction. The Sessions Judge proceeded to consider the whole case, and finding that a proper inquiry had not been made and all evidence available not taken, and that, had this been otherwise, a Sessions case might have been established, directed the Magistrate to hold a further inquiry, and to proceed, in accordance with the result of such inquiry, either to commit the accused to the Sessions or grant the sanction, as the case might be. *Held* that the Sessions Judge had exercised a jurisdiction not vested in him by law. Acting as a Revision Court, he could send for the record for any purpose mentioned in s. 435, but he was not competent under s. 436 to direct a fresh inquiry inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Sessions, but had been acquitted of an offence within the Magistrate's jurisdiction. The Sessions Judge had in fact exercised the jurisdiction vested in him as an Appellate Court under s. 423, as if an appeal had been presented to him from an order of an acquittal, such powers in revision cases are only conferred on the High Court. *BALANATH PANDAY v. GAURI RANTA MANDAL* I.L.R., 20 Cal., 633

55. — *Power to revise—Sessions Judge's power to revise his order in proceedings taken to revoke sanction—* A Sessions Judge, having once refused to revoke a sanction granted by a subordinate Court under s. 195 of the Criminal Procedure Code (Act X of 1882) has no jurisdiction afterwards to

## SESSIONS JUDGE, JURISDICTION OF

—continued.

review his order and set aside the sanction. An application to a Sessions Judge for revocation of sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revived by him. *Queen-Empress v. Fox*, I. L. R., 10 Bom., 176, and *Mehdi Hasan v. Tota Ram*, I. L. R., 15 All., 61, referred to. *QUEEN-EMPRESS v. GANESH RAMKRISHNA*. I. L. R., 23 Bom., 50

61. ———— *Appeal from a conviction by a Magistrate, other than a Presidency Magistrate, where accused pleads guilty—Power of Sessions Court.*—The accused pleaded guilty to a charge of kidnapping from lawful custody, and was thereupon convicted by a Magistrate of the first class and sentenced to four months' rigorous imprisonment and a fine of ₹20. The accused appealed, and in appeal denied that he had committed the offence. The Sessions Judge was of opinion that, as the accused had pleaded guilty at the trial, he had no power to deal with the appeal except as regards the amount of punishment awarded. He therefore referred the case to the High Court. *Held* that the Sessions Judge was competent to deal with the whole appeal. S. 412 of the Criminal Procedure Code (Act X of 1892) had no application. That section provides for convictions by Courts of Session or Presidency Magistrates only, and the exception is not only as to the extent, but also as to the legality of the sentence. *QUEEN-EMPRESS v. KALU DOSAN* [I. L. R., 22 Bom., 759]

62. ———— *Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.*—A Deputy Magistrate, having decided that certain witnesses (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances. *Held* that, whether the Deputy Magistrate had intended to pass an order under s. 476 or to make a complaint under s. 195 (1) (b) of the Code of Criminal Procedure, the Sessions Judge had no power to interfere. *QUEEN-EMPRESS v. AUKADNA* [I. L. R., 23 Mad., 205]

63. ———— *Criminal Procedure Code (Act V of 1898), s. 436—Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal.*—Charges under ss. 304 and 147 of the Penal Code were brought by the police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution, but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under ss. 325 and 147 of the Penal

## SESSIONS JUDGE, JURISDICTION OF

—concluded.

Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge, considering the alteration in the charges improper at such a stage, ordered a fresh inquiry into the offence. *Held* that the Sessions Judge had exercised jurisdiction not conferred upon him by law, and that his order for a fresh inquiry must be set aside. *Bajjnath Pandey v. Gauri Kanta Mandal*, I. L. R., 20 Calc., 633, approved of. *QUEEN-EMPRESS v. HANUMANTHA REDDI*. I. L. R., 23 Mad., 225

## SET-OFF.

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1. GENERAL CASES . . . . .	8538
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*See COMPENSATION—CIVIL CASES.*

[I. L. R., 18 Bom., 717]

*See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.*

[5 B. L. R., Ap., 1]

*See ROAD CESS ACT.*

[I. L. R., 4 Calc., 576]

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*See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—SET-OFF.*

[I. L. R., 20 Calc., 527]

I. L. R., 21 Calc., 419

### 1. GENERAL CASES.

1. ———— *Raising issue of set-off on trial—Procedure.*—When a defendant raises a claim of set-off on the trial of that issue, he must be considered as plaintiff. *JAGADAMBA DASI v. GROB* [5 B. L. R., 639]

As to how cases of set-off will be dealt with, *see RAMGOPAL v. MAJETI MALIKKARJANUD*

[1 Mad., 396]

2. ———— *Power of Revenue Court to allow set-off under Act X of 1859, s. 24—Suit by principal against agent.*—A Revenue Court acting under the provisions of s. 24, Act X of 1859, had jurisdiction to allow a set-off for any sums which the agent might either have paid to his principal directly or used for the benefit of his principal with his sanction and authority. *MOHIA RUNJUN ROY CHOWDHRY v. NOBO COOMAR MISSEK* [18 W. R., 339]

3. ———— *Written statement of set-off—Act VIII of 1859, s. 121.*—Under s. 121, Act VIII of 1859, a defendant, desirous of setting off against the claim of the plaintiff the amount of any payment made by him on plaintiff's account, was bound to tender a written statement containing the particulars of his demand. *POORNA CHUNDER ROY v. BEHAREE LALL MOOKERJEE*. 14 W. R., 473

4. ———— *Character in which claim is made—Civil Procedure Code, s. 111—Written*

**SET-OFF—*cont. sued*****1. GENERAL CASES—*continued***

*statement pleading a set-off*—In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promise to note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil exceeding the amount due on the promissory note and bond and asked for a decree for the difference. *Held* (1) that the written statement must be regarded as a plea in regard to the set-off, and should have been stamped accordingly; (2) that if the plaintiff claimed as the heir and representative of his father, the set-off was rightly pleaded. *CHITRAPPA v. RAGHUVATHA* I. L. R., 15 Mad., 29

**5** — **Right of set-off—Cross-demands arising out of same transaction**—*Sentile*—The right of set-off will be found to exist not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. *CLARK v. RUTHVENALOO CHETTI* 2 Mad., 298

**6** — **Cross-demands arising out of same transaction—Suit to enforce contract—Damages**—The right of set-off exists where there are cross-demands arising out of one and the same transaction, or where these are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. In a suit to recover money due under a contract made between the plaintiff and defendants.—*Held* that the defendants were entitled to set off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on. *KISTNASAMY PILLAY v. MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS* 4 Mad., 120

**7** — **Cross-demands arising out of the same transaction—Civil Procedure Code (Act XIV of 1852) s. 111**—When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under s. 111 of the Civil Procedure Code. *Bhagbat Pande v. Bamdeb Pande* I. L. R., 11 Cal., 557, relied on. *Clark v. Ruthvenaloo Chetti*, 2 Mad. H. C., 296, referred to. *CHINHOUM v. GOPAL CHANDER SERRA*

I. L. R., 16 Cal., 711

**8** — **Civil Procedure Code s. 111—Suit for balance of account**—The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained amongst other provisions, one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other Magistrate, would be bound to take over the house along with the bridge to be determined by having failed to prove it.

**SET-OFF—*continued*****1. GENERAL CASES—*continued***

arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge or for any other cause for which the lessee is not responsible, he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease and the Magistrate of the district, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs 10,000. The Magistrate added a percentage, bringing the total amount up to Rs 12,100 and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract. *Held* that the sum of Rs 12,100 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account, and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favour. *SECRETARY OF STATE FOR INDIA v. MADANI LAL* I. L. R., 13 All., 298

**9** — **Civil Procedure Code ss. 111, 216—Cross-claims of the nature of set-off**—The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held* that in such a suit the defendant might claim by way of set-off compensation for the loss which he had incurred in the resale of that portion of the timber, the subject of the contract, or which the plaintiffs had failed to take delivery of. *S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off.* *Clark v. Ruthvenaloo Chetti*, 2 Mad., 296; *Kistnasamy Pillay v. Municipal Commissioners for the Town of Madras*, 4 Mad., 120; *Kishorchood Chamlpal v. Madhori, Faram*, I. L. R., 4 Bom., 407, *Prasanna Lal v. Maxwell*, I. L. R., 7 All., 384; *Bhagbat Pande v. Bamdeb Pande*, I. L. R., 11 Cal., 557, and *Chinhoum v. Gopal Chander Serra*, I. L. R., 16 Cal., 711, referred to. *NIAZ GUL KHAN v. DUKKA PRASAD* I. L. R., 15 All., 9

**10** — **Right to set off a claim for unliquidated damages—Civil Procedure Code (Act X of 1857), s. 111—Costs—Act XXVI of 1864, s. 9**—The provisions of the Civil Procedure Code (Act X of 1857) do not give the right to set off claims for unliquidated damages, but that Code does not take away any right of set-off, whether legal or equitable, which parties to a suit would have independently of its provisions. Where, therefore, in a suit for the price of goods sold and delivered, the

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

defendant admitted that there was a sum of Rs. 159-12-0 due by him to the plaintiff, but sought to set off the sum of Rs. 72 as damages sustained by him by reason of the non-delivery of some of the goods contracted for, it was held that, as the claim of the defendant against the plaintiff was connected with the same transaction and arose out of one and the same contract as that in respect of which the plaintiff's suit was brought, and as the amount of the defendant's claims was capable of being immediately ascertained, the defendant might set off his claim. *Clark v. Ruthnavaloo Chetti*, 2 Mad., 296, and *Kistnasamy Pillay v. Municipal Commissioners of Madras*, 4 Mad., 120, followed. Where the defendant proved a set-off against the plaintiff, and thus reduced the amount which he (plaintiff) was entitled to recover from the defendant, for breach of contract, —Held that, notwithstanding the provisions of s. 9 of Act XXVI of 1864, the plaintiff was entitled to his costs. *KISHORCHAND CHAMPALAL v. MADHONJI VISRAM*. I. L. R., 4 Bom., 407

11. — Right to set off a claim for an unascertained amount.—Civil Procedure Code (Act XIV of 1882), s. 111.—The provision of the Civil Procedure Code (Act XIV of 1882), s. 111, does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of that Code. And such right exists not only in cases of material debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover, and the defendant should be driven to a cross-suit. Where, therefore, a decree had been obtained against certain persons in respect of arrears of rent of an ijara held jointly by them, and one of them, having been forced to pay the whole amount of decree, sued the others for contribution, and where in such suit the defendants pleaded that, although the plaintiff had paid off the whole of the decree in question, he was not entitled to recover any portion from them, inasmuch as he was indebted to them for his share of the ijara rents, the whole of which had been paid by them to the zamindar in previous years, as well as in respect of rent due to them for the share on account of a portion of the land which he himself held in nij-jote, and for which he had paid no rent, and that, on accounts being gone into, it would be found that their claim exceeded that of the plaintiff,—Held, following *Clark v. Ruthnavaloo Chetti*, 2 Mad., 296, and *Kishorchand Champalal v. Madhonorji Visram*, I. L. R., 4 Bom., 407, that notwithstanding the provisions of s. 111 of the Civil Procedure Code, the defendants' claim for the share of rents paid by them to the zamindar on account of the same ijara might properly be pleaded as a set off, and be taken into account in determining the plaintiff's suit as arising out of the same transaction, but that their claim for rent for the portion of the lands held by the plaintiff in nij-jote could not be treated in such manner, but must form the subject-matter of a separate suit. *BHAGBAT PANDA v. BAXENDER PANDA*. [I. L. R., 11 Calc., 557

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

12. — Right to set off damages for breach of contract.—Civil Procedure Code, 1882, s. 111—"Ascertained" sum.—A suit was brought by P against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. Defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879 and subsequently. Held that, although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set off under s. 111 of the Civil Procedure Code, this section was one regulating procedure, and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions, that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit; and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai v. Ram Sahai*, 7 N. W., 157; *Kistnasamy Pillay v. Municipal Commissioners of Madras*, 4 Mad., 120; and *Kishorchand Champalal v. Madhonorji Visram*, I. L. R., 4 Bom., 407, followed. *Per* OLDFIELD, J.—That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim. *Per* DUTHOOR, J.—That although the set off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account. *PRAGI LAL v. MAXWELL*. I. L. R., 7 Mad., 284.

13. — Civil Procedure Code, 1859, s. 121—Suit or award determining several items—Mutual liability under award.—G and R referred to arbitration disputes between them regarding the partition of their paternal estate. The concluding portion of the award ran as follows: "Both parties shall jointly satisfy the debts on the creditors demanding payment, which debts are joint and have hereunder been declared payable by both parties. Should one party neglect to pay or show carelessness in the matter, and should the other be obliged to pay the whole amount of any such debts, the latter shall be competent to realize from the former portion of the debt paid on his account, together with costs and interest, by the enforcement

## SET OFF—continued

## 1 GENERAL CASES—continued

of the award and shall also be entitled to recover the amount by suit. *Curt*. Both parties shall act up to the award in its entirety. The sum of Rs 338-9-9 which has been found due and payable by G to R as per account showing the mutual dealings between the parties shall be made good as follows: *s.c.* G shall pay to P the whole amount of Rs 338-9-9 by the middle of the month of Pous 1276. First either in a lump sum or by instalments, and in case of non payment within the said period he shall be charged with interest at the rate of one per cent. up to the day of payment. R sued to recover from G the money found to be due and payable to him under the award. G admitted the claim but desired to set off half the amount of certain debts which were payable under the award by the parties jointly and which he alone had satisfied. The lower Appellate Court deducted from the claim items of the demand admitted by P but refused to determine G's right to set off the items which P disputed on the ground that they could be more conveniently inquired into in a separate suit. It was held (*per* STUART C.J. SPARKIE J., dissenting) that G was entitled to demand a set-off and that the lower Appellate Court should have inquired into the disputed items of the demand, and not have referred G to a separate suit in respect of those items. *GARHI SAHAI v. PAM SAHAI*

[7 N. W., 157]

14. *Decree in—Set off of costs against mortgage money—Law of attorney—Civil Procedure Code, 1907 ss 111 221*—The decree in a redemption suit directed the plaintiff (the mortgagor) to pay the mortgage-money and interest to the defendant and directed the defendant to pay the plaintiff the costs of the suit. Held that the plaintiff was entitled to set off the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of suit. *BRINATH DASS v. JUGGERNATH DASS* I. L. R., 4 Cal., 742

F. C. BRINATH DASS v. JUGGERNATH DASS

[4 C. L. R., 122]

I. L. R., 15 All., 8

15. *Civil Procedure Code (Act XIV of 1902) s. 221—Costs due by mortgagee to mortgagor—Set-off against the mortgage-debt—Liability of mortgagee for any balance—Redemption suit*—The mortgagor is entitled to set off or deduct the amount of costs payable to him under the decree against or from the mortgage-debt payable by him. If the amount of the costs be larger than the mortgage-debt the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance against the mortgagee. *SINGH v. RAM* I. L. R., 17 Bom., 32

16. *Insolvent Act s. 33—Misordered to—Civil Procedure Code 1907, s. 111*—Where there is a debt due from an insolvent prior to his insolvency to another from whom there was a debt which was in dispute due to the insolvent,

## SET OFF—continued

## 1 GENERAL CASES—continued

in a suit brought by the Official Assignee to recover the latter debt, the defendant is entitled under s. 33 of the Insolvent Act 11 and 12 Vict. c. 21 to set off the debt due from him to the insolvent against sums which may be claimed from him. *MILLER v. BERR*

[8 C. L. R., 234]

17. *Civil Procedure Code 1902 s. 111—Court fee on set-off*—In a suit to recover a sum of money due as wages the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him and the plaintiff (then defendant) pleaded that there had been no sale to him but the cloth had been delivered to him on commission sale. The suit was dismissed on the ground that there was no proof of a sale of cloth and the question whether any sum was due for cloth sold on commission sale was not gone into. The cloth now alleged to have been delivered on commission sale was the same as that alleged in the former suit to have been actually sold to the plaintiff. Held that the defendant was entitled under s. 111 of the Civil Procedure Code, to set off the amount claimed as due for goods sold on commission against the plaintiff's demand. Held also that the court fee payable on the claim for set-off was the same as for a plaint in a suit. *AMIZ ZAMA v. NATHU MAL* I. L. R., 8 All., 396

18. *Liquidated sum due on bond—Suit for rent*—A liquidated sum due on a bond is payable according to law even without an agreement to that effect, of being set off against sums due for rent. *WATSON & Co. v. HINGO* MOODURIE DIXIA I. L. R., 225

19. *Debt due from deceased husband—Debt due to widow*—A widow is liable for a debt contracted by her husband. Such debt may be set off against a debt due to her. *CHANDER LALOOCH v. HOOMANEE DASSA*

[1 W. R., Mls., 23]

20. *Lambardar—Revenue, Payment of—Profits, Suit for share of—Held (SPARKIE, J., dissenting)* that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment. *UDAI SINGH v. JAGAN NATH* I. L. R., 1 All., 135

21. *Purchase by partner of shares in zamindari—Set off on payment of rent*—The four defendants obtained jointly a patta lease of P., and subsequently purchased jointly a 5 annas share in the zamindari. Defendants 1 and 2 separated from 3 and 4 each taking 8 annas

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

of the patni and 2½ annas of the zamindari, and then defendants 3 and 4 sold their zamindari right in 2 annas and 15 gundas share to K, the plaintiff, retaining 5 gundas share on their own account. The plaintiff sued to recover the rent of 2 annas and 15 gundas from the defendants 1 and 2, who denied the plaintiff's claim, while they admitted that they were liable for 8 annas rent of the patni, treating themselves as their own zamindars for 2½ annas share in the zamindari, and they alleged payment of 5½ annas of the patni rent to the 8 annas shareholder in the zamindari, and a set off against the other 2½ annas against their own claim as zamindars. *Held* that, as the defendants 1 and 2 were strangers to the transfer of the rights of defendants 3 and 4 to the plaintiff, they had, as between themselves and the plaintiff, a right still to do what they did formerly, namely, set off their patni liability against their zamindari right. **GOOROO DIAL CHUCKFERNUTTY v. KESHUN BIBEK** . . . 20 W. R., 409

22. ————— *Rent, Suit for—Rent paid in kind—Set-off allowed for—Account.*—In a suit for arrears of rent, where defendant pleaded that, under an arrangement between him and plaintiff's ancestors, payment had been made by him in cash or in kind, and asked for an account to be taken, the lower Court was held to have been wrong in decreeing the suit on the ground that it could not go into evidence on a question of set-off in a rent suit, and was bound to take an account. **ROX NUNDEPUT MOHATOON v. STEWART** . . . 23 W. R., 20

23. ————— *Plea of payment in suit for arrears of rent—Indirect payment.*—In a suit by a zamindar for arrears of rent the defendant alleged that his tenure had been placed under the management of the Collector, and had so remained for a number of years, and that the Collector, from money realized by him as manager, had, in addition to satisfying all other claims of the plaintiff, paid the rents accruing, not only during the period of his management, but up to, and inclusive of, the years the arrears of rent for which were claimed in the suit. The lower Court refused to consider the defendant's plea, on the ground that it was in the nature of a set-off, and that, not being a debt due from the plaintiff to the defendant, it was not such a set-off as could be allowed by the Court. *Held* that the plea was a plea of payment merely, and not in the nature of a set-off. **KOONJO BHABY SINGH v. NEMONEY SINGH DEO** . . . 4 C. L. R., 296

24. ————— *Suit for contribution against person jointly liable for rent.*—In ascertaining the amount due for contribution in a suit by one of two persons jointly liable under a decree for rent, the Court is bound to take into consideration sums paid by the defendant, on former occasions, for rent in excess of his own share of the rent, although such sums are not claimed in his written statement, the sums paid not being in the nature of a set-off. **GOGUN CHAND DUT v. HURI MOHUN DUT**

[12 C. L. R., 539]

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

25. ————— *Civil Procedure Code, 1859, ss. 121, 195—Claim arising out of same transaction.*—Where a defendant claims a right of set off arising out of one and the same transaction as that in which the suit originated, it is not equitable to drive him to a cross suit: a decree under Act VIII of 1859, s. 195, and the latter portion of s. 121, being of the same effect and subject to the same rule as if it had been made in a separate suit. **RADHA RAM DEB v. JAMES** . . . 20 W. R., 410

26. ————— *Decree for defendant on set-off where nothing found due to the plaintiff.*—*Held* that a defendant may deny the plaintiff's claim, and also plead a set off and obtain a decree for it, although no sum may be found to be due to the plaintiff. **HATATEKA v. ABDULAKHA** [6 Bom., A. C., 151]

27. ————— *Civil Procedure Code, 1859, s. 195—Counter-claim—Deductions allowed in ascertaining mesne profits.*—S. 195. Act VIII of 1859, which enabled a defendant to obtain a decree against a plaintiff in respect of a counter-claim, was only applicable where defendant had been allowed to "set off" a demand against plaintiff's claim, and did not apply to a case where, in ascertaining a defendant's liability for mesne profits, deductions were allowed from the rent proved to have been received, in the nature of allowances made for costs of cultivation or collection expenses. **TILUCK CHAND v. SOWDAMINEE DASSEE** [25 W. R., 275]

28. ————— *Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XII of 1882), s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Procedure.*—In a suit brought by the plaintiff to recover Rs 67-9 from the defendant under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court, *Held* that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off. **RAMPBAT v. GANESH RANGNATH**

[I. L. R., 12 Bom., 31]

29. ————— *Civil Procedure Code, ss. 111, 216—Suit for dissolution of partnership.*—A suit for dissolution of partnership in which the claim was valued at Rs 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs 5,000, then by reason of the provision in paragraph ii, s. 216 of the Code, an appeal from the

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

decree will lie to the High Court, and not to the District Court. **RAMJIWAN MAL v. CHAND MAL**  
[I. L. R., 10 All., 587]

30. ——— *Claim of different nature*—It is not equitable to allow a set-off against a claim relating to a particular account, stated, of a matter of another nature altogether. **KALSHR KUMAR CHUCKERBUTTY v. HERO CHUNDER CHUCKERBUTTY**  
17 W. R., 177

31. ——— *Amount in excess of jurisdiction of Court*—A Court cannot entertain the question of set-off if the amount claimed by it, the defendant exceeds the amount cognizable by it. When a defendant pleads a set-off and claims a decree, the subject matter of the suit is no longer the mere claim of the plaintiff, but the cross-claim of both parties. **RAM LAL v. LANCASTER**  
3 N. W., 114

32. ——— *Unascertained sums*—Setting off an unascertained sum against another is a mode of settlement which is suggested to the parties as a compromise may, with their assent, be a kind of arbitration, but cannot properly be made the basis of a decree between hostile litigants. **BACHU v. HAMID HOSSEIN ABDOL AZEEZ v. HAMID HOSSEIN**  
17 W. R., 113 10 B. L. R., 45

33. ——— *Civil Procedure Code, 1859, s. 121, 125—Claim for unliquidated damages—Suit on bill of exchange—Cross-demands.*—Ss. 121 and 125 of the Code of Civil Procedure (Act VIII of 1859) had not the effect of enlarging the right of set-off. In a suit against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set off a claim for unliquidated damages unconnected with the bills of exchange. Held that defendant had no right to set off his claim against the debt due to the plaintiff. **CLARK v. BUTHAYALOO CHETTI**  
3 Mad., 286

34. ——— *Unascertained damages—Civil Procedure Code, 1859 s. 121—Under s. 121, Act VIII of 1859, a defendant could not claim a set-off for damages in respect of an alleged breach of contract which had not been ascertained in a suit brought against him to recover the amount due on certain debencoured hundis.* **RAM DIAL v. RAMDHUN DASS**  
3 Agra, 43

**RAM LAL v. KONDUN LALL**  
3 Agra, 97

35. ——— *Separate debt—Joint and several debt—Directors.*—A separate debt cannot be set off against a joint and several debt, and directors cannot set off money due from the company to them against sums which they may be ordered to refund to the liquidators. **NEW FLEMING SPINNING AND WEAVING COMPANY v. KESROWAT NAIK**  
[I. L. R., 9 Bom., 373]

36. ——— *Joint and separate debts—Mutual dealings.*—A had dealings with a firm consisting of a father and two sons, who carried on business jointly. Shortly after the father's death,

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

the two brothers separated, and A dealt with each separately, having notice of the separation. A could not set off, against a claim made by one of the brothers, in respect of the separate dealings between himself and A, a debt due to himself from the former joint concern. **DARREY SINGH v. FORRES**  
[I. Ind. Jur., N. R., 354]

37. ——— *Costs—Omission to award costs.*—A set-off cannot be allowed for costs not actually awarded, as where a decree of the High Court gave the successful appellant costs of that Court and of the lower Appellate Court, but omitted to award the costs of the first Court. **HERO PRERAD ROY CROWHURY v. FOOL KISHORE DOWSE**  
[18 W. R., 309]

38. ——— *Suit for carriage of goods—Set-off for damages.*—In a suit for money claimed on account of the carriage of goods in which defendant pleaded non indebtedness and a set-off on account of damage caused to the goods.—Held that defendant could not answer the claim with the set-off on account of damages, though the extent, if any, to which defendant was entitled to draw back might be put in issue, after which it would still be open to defendant to bring an action against plaintiff for special damages. **SCANTLAN v. HERROLD**  
10 W. R., 295

39. ——— *Suit for mesne profits—Civil Procedure Code, 1859, s. 121.*—A set-off is not admissible in a suit for mesne profits, which is not suit for a debt within the meaning of s. 121. Act VIII of 1859. **ROTEX BOMON GOPADHYA v. GIREJA NEND GOPADHYA**  
5 W. R., 180

40. ——— *Unascertained mesne profits—Debt not due at time of suit.*—An indefinite claim for damages in the nature of unascertained mesne profits cannot be pleaded as a set-off against specific claim for rent of later years. Such damages must be sued for separately. In a suit for rent a defendant has no right to set off against the plaintiff's claim money in deposit with the plaintiff, unless such money was due and payable to the defendant at the time the suit was brought. **GOCOM COOMAR v. BRICKHOOD SINGH**  
23 W. R., 1

41. ——— *Civil Procedure Code, 1857, s. 111—Mortgage—Compensation for waste.*—The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged the mortgagee had committed waste and was liable to him for compensation which he claimed to set off. Held that under s. 111 of Act X of 1877 the amount of such compensation could not be set off. **RAGHU NATH DASS v. ASHRAF HUSAIN KHAN**  
[I. L. R., 2 All., 253]

42. ——— *Claim against deceased father—Right to appropriate property.*—Where a widow administering her husband's estate sued to recover certain moveable property wrongly appropriated by her son, who pleaded a set-off on account of a claim against his father.—Held that

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

defendant was rightly referred to a separate suit.  
**MANLY v. MANLY** . . . 14 W. R., 136

43. ———— *Civil Procedure Code, 1882, s. 111—Suit by creditor of deceased.*—The heirs to *M*, deceased, appointed *A*, one of the heirs, manager of *M*'s estate, with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt and obtained a decree, in execution of which the share of *Z*, one of the heirs, in *M*'s landed estate was sold. The sale-proceeds exceeded *Z*'s share of such debt, and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set-off in respect of *Z*'s share of the liabilities of *M*'s estate which had been satisfied by *A* as manager. *Held* that the set-off claimed could not be entertained in such suit. **ABUL HASAN v. ZOHRA JAN**

[I. L. R., 5 ALL., 208]

44. ———— *Act VIII of 1859, s. 121—Co-sharers—Suit for contribution.*—In a suit brought against a lessee of a portion of an estate by one of the co sharers for money alleged to be due as the plaintiff's share of arrears of rent for a certain period, where the claim was admitted, —*Held* the defendant was not entitled to set off under s. 121, Act VIII of 1859, the plaintiff's share of the Government revenue of the whole estate which had been paid by the defendant for the period for which the arrears of rent were alleged to be due. *Held* also that there was no such connection between the claim of the plaintiff and the counter-claim of the defendant as would entitle the defendant, as a matter of equity apart from legislative enactment to a set-off. **HOSSEINA BIBI v. SMITH**

[13 B. L. R., 440 : 22 W. R., 15]

45. ———— *Suit for contribution—Shares on zamindari and shikmi rights.*—Plaintiffs, as being entitled collectively to an 11-anna share of the jumma of a talukh and alleging that they had obtained such portion of their share as the 14-anna talukhdars were liable for, sued the 2-anna sharer for what he ought to have contributed. The lower Appellate Court, finding that the defendant had a 2-anna share in the zamindari, as well as in the shikmi, considered that the one right might be set off against the other, and that the plaintiffs had consequently no claim against the defendant. *Held* that this conclusion was erroneous, for though there were in a certain sense opposing rights, still they were not mutual rights as between the parties to the present suit. The plaintiffs were entitled to get a 2-anna share of the jumma from the defendant and the 14-anna talukhdars jointly, and the defendant was entitled to get a like share from these 14-anna talukhdars and himself jointly, but the defendant had no right to set off the debt thus due to him against the debt due to the plaintiffs from the same persons. **HUREE KISHORE ROY v. HUR KISHORE ADHIKARRE** . . . 23 W. R., 134

46. ———— *Debts not mutual—Disputed claim for rent in suit for payments*

## SET-OFF—continued.

## 1. GENERAL CASES—continued.

*made to save estate.*—*A* and *B* were the proprietors of a jote, of which *B* leased half of his share to *C* as mirasidar. The zamindar brought a suit for rent of the jote against *A* and *B* and got a joint decree, in execution of which he put up the jote for sale. *C*, in order to save his miras right, paid the amount of the decree before sale, and then sued *A* and *B* for the amount so paid. *Held* that *C* was entitled to recover, and that a claim for rent by *B* against *C*, but which *C* disputed, could not be admitted as an answer to *C*'s claim in the present suit or as a set off. It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties and in the same right. *Bengal Regulation VIII of 1819, s. 13, and Bengal Act VIII of 1869, s. 62, discussed.* **BHOIRUP CHUNDER DOSS v. HAREZUNISSA KHATOON** . . . 2 C. L. R., 414

47. ———— *Suit for rent—Compensation for damage done in execution of decree.*—If the cultivator suffer damage in execution of a decree of the Civil Court, he may sue and claim compensation for such damage; but until such damage has been ascertained and decreed, it cannot be set off against a claim for rent. **RAI GOBIND SINGH v. SOONDER PAL** . . . 2 Agra, Pt. II, 177

48. ———— *Claim for rent—Suit for money paid to protect lease.*—A claim for rent cannot be pleaded as a set-off in a suit for money paid by the plaintiff on account of revenue to protect a lease in the nature of a mortgage held by him. **HEERA LALL v. BISHEN SUHAYE** . . . 1 W. R., 297

49. ———— *Account, Suit for—Cross-appeal.*—Of two appeals heard together the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other, their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties for damages for the detention of property which had belonged to the estate of the deceased. In the first the plaintiffs appealed; and in the second the defendant, who also, by cross-appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits. *Held* that, as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtful whether a set-off could be pleaded in defence, and as also no issue had been framed or even asked for on the question, it was not open to the defendant to raise it on this cross-appeal. **NAN KARAY PHAW v. KO HTAW AH. KO HTAW AH v. NAN KARAY PHAW**

[I. L. R., 13 Calc., 124 : L. R., 13 I. A., 48]

50. ———— *Civil Procedure Code (1882), s. 111—Counter-claim for damages—Costs of preparing a deed—Stamp duty.*—In December 1892 the plaintiffs agreed to supply the defendants with machinery for their mill near Calcutta. The defendants, being unable to pay for it in accordance with that agreement, entered into a



## SET OFF—continued

## 1 GENERAL CASES—concluded

supplementary agreement with the plaintiffs on the 10th August 1894 whereby it was arranged that the plaintiffs should accept shares in the defendant's company and debentures charged on the property in satisfaction of their claim. The agreement provided that the defendant company should forthwith execute an indenture of trust in favour of trustees to be named by the plaintiffs for the purpose of securing the said debentures such indenture to be prepared by the plaintiffs solicitors together with the debentures at the expense of the company and to be approved by the company's solicitors. It was lastly provided that this agreement should be treated as forming part of and supplemental to the agreement of December 1892. This agreement was signed by J Marshall on behalf of the plaintiff. The indenture and debentures were duly prepared by the plaintiffs and approved by the defendants' solicitors. The plaintiffs having paid the solicitors' bill of costs in respect of the preparation of the indenture and debentures now sued to recover the amount from the defendants under the terms of the above agreement of 1894. The defendant alleged that the plaintiffs had failed to carry out their part of the agreement of 1892 and contended that they were entitled in this suit to claim damages against the plaintiffs and to set them off against the plaintiffs' claim. Held that the defendant should not be permitted in this suit to claim damages against the plaintiffs for their alleged failure to carry out their part of the contract of 1892. Their counter-claim or set off did not fall under s. 111 of the Civil Procedure Code (Act XIV of 1882) as it was not a claim for an ascertained sum of money and, that being so they could not claim as of right to have it investigated in this suit. Nor was there any equitable ground for admitting the counter-claim, as it could not be doubted that there would be considerable delay in investigating it and there was no reason why the plaintiffs should have to wait so long for the money to which they were now legally entitled. Held also that the plaintiffs were entitled to include in their claim the stamp duty paid on the trust deed. The agreement contemplated that the defendants should pay all the costs incidental to the execution of the deed. **DORRIS AND BARKLEY v. BENGAL SPINNING AND WEAVING CO.**

[I. L. R., 21 Bom., 126]

## 2 CROSS DECREES

51. — *Decrees under Act X of 1859* — *Quere* — Where the provisions of s. 209 of the Civil Procedure Code, 1859 were applicable to decrees passed under Act X of 1859. **DE SILVA v. AMER SHAH.**

18 W. R., 303

There is now no distinction in this respect between rent decrees and other decrees.

52. — *Award on private arbitration* — An award of private arbitration *per se* did not come under the provisions of s. 209 of Act VIII of 1859 so as to be set off against a decree of Court. **DHARAJ SINGH v. DEEN DIAL SINGH.**

[I. W. R., 144]

## SET OFF—continued

## 2 CROSS DECREES—continued

53. — *Requisites for right—Decrees in same Court for execution* — Before cross-decrees can be set off the one against the other it is necessary that they should be in the same Court for execution. **FAST INDIAN RAILWAY COMPANY v. HALL.**

3 N. W., 104

**DE SILVA v. AMER SHAH.**

18 W. R., 303

54. — *Requisites for right—Decrees in same Court for execution—Civil Procedure Code, 1859, s. 209* — The provisions of s. 209, Act VIII of 1859, applied only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which had found their way for execution to the same Court. **RAM COOMAR GHOSH v. GORIND NATH SANDIAL.**

7 W. R., 480

Persevering on review, **S. C. GORINDNATH SANDIAL v. RAMCOOMAR GHOSH.**

8 W. R., 21

**HANOO SIEDAN v. JADOO MOYER DORSEY.**

[17 W. R., 46]

55. — *Requisites for right—Decree in same Court for execution* — The decrees must be under execution at the same time. **JEDOO NATH ROY v. RAM BUKSH CHUTTAYGEE.**

[7 W. R., 535]

56. — *Requisites for right—Decrees not in same Court—Act VIII of 1859, s. 209* — Act VIII of 1859, s. 209, which provided for the set-off of cross-decrees, applied only to decrees of the same Court or decrees sent to a Court for execution. Therefore where, on application for execution of a decree in the Court of a Principal Sudder Ameen, it was sought to set off a decree obtained in the Judge's Court, which had not been sent to the Principal Sudder Ameen for execution, — Held that s. 209, Act VIII of 1859 did not apply. **GHISHCHANDRA LAHURY v. FAKIR CHAND.**

[I. L. R., Sup. Vol., 503 6 W. R., Mils., 72]

57. — *Requisites for right—Decrees for definite sums—Civil Procedure Code, 1859, s. 209* — In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite. **REZAOD-DREY HOSSAIN v. FULZOOTISSA.**

[5 W. R., Mils., 12]

58. — *Appeal from decree* — A judgment-debtor is entitled to set off a decree whether the judgment-creditor may or may not intend to object on appeal to the judgment-debtor's decree. **HUSSO PERSHAD POY CHOWDHURY v. SHAMA PERSHAD POY CHOWDHURY.**

[5 W. R., Mils., 52]

59. — *Set off of joint decrees—Civil Procedure Code (Act X of 1877), s. 246* — A judgment-debtor may set off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. **HURST DONAL GUHO v. DIN DONAL GUHO.**

[I. L. R., 9 Cal., 479; 13 C. L. R., 93]

## SET-OFF—continued.

## 2. CROSS-DECREES—continued.

60. ————— *Civil Procedure Code, s. 246.*—Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of s. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly. *RAM SUKH DAS v. TOTA RAM*  
[I. L. R., 14 All., 339]

61. ————— *Joint decree—Decrees not between same parties—Civil Procedure Code, 1877, s. 246.*—S and two other persons held a decree for costs against M which did not specify the separate interests of each in the decree, and M held a decree for money against S alone, which he wished to treat as a cross decree under s. 246 of Act X of 1877. *Held* that the decree held by S and the other persons was not a decree between the same parties as the parties to the decree held by M, and M's decree could not therefore be treated as a cross-decree under that section. *MURLI DHAR v. PARSOTAM DASS*  
[I. L. R., 2 All., 91]

62. ————— *Execution by two decree-holders—Act VIII of 1859, s. 209.*—Where there were cross decrees, and one of the decree-holders was, by an order of the Court made with the consent of both parties, bound in executing his decree to set off the amount of the decree against him,—*Held* that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him. *HARO SANKER SANDYAL v. TARAK CHANDRA BHUTTACHARJEE*  
[3 B. L. R., A. C., 114; 11 W. R., 488]

63. ————— *Civil Procedure Code, 1859, s. 209—Attachment.*—In April 1877 M sued S for money, and on the 10th May 1877 S sued M for money, both suits being instituted in the same Court. In the meantime, on the 9th May 1877 B applied for the attachment of the money claimed by M in his suit, and obtained an order prohibiting M from receiving, and S from paying, any sum which might be found in that suit to be due by S to M. On the 23rd June 1877 M obtained a decree in his suit against S, and S obtained a decree in his suit against M, S's decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of S's decree for so much as remained due. At the same time S objected to B's attachment, but his objection was disallowed. *Held*, in a suit by S against B to have the order disallowing his objection set aside and the property and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if B had followed up that order and attached M's decree against S, that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross decrees, that for the smaller sum

## SET-OFF—continued.

## 2. CROSS-DECREES—continued.

became absorbed in the one for the larger, and attachment could not affect it. *BHUTJAWAN LAL v. SUKHAJ RAI* . . . I. L. R., 2 All., 886

64. ————— *Cross-decrees for mesne profits.*—Where there are cross-decrees for possession and mesne profits in respect to the same land, the earlier decree comprehending only a part of the land embraced in the latter, each party may take out execution and be entitled to receive vasilat separately. *ANUND MOHUN HAJRAH v. SHIBO SOONDUREE DAHER* . . . 16 W. R., 256

65. ————— *Cross-decrees for mesne profits.*—In 1827 S commenced a suit against B, and before judgment applied for and obtained, under Bengal Regulation 11 of 1806, an attachment of certain immovable property belonging to the defendant. In 1828 S obtained a decree, upon which he did nothing immediately; but in 1844 he sold the attached property in execution and purchased it himself. Thirteen years after B commenced proceedings to set aside that sale, and in 1860 obtained a final decree reversing the sale, restoring to him the possession and awarding him mesne profits. The mesne profits were ascertained, and a third party (R) attached the decree in respect of a judgment-debt due to himself from B. Upon this S, after trying ineffectually to stay R's proceeding, brought a suit claiming to set off the amount of the decree of 1828 against the decree of 1860. *Held* that whatever equitable right S might have in consequence of the situation of the parties, it should have been urged in the suit before decree, and not in execution when rights of third parties had accrued, and that what R sought was not the mesne profits attached by S under the decree of 1828, but the amount decreed to be paid by S to B. *RAM COOMAR GHOSH v. GOBIND NATH SANDYAL* . 12 W. R., 391

66. ————— *Decree not enforceable.*—A decree which is incapable of being enforced cannot be set off against a decree which is alive. *HURO PERSHAD ROY CHOWDHURY v. POOL KISHOREE DOSSEE* . . . 16 W. R., 308

67. ————— *Decree barred by lapse of time.*—A set-off is not admissible, except upon a cross-decree which the decree-holder is seeking to execute, and not upon a cross-decree incapable of execution by lapse of time. A cross-decree must be kept alive by the action of the party entitled under it. *ANUND MOHUN SUBMA MOJUMDAR v. HURO CHUNDER BHUTTACHARJEE* . 5 W. R., Mis., 16  
*PROSUNNO COOMAR GHOSH v. SHAM LAL GUNGO-PADHYA* . . . 5 W. R., Mis., 8

*HEMRAJ CHOWDHURY v. ASOODUN*

[5 W. R., Mis., 43]

68. ————— *Civil Procedure Code, 1859, s. 209—Decree barred by limitation.*—In a suit for re-umption of land, plaintiff obtained a decree for a portion of her claim, with costs in proportion. Subsequently, on application for a review, she obtained a further decree for the rest of her claim. The latter decree was reversed on appeal by the High Court, who gave defendants all costs of the proceeding

## SET OFF—continued

## 2 CLOS-DECREE—continued

In proportion Plaintiff allowed more than three years to elapse from the date of the former decree without applying for execution, but when defendant applied to execute his decree for costs, she petitioned for a set-off of so much of the costs as had been decreed to her. *Held* that these two judgments and decrees must be treated as reduced to one, wherein judgment was given in part for the plaintiff and in part for the defendant; and before issuing a warrant of execution, the Court was bound to ascertain how much, on the whole case was due to the party executing and to issue a warrant for that sum and no more. *Held* further that no question of limitation could arise in respect to the execution of the first decree, which became incapable of execution as soon as the High Court's decree in appeal (which was for a larger sum) was passed, but that the latter, under s 209 Code of Civil Procedure, could only be executed to the extent of the difference between the two decrees. *NABO LALL KHAN v. MAHARAJAN OF BURDWAN*

[9 W. R., 590]

69

*Act VIII of 1859 s 121*—A by deed of sar i pushgi, let certain lands to B to secure a sum advanced by him to her and interest thereon. B covenanted to pay certain dues annually to A. On failure by B, A obtained a decree against him for the amount. In execution of a decree against B, C purchased his interest in the sum secured by the deed of sar i pushgi, and sued A to recover the same. *Held* that A was entitled in such suit to set off the amount of the decree obtained by her against B. *BHAGWANI KUNWAR v. LALA BALINATH PRASAD*

[2 B. L. R., A. C., 64; 10 W. R., 380]

70.

*Assignee of decree*, *Right of*—Where execution of A's decree against B was stayed pending the passing of a decree in B's cross suit.—*Held* that no subsequent purchase of B's rights and interests in his cross suit could be set up as a bar to A's rights to attach the whole of the decree in the cross suit, in execution of his decree against B. *PRELOO CHOWDHRAIN v. COURT OF WARDS*

7 W. R., 219

71.

*Assignment of decree—Act VIII of 1859, s 203—Act XXIII of 1821, s 11*—The plaintiffs obtained a decree against B in the Subordinate Judge's Court. Some time afterwards B recovered a decree in the Munsiff's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against B. Before attachment, however, B assigned her decree to C. On C trying to execute B's decree against the plaintiffs they brought the present suit for a declaration of their right to have a set-off made of the two decrees. *Held* that such a suit would not be. *STUART NUNDEY RAIN v. SUMSAR PANDAY*

[13 B. L. R., 469. 23 v 235]

72.

*Civil I Code, 1859, s 209*—A obtained a decree in a suit of the N. W. Provinces against B. C, taking the debt *bona fide* by assignment, applied to execute it

## SET-OFF—continued.

## 2. CROSS-DECREE—continued

the 21 Pergunnahs. B, who got a decree against A in the 21 Pergunnahs, applied to have the decree set off against the other decree in the hands of C. *Held* that, in such circumstances s 209, Act VIII of 1859, did not apply. *ROZHOODDEEN v. JERANORA*

[5 W. R., Mis., 22]

73.

*Purchaser of decree—Act VIII of 1859, s 209*—The purchaser of a decree sought to execute the decree, but was opposed by the judgment-debtor, who sought to set off two other decrees obtained by herself and her two sisters against the judgment-creditor. These decrees were obtained about the date of the purchase, but it did not appear whether previously or subsequently. *Held* in neither case could they be the subject of a set-off. *KASIMUNISSA BINT v. HILLS*

[6 B. L. R., Ap., 125; 15 W. R., 127]

74

*Purchaser of decree—Act VIII of 1859, s 209*—A and B, having obtained a decree for a sum of money against C and D, sold part of their interest therein to E, who afterwards sold the same to F. G obtained a decree against F, and in execution attached and sold F's interest in the decree obtained by A and B, and H became the purchaser of the same. He applied for execution against C and D. C claimed to have set off the amount of a decree obtained by his son I against G, and which C alleged was held by I tenam for him as a cross-decree within the meaning of s 209 of Act VIII of 1859. *Held* that the decree could not be set off. *TARACHAND GHOSH v. ANANDA CHANDRA CHOWDEY*

[3 B. L. R., A. C., 110; 10 W. R., 450]

75

*Purchaser of decree—Act VIII of 1859, s 209*—The purchaser of a decree held by A, against whom B holds a cross-decree, takes it subject to a set-off on account of B's decree. *KAIM ALI JAWAIDAR v. LAKHNAUT CHUCKREBUTTY*

[1 B. L. R., F. B., 23; 10 W. R., F. B., 32]

*NUNDO COOMAR BUKSHER v. KOONJO KISHORE ROY*

6 W. R., Mis., 73

*DOORGA CHURN NUNDEY v. DEBNATH ROY CHOWDHREY*

18 W. R., 442

*OPPENDING MOHUN MOOSTAFEE v. POORNA CHURN DER BRUTTACHARJEE*

19 W. R., 85

*RAM CHUNDER v. MOHENDRO NATH BOSE*

[21 W. R., 141]

76.

*Civil Procedure Code, 1859, s 209*—A got a decree against B, who subsequently got a larger decree against A, which he sold to C. After that A executed his decree, and put up B's decree for sale and bought it himself. C then took out execution against A, who, having unsuccessfully put in a claim under Act VIII of 1859, s 243, brought a suit to have his claim established, and the sale of B's decree to C declared collusive. Both the lower Courts found that the sale was *bona fide*. *Held* that this finding could not be set aside on special appeal, but that, when C took out

## SET-OFF—continued.

## 2. CROSS-DECREES—continued.

execution, A might apply for a set-off under s. 209. *SHEO NARAIN SINGH v. CHOONEE BRUGGUT* [24 W. R., 299]

77. ———— *Fraudulent assignment—Rights of assignee.*—Where cross-decrees had been obtained and one of them had been assigned, in a suit by the other decree-holder to set aside the assignment as fraudulent,—*Held* that it was fraudulent, and the right of set-off was unaffected. *Quære*—Whether, had the assignment been a *bond fide* one, —i.e., for a valuable consideration,—the assignee would have taken the decree subject to the equities or liabilities of the decree-holder to the judgment-debtor. *TALUB HOSSEIN v. WAIKER* [7 W. R., 470]

78. ———— *Civil Procedure Code, 1877, s. 246—Execution of cross-decrees—Power of Court executing decree—Bond fide purchaser—Presumption of validity of order for sale.*—If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property sold in execution of a valid decree, under the order of a competent Court, was purchased *bond fide* and for fair value,—*Held* that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. *REWA MAHTON v. RAM KISHEN SINGH* . . . I. L. R., 14 Calc., 18 [L. R., 13 I. A., 106]

*MOTHRU MOHUN GHOSH MUNDUL v. AKHOY KUMAR MITTER* . . . I. L. R., 15 Calc., 557

79. ———— *Civil Procedure Code, 1859, s. 209—Stay of execution of decree.*—Where a decree for the plaintiff has been obtained in a suit, and a cross-suit is pending, the Court will not stay proceedings in execution of the first suit, or order the proceeds of that decree to be paid into Court to abide the result of the second. *MOOLCHUND v. RAJNARAIN GHOSH* . . . 1 Ind. Jur., N. S., 330

80. ———— *Civil Procedure Code, 1859, s. 209, Procedure under.*—When an application to stay execution of a decree is made to a Court in which a suit is pending against a decree-holder, the Court's competency, under s. 209, Act VIII of 1859, to grant the application depended on the decree being its own decree. An application of this nature ought not to be entertained, in the absence of an affidavit or satisfactory proof of the

## SET-OFF—continued.

## 2. CROSS-DECREES—continued.

complaints alleged in it, without the Court calling for such proof. *MITTUN BIBEE v. BUTZLOOR KHAN* [8 W. R., 392]

81. ———— *Civil Procedure Code, 1859, s. 209—Execution of cross-decrees.*—S had against U in the Rungpore Court a decree for costs which he removed for execution to the Court of Beerbhoom. On this M applied to the latter Court, under s. 209, Act VIII of 1859, for stay of execution pending the decision of another suit which he had brought against S. *Held* that, on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum. *SHIBCHUNDER SIRCAR v. JUGGUT INDUR BUNWAREE GOHIND* [12 W. R., 212]

82. ———— *Pending suit by defendant in which he has credited sum sued for—Stay of suit.*—In a suit brought in a Small Cause Court to recover balance of rent due, the defendant pleaded the pendency of a suit brought by him in the District Munsif's Court against the plaintiff for damages for illegal dispossession, and that he had given credit against the amount of damages for the balance of rent due. *Held* that the pendency of the suit in the District Munsif's Court was not a bar to the present suit, but that it was open to the Court, in its discretion, to postpone the hearing of the present suit until the District Munsif had given his decision. *MUTTUKARUPPA KAUNDAN v. RAMA PILLAJ* . . . 3 Mad., 158

83. ———— *Right to execution of decree—Obligation to set off.*—Where two parties have to recover sums from each other under the same decree (not cross-decrees), the party entitled to the lesser sum cannot be allowed to take out execution against the party entitled to the larger sum, and the Court is bound to direct a set-off or to enter satisfaction of the smaller sum upon the decree. *JUGO MOHUN BUKSHEE v. SOORENDRONATH ROY CHOWDHRY* . . . 18 W. R., 108

84. ———— *Decree in favour of one party with costs in favour of the other—Civil Procedure Code, 1859, s. 209.*—When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only recovered under the decree. S. 209, Code of Civil Procedure, had no application in such a case. *ISSUR CHUNDER MOOKERJEE v. MUKUNOHAN CHOWDHRY* . . . 12 W. R., 308

85. ———— *Civil Procedure Code, 1882, ss. 246, 247—Execution of decree—Cross-decrees—Simple money-decree—Decree enforcing mortgage.*—S. 246 of the Civil Procedure

SET OFF—*contd.*2. CRO & DECREES—*contd.*

Code is applicable to cross-claims and not to cross-claims under a decree. To make a 247 of the Code applicable in the case of cross-claims under one decree, the parties entered thereunder to recover from each other must hold the same character and possess all the rights of enforcing execution and enforcement of the decree can only be refused or set aside entered up when this is the case. Held therefore where a decree for money of a Court of first instance directed that the money should be realised from certain specific property of the defendant and exempted his person and other property and the lower Appellate Court modified the decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower Appellate Court's decree and restored that of the first Court, directing that the costs of the defendant in the lower Appellate Court and in the High Court should be paid by the plaintiff that inasmuch as the plaintiff was only entitled to recover the judgment debt due to him from the defendant from such specific property whereas the defendant was entitled to recover the judgment debt from him from the plaintiff from his person and property the provisions of 47 were not applicable. **KALKA PRASAD LAM DIN** I. L. R., 5 All., 272

88 *Costs* Two awards of costs in same decree—*Execution of decree*—Where a Court makes two different awards of costs in one and the same decree when it ought to have made a decree only for the difference between them—Held that execution could only be taken out for the difference between the two amounts awarded. **AMJED ALI KHAN v. PARUL HOSSEIN** [19 W. R., 167]

Conditional purchase-money—*Civil Procedure Code 1882* at 214 215 217—*Decree in suit for pre-emption*—The decree in a suit to enforce a right of pre-emption directed in accordance with the provisions of a 214 of the Civil Procedure Code that the plaintiff should obtain possession of the property & recover cost of the suit from the defendant (vendor and vendee) on payment of the purchase money within a fixed time but that on default of such payment, the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him, deducting from such costs the unpaid portion of the purchase-money. Held applying by analogy of ss. 221 and 24 of the Civil Procedure Code the equitable doctrine of set-off that the plaintiff was entitled, when depositing the purchase-money under the decree to deduct therefrom the sum the decree awarded to him as costs, and that therefore the decree did not become null and void by reason that he had not deposited the full amount of the purchase-money within time. **Dewanjee Dabee v. Eaken Chauder** (Civ. B. L. R., 1901, 11, 333) 9 W. R., 230 *Jago Mehmud*
SET-OFF—*continued*2. CROSS-DECREES—*contd.*

**Pakshie v. Soorindra Nath Roy Chowdhry** 13 W. R., 106; and **Brynnath Dass v. Jagannath Dass** I. L. R., 3 Cal., 742 referred to. **ICHHI v. GORL** 5 KAR. I. L. R., 6 All., 351

89 *Civil Procedure Code (1882) at 217*—*Cross-claims under the same decree*—Costs under the same decree recoverable in different ways—A 217 of the Code of Civil Procedure is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus where one party to a suit was entitled to recover certain costs by means of the sale of hypothecated property, and the other party under the same decree was entitled to recover a sum of money from his opponent personally it was held that a 24 of the Code applied, and that the costs recoverable personally could be set off against the costs recoverable by sale of the hypothecated property. **Halka Prasad v. Ram D.** I. L. R., 5 All., 272 *disapproved*. **ENIGWAN KHAN v. BATAK** I. L. R., 16 All., 333

90 *Civil Procedure Code (1882) at 217*—*Execution of a decree*—Part of suit set aside under same decree to recover from each other—A plaintiff obtained a decree for the surrender to him of certain mortgaged property as his saying, the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants. He set that the defendants were entitled under a 217 of the Code of Civil Procedure to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them. **Elagowan Sigh v. Latch** I. L. R., 16 All., 353 *approved*. **ANKARA MISHIN v. GORALA PATTAR** I. L. R., 23 Mad., 121

91 *Civil Procedure Code, at 216 217 411*—*Cross-decrees in same decree*—*Recovery by Government of Court fees in pauper suit*—A plaintiff suing in form of pauper to recover property valued at Rs. 100,000 obtained a decree for Rs. 1439. The Court, with reference to the provisions of a 411 of the Civil Procedure Code directed that the plaintiff should pay Rs. 1439 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under a 411 to recover this amount by attachment of the Rs. 1439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court should be set off against the Rs. 1439 payable by her to him, with reference to ss. 216 and 247 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff or his Rs. 1439 or by the defendant for her costs. In appeal from an order allowing the Collector's

**SET-OFF—continued.****2. CROSS-DECREES—continued.**

application, it was contended that the "subject-matter of the suit" in s. 411 of the Code meant the sum which the successful proper plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether. *Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 439 so as to bring into operation the special rules of ss. 246 and 247 of the Code between him and the defendant. *Held* also that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it in the same way as costs are ordinarily recoverable under the Code. *Held* that, the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained.

JANKI v. COLLECTOR OF ALLAHABAD

[I. L. R., 9 All., 64]

91.

*Civil Procedure Code (Act XIV of 1852), ss. 233, 243, 246—Execution of assigned decree—Set-off against assigned decree partly executed.*—A B had obtained a decree against K and T. After the decree had been partially satisfied, A B assigned it to D. Prior to the date of the assignment, K and T had instituted a suit against A B and D, and ultimately obtained a decree against both of them. *Held* that K and T were entitled to set off their decree against the unexecuted portion of the decree which had been assigned to D. KRISTO RAMANI DASSEE v. KEDAR NATH CHAKRAVARTI. I. L. R., 16 Calc., 619

92.

*Civil Procedure Code, s. 246—Limitation.*—Under two decrees of the Sudder Dewany Adalat passed in 1864, A was entitled to two-thirds and B to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. B appealed to the Privy Council from both decrees in respect of the two-thirds awarded to A. In April 1866, pending the appeal, A applied for an account of the mesne profits due to him after setting off the mesne profits due to B, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow B's appeal, the application was struck off. In January 1867 B applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,700

**SET-OFF—concluded.****2. CROSS-DECREES—concluded.**

to be the amount so due, but, on application by A, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed B's appeal. In 1885 A, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. B at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set off against the amount claimed by A. *Held* that the question of the amount due to A up to the date when he acquired possession of the two-thirds, and which had never yet been decided, should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to B, satisfaction of A's claim to that extent should be entered up and the balance recovered from B; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity. *Held* also that, until the amount due to A had been definitely ascertained in the execution department, B's right to maintain his set off did not arise; that the set-off was therefore not barred by limitation; that the order of January 1867 was equivalent to a decree for the amount declared thereby as due to B; that when the execution department had determined the amount due to A, that decision also would be a decree, and that s. 246 of the Code could then be applied. MATADIN v. CHANDI DIN

[I. L. R., 10 All., 188]

**SETTLEMENT.**

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1. CONSTRUCTION . . . . .	8563
2. RIGHT TO SETTLEMENT . . . . .	8565
3. EVIDENCE OF SETTLEMENT . . . . .	8568
4. MODE OF SETTLEMENT . . . . .	8569
5. SUBJECTS OF SETTLEMENT . . . . .	8570
6. EFFECT OF SETTLEMENT . . . . .	8570
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See ACT IX OF 1847.

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See ASSAM LAND AND REVENUE REGULATION . . . . .

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See COVENANT TO REVEW.

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[I. L. R., 20 Bom., 310]

**SETTLEMENT—continued.**

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES—ACT XI of 1859

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22 W. R., 53

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Wife's equity to—

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**1. CONSTRUCTION.**

1. ———— Agreements made at time of settlement. Duration of.—*Held* on the construction of an "ikaramamah" and settlement "sothan" that it was binding on the plaintiffs only for the currency of settlement. In general

**SETTLEMENT—continued.****1. CONSTRUCTION—continued.**

engagements made at the time of settlement ought to be considered *prima facie* as intended to exist only for the time of settlement. *DIAL BISHU & JAWAHIR BISHU* . . . . . 2 Agra, 109

*IKRAM ALI KHAN & LUDWA* . . . . . 2 Agra, 113

2. ———— Effect of settlement.—*Duration of, and right created by, settlement—Transfer of proprietary right*—Where a settlement of a talukh, although it ran for twenty years only was with a person professing to be a proprietor—*Held* that the settlement conferred a proprietary right, and not a limited interest; and that the plaintiff's vendor, having been admitted to a share in the settlement with a mahli allowance, became a co-sharer in the proprietary interest, which proprietary right had been transferred to the plaintiffs by their purchase. *POGOSS & AZAM BIKER*

[18 W. R., 274

**3. ———— Settlement by**

*Government of land on which stood a hiti—Calculation for purpose of settlement—Tools—Hiti—Reg. XXVII of 1793.*—A settlement of land (on which stood a hiti) by the Government to a private person, such settlement being arrived at by taking into calculation the profits of the hiti, does not amount to a grant of the tolls, but of the land only; the reason for looking at the tolls being to ascertain the value of the land. Such a settlement therefore does not imply a monopoly which will enable the holder to restrain other persons from setting up another hit close by. *KARNAL DAS ADDY & DURGAS SUNDARI DIAL. DURGAS SUNDARI DEBI & RAKHAL DAS ADDY*

[I. L. R., 17 Calc., 458

4. ———— Summary Settlement Act (Bom. Act VII of 1863)—*Nature of settlement under that Act—Settlement made and sanad issued under a mistake—Quit rent paid by sanad to Government under such settlement—Refund—Tond agreement—Contract Act (IX of 1872), ss. 20, 65—Sanad, Meaning and effect of*—Under the Bombay Summary Settlement Act (Bombay Act VII of 1863), a settlement in respect of the village of Manhol was effected in 1864 between the Government and the plaintiffs, who were the riamars, and a sanad was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain wanta lands. It subsequently appeared, however, that the wanta lands were the property of certain gusals who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of a 32 of Bombay Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit rent of the village for the "samvat" years 1939-1940, as fixed by the sanad. The plaintiffs paid under protest and brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the wanta lands. *Held* that the plaintiffs were entitled to a refund of the quit-rent

**SETTLEMENT—continued.****1. CONSTRUCTION—concluded.**

paid in respect of the wanta lands. A settlement under Bombay Act VII of 1863 is an agreement effected by proposal and acceptance (see s. 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was therefore a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under s. 20 of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the wanta lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being therefore entitled to a refund of the quit-rent paid in respect of such lands under s. 65 of the Contract Act. A sanad issued under Bombay Act VII of 1863 merely declares what by s. 6 of the Act is stated to be the effect of the settlement to which both the Government and the holders of the land have consented; but it is by virtue of the settlement itself as provided by the Act that Government are entitled to demand payment of such rent. **SECRETARY OF STATE FOR INDIA v. SHETH JESHINGBHAI HATHISANG**

[L. L. R., 17 Bom., 407]

**2. RIGHT TO SETTLEMENT.**

**5. ——— Claim to settlement after resumption—Beng. Reg. II of 1819—Ex-lakhtarajdar—Limitation.**—Long possession gives no title to a settlement, unless the party claiming a settlement has put forward his claim when the lands were resumed, and the notice has issued to parties to assert their claims to such settlements, and has thus complied with the requirements of the law. **GOLACK CHANDRA CHOUDHRY v. ALI MOLLAH**

[S B. L. R., 528 note]

**6. ——— Claim to permanent settlement after expiration of temporary one—Forfeiture of right by conduct**—When a temporary settlement expires, whether the holder thereof had been the proprietor of the land within the meaning of the old regulations or a stranger, the proprietor is entitled to come forward and to claim as of right from the Government a permanent settlement of the land, unless he has by his own conduct forfeited that right. **WATSON & Co. v. BROJO SOONDUREE DABEE**

. . . . . 10 W. R., 395

On remand an order was made declaring the plaintiff entitled to the permanent settlement instead of the defendants, and confirmed on special appeal, subject to the proviso that such declaration would not entitle her to dispossess them if they were in possession as patnidars. **WATSON & Co. v. BROJO SOONDUREE DEBIA**

. . . . . 17 W. R., 376

**7. ——— Purchase of zamindari rights during maafi grant—Rights on expiry of maafi grant.**—An auction-purchaser of the rights and interest of one of several zamindars who at the

**SETTLEMENT—continued.****2. RIGHT TO SETTLEMENT—continued.**

time of the purchase held only certain nankar land in lieu of their zamindari right during the continuance of the maafi grant by Government to another party stands in the place of the zamindar, not in respect of the nankar land only, but in respect of all the right to settlement as zamindar after the maafi grant comes to an end. **GOKUL PERSHAD v. RUGHONATH**

. . . . . 3 Agra, 245

**8. ——— Right among co-sharers—Arrangement for collection and receipt by one co-sharer—Effect on rights of others on expiration of settlement.**—Where at the time of settlement it was arranged that one co-sharer should make the collections and other co-sharers should receive money allowance, and such arrangement was to last for the term of settlement only,—Held that after the expiry of the settlement such co-sharers were, if the revenue authorities thought fit, entitled to be allowed to engage for their shares. **KOOVVER SINGH v. SHIB DIAL**

. . . . . 3 Agra, 297

**9. ——— Right on resumption—Suit to set aside settlement.**—In a suit by a person claiming certain lands which have been resumed by the Government, the plaintiff is entitled, on the allegation that he is the rightful owner of the lands, and that the defendant obtained a settlement by false allegations of ownership and of possession, to an adjudication of his right to a settlement. It is not discretionary with the Collector under such circumstances to settle with any person he pleases for the land, nor is such settlement, if made, final as regards all claims. **MAHOMED ISRAEL v. WISE**

[13 B. L. R., F. B., 118: 21 W. R., 327]

**10. ——— Ghatwali tenures—Suit against Government for settlement—Limitation.**—A ghatwali tenure was resumed by the Government under Bengal Regulation II of 1819. After the resumption, *H N*, the former holder of the tenure, claimed settlement as proprietor. The Government denied his title, but offered him a lease on his giving security. On his failure to find security, the Government in 1841 made a temporary settlement with *J S*, who entered into possession of the land. No malikana was reserved to or ever paid to *H N*. In 1862 the Government settled the land permanently with *J S*. The heir of *H N* then brought a suit in the Civil Court, praying that this settlement should be set aside, and for a declaration of his right to have a settlement concluded with him. Held that, supposing *H N* ever to have had any legal right to a settlement as proprietor, the suit to enforce such right was barred by limitation, he having been effectually dispossessed, and the cause of action, if any, having accrued in 1841. *Note.*—The Court appeared to consider that in fact *H N* never had any right to maintain an action in the Civil Court to compel the Government to make a settlement with him. **JAY MUNGOUL SINGH v. POKHARUN SINGH GOVERNMENT v. POKHARUN SINGH**

**11. ——— Right to settlement of person whose tenure is not cancelled—Lease by Government after purchase at sale for revenue.**—A



**SETTLEMENT—cont. next****2 RIGHT TO SETTLEMENT—continued**

was the owner of a taluk in a zamindari which was purchased by the Government at an auction sale for arrears of revenue. The Government did not cancel the taluk but sold it with A for twelve years. When the term was expired the Government refused to make a new lease with A and instead leased it for a year to B. Held that the refusal of the Government to sell the land with A in no way affected B's right to a settlement on the expiration of the lease to B. *ABANOOILLAH v KRISTO GOVIND DOSS*

[3 C L R., 502]

**12 ——— Owner of parent estate—**

*Accretion to estate—Estate separately numbered*—Certain lands accreted to an estate No. 67 and were temporarily settled as a separate estate No. 3149. During the currency of the settlement the owner sold his rights and interests in 67 to the plaintiffs and in 3149 to the defendants. On the expiry of the temporary settlement the plaintiffs as owner of the parent estate sued to establish his right to the permanent settlement of 3149. Held that he was not entitled and that the plaintiffs had no claim to have a settlement of 3149. *KUTB ULLAH v CHISA HAZARI*

[3 B L R., A C 339]

**13 ——— Right to pottah of waste lands—**

*Alleged failure to cultivate or pay assessment*—The plaintiff sued, as the mirasidars of a village to establish their right to the grant of a pottah of certain waste land of the village which had been granted to some of the defendants. The Collector who was made a defendant stated that the hokum namah ruler of the district directed that land should be given to mirasidars on their tendering sufficient security and that the plaintiffs on previous occasions had received lands to which offers had been made by others in consideration of the plaintiffs' preference but that they had failed to cultivate the lands or pay the assessment in breach of the agreements. Held that the plaintiffs were entitled to the relief sought for. *COLLECTOR OF MADRAS v RAMANTJA CHARIYAR KULLAPPA NAIR v RAMANTJA CHARIYAR*

[4 Mad., 429]

**14 ——— Right of ex-lakhirsajdar—**

*Resumption by Government—Limitation*—An ex-lakhirajdar whose lands have been resumed by Government under Regulation II of 1819 has no absolute right to a settlement. When a party claims a right to a settlement as being an ex-proprietor and his claim is rejected he must to avoid being barred by limitation sue within three years for a declaration of his right. *BRICK HUGH v GOVERNMENT*

[9 B L R., 529 note] [3 B L R., 119 note]

[10 W R., 298]

See *KRISHNA CHANDRA SANDYAL CHOWDREY v HARISH CHANDRA CHOWDREY*

[8 B L R., 524]

*S C KRISTO CHITENDER SUNDIAL v KARNER KISHORE ROT CHOWDREY*

[17 W R., 145]

**15 ——— Right of shikmi talukholders—**

*Tenants of lakh rajdars—Resumption by Government of lakhirajdar's tenures—Shikmi talukholders under lakh rajdars, whose lands have been resumed by*

**SETTLEMENT—continued****2 RIGHT TO SETTLEMENT—continued**

Government cannot sue for a settlement, they can only claim to have the shikmi taluk hybrid. *GRISH CHANDER DOR v BODDANATH DOR*

[W. R., 1864, 202]

**3 EVIDENCE OF SETTLEMENT****16 ——— Evidence necessary to establish creation of talukhs—**

*System of talukholders—Registration of tenure*—The registration of a taluk or of the creation of talukhs is not absolutely necessary to prove the creation of the taluk before the decennial settlement. The omission of any mention of such a taluk in the decennial or quinquennial settlement and the inclusion of the lands in the decennial settlement as part of the zamindari for which the jumma is assessed, does not afford any strong inference against the evidence of the taluk being or by a shikmi taluk paying rent to the zamindar; the talukholders were not required to mention it, nor was it necessary for the zamindar to do so. Discussion of the evidence requisite to establish the existence of an old shikmi taluk. *WILLIAMS v BROOKS MOORE DENIA*

[3 W. R., P. C., 5] [10 Moore's L.A., 185]

**17 ——— Evidence of loss of proprietary right—**

*Possession of air land*—The possession of a share in an estate on settlement may or may not be accompanied by the possession of air land and the fact of a sharer holding no air land is not of itself sufficient to show that he had lost all proprietary right in the village. *TOOLEY RAW v NAHAR SINGH*

[3 N. W., 43]

**18 ——— Settlement of noabad taluk in Chittagong—**

*Power of Government to make settlement—Waste lands—Resumption—Kabuliat Effect of—Acceptance of kabuliat by the landlord—Ratification—How for the acts of Government officers had the Government—Reg. III of 1892 s. 5 cl. 1—Reg. VII of 1892, s. 7, cl. 1—Evidence—Presumption of due performance of official acts—Due exercise—Acceptance of rent after term of settlement*—The plaintiff sued the Secretary of State for India in Council for the declaration that a certain noabad mahal of his in the district of Chittagong was a permanent taluk not resumable by the Government. He based his claim on two grounds: (1) that the mahal existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the talukholder in the same; and (2) that at any rate, a kabuliat executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence it was alleged (1) that the mahal was not in existence at the time of the Decennial Settlement and the settlement of 1800 was a temporary one; and (2) that the kabuliat was never accepted by the Government but that on the contrary the Government passed distinct orders that the settlements of 1836 were for thirty years only which order was duly published by an istahar to that effect. It was found on the evidence that the taluk was not shown to have been in existence before 1800 and the settlement

**SETTLEMENT—continued.****3. EVIDENCE OF SETTLEMENT—concluded.**

proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention. *Held* that the kabuliat of 1836 was merely an offer on the part of the talukhdar for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorized officer thereof; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor General in Council. There being no proof given by either party as to whether the istahar above mentioned was or was not duly published.—*Held* that the publication of the istahar must be presumed, having regard to the presumption in favour of the due performance of official acts. *Held* also that, even assuming that the officers of the Government induced by their act and conduct a belief in the talukhdar that the kabuliat had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the kabuliat, inasmuch as such conduct of the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government. *Held* also that the acceptance by the Government of rent at the old rate from the talukhdar for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the kabuliat. Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. *PROSUNO COOMAR ROY v. SECRETARY OF STATE FOR INDIA IN COUNCIL*. . . I. L. R., 28 Cal., 792 [3 C. W. N., 695]

**4. MODE OF SETTLEMENT.**

**19.** ——— Procedure on making fresh settlement.—*Beng. Reg. VII of 1822, s. 14—Refusal to accept new settlement—Time to remove house.*—Where the Collector had issued due notice of enhancement under s. 14, Bengal Regulation VII of 1822, of the jumma of lands situate in a town and subject to that Regulation, and the tenant refused to accept a revised settlement, under such circumstances he was held to be entitled to a reasonable time within which to remove a house standing upon the lands in question. *RAM CHAND BEBA v. GOVERNMENT*. . . . . 6 C. L. R., 365

**20.** ——— Power of Collector to alter settlement.—*Recognition of title by settlement officer—Beng. Reg. VII of 1822, s. 20.*—Where the plaintiff's title was recognized by the settlement officer in 1836, who assigned an allowance of 5 per cent. on the Government demand.—*Held* that the Collector had no power in subsequent years during the pendency of this completed settlement to interfere with the arrangement of the settlement officer, except to the extent allowed by s. 20, Regulation VII of 1822. S. 20, Regulation VII of 1822, did not confer on the Collector the power of remodelling the arrangements completed by the settlement officer under s. 10 of the Regulation; nor could the

**SETTLEMENT—continued.****4. MODE OF SETTLEMENT—concluded.**

notification of Government extend to revenue officers an authority that the law did not allow to them. *HIMMUT SINGH v. COLLECTOR OF Bijnour* [2 Agra, 258]

**21.** ——— Power of Collector to assign lands for cultivation.—*Bhagdari tenure.*—*Held* that any interference by the Collector to assign of his own authority lands in a bhagdari village to a tenant for cultivation is irregular and unauthorized. *RAJJI NAROTTAM v. PURUSHOTTAM GIRDHAR* [2 Bom., 244 : 2nd Ed., 233]

**5. SUBJECTS OF SETTLEMENT.**

**22.** ——— What passes by settlement.—*Right of julkur—Beng. Reg. XI of 1825, s. 4.*—A settlement does include all that ordinarily passes as assets of the settlement, but not what is exclusively reserved as the right of the State, e.g., the right to the julkur of large navigable rivers, which, according to cl. 2, s. 4, Regulation XI of 1825, never passes to private individuals with whom Government makes settlements. *COLLECTOR OF JESSORE v. BECKWITH*. . . . . 5 W. R., 175

**23.** ——— Non-mirasi lands left waste by pottahdar.—*Claim of former occupant.*—Non-mirasi land left waste by a pottahdar may be granted by the Collector, without reference to the claim of the former occupant. *GENU REDDI v. ASAL REDDI* [1 Mad., 12]

**24.** ——— Waste lands.—*Lands held on raiyatwari settlement—Raiyat's right of occupation.*—Lands held on the terms of an ordinary raiyatwari settlement, with annual pottah, and left waste by the pottahdar, may be legally granted by the revenue authorities. The raiyat has an indefeasible right of occupation only so long as he pays the Government assessment. *KUMARADEVA MUDALI v. NALLATAMBI REDDI*. . . . . 1 Mad., 407

**6. EFFECT OF SETTLEMENT.**

**25.** ——— Effect on rights of third parties.—*Sanad granted by settlement officers, Effect of—Bom. Act II of 1863.*—Sanads granted by settlement officers under Bombay Act II of 1863 do not prejudice the rights of third persons. *PUJUBIN KADAN v. MALHABI BIN RANA* [1 Bom., 171]

**26.** ——— Effect on ex-maafidar.—*Status of maafidar after settlement of resumed maaf.*—An ex-maafidar, with whom a sub-settlement has been made of the resumed maaf, is presumably not a hereditary cultivator but his position is that of a proprietor subject to payment of Government revenue. *HUMBERD-POOL-LAH KHAN v. PRAN SOOKH* [3 Agra, 280]

**27.** ——— Effect on maafidar.—*Settlement with maafidar—Payment of revenue.*—Where a plot of maaf land was on resumption settled with the ex-maafidar, who engaged for the Government

**SETTLEMENT—continued.****6 EFFECT OF SETTLEMENT—continued**

revenue for the term of settlement, and the settlement was made under s. 5, Regulation XIII of 1825 and paragraph 151, circular order, Sudder Board of Revenue as provided by s. 5, Regulation XXXI of 1903—*Held* that they were in possession as owners, and on the expiry of the settlement the mere fact of its having expired would not deprive them of the right of being assessed with revenue as proprietors of masfi land, for where there has been a grant of soil and possession taken and long continued thereunder, the ownership thereof vests in the grantee, although the grant as to exemption from payment of revenue may be invalid and subject to assessment. **TOOLSEE RAM v. NARAIN SINGH** [3 Agre, 285]

**28** — *Resumed masfi lands, Settlement of—Adverse possession.*—Where owing to the refusal of the original possessor of a resumed masfi land to fulfil the revenue engagements the settlement was made with a stranger—*Held* that such settlement could not confer upon him any right adverse to the original possessor after the expiration of that settlement when the original possessor is entitled to claim settlement. **MAHOMED ATA-OL-LAH v. MAHOMED MOHIB-OL-LAH** 1 Agre, 231

**29** — *Liability for rent—Beng. Reg. VII of 1922—Holder of resumed lakhiraj.*—The holder of resumed invalid lakhiraj land, within a Government khas mahal was bound to pay rent according to the settlement of the revenue authorities under Regulation VII of 1922, until he sued in the Civil Court to set aside that settlement, or sued under Act X of 1859 for a mitigation or re-settlement of rent. **HUTO PERSHAD CHOWDERY v. SHAMA PERSHAD ROY CHOWDERY** 6 W. R., Act X, 107

**30** — *Lakhirajdar in Assam—Holder of resumed grant—Right of ejectment.*—Whatever might have been his position under former Governments a lakhirajdar in Assam is entitled to manage his lands in any manner he pleases consistently with existing regulations, and, as holder of a resumed grant which has been settled with him, to eject a tenant who has no right of occupancy or lease of any kind. **JULLOW SHEMA PATWARY v. MADHUR RAM ATOI BOORHA BUKT** [16 W. R., 202]

**31** — *Effect of resumption and settlement of lakhiraj—Invalid lakhiraj.*—Assessment of revenue by Government upon invalid lakhiraj land after resumption does not confer a new estate on the lakhirajdar, and does not cancel or extinguish a mokorari lease granted by the lakhirajdar previously to the settlement and during the time he was in possession of the land as lakhiraj. **PRATAP NARAYAN MOOKERJEE v. MADHUR SUDAN MOOKERJEE** 8 B. L. R., 187 16 W. R., 35

**32** — *Abadkari talukhdar—Acceptance of farming leases—Sale of Government right—A Government settlement, whether permanent or farming so far from destroying the rights of a talukhdar, always preserves them if there be really a dependent tenure. Neither the acceptance*

**SETTLEMENT—continued****6. EFFECT OF SETTLEMENT—continued**

of farming leases by the talukhdar was a farmer subject to the Government proprietary right, nor the sale of that Government right, in any way, *oper facto*, extinguishes any talukhdari right existing in the abadkari talukhdar in that capacity, if otherwise valid. **HUTO PERSHAD BUKTACHARNEY v. BUKTACHARNEY MOJUMDAR** 8 W. R., 391

**33** — *Settlement with several persons—Resumption as to equality of rights.*—In the settlement of a talukh after resumption by Government with thirteen persons, it is not to be presumed that all thirteen persons had equal rights, simply because the settlement was made with all of them jointly, particularly where the settlement proceedings show that the question of the extent of the shares was in dispute, and that the settlement was made jointly with the whole without prejudice to title. **GOOROO CHUTAY PONDAR v. HAREZIA BIKER** [7 W. R., 366]

**34** — *Omission to settle boundaries and proportion of assessment which each cultivator ought to pay—Liability to pay revenue individually.*—In a suit against a Collector for an illegal seizure and subsequent usurpation of plaintiff's shares in an Agraharam village for non-payment of trihari due from other tenants of the village and to recover the increased trihari imposed by the Collector—*Held* that the fact of pottahs having been issued separately to each tenant, stating the share of land occupied, without defining the holding by boundaries and the proportionate amount of assessment which the cultivator is to pay for it, though affording cogent evidence of the distinct liability of each for the amount of trihari stated in his pottah and no more, is not conclusive evidence of such individual liability. **ELLAIYA v. COLLECTOR OF SALEM** 3 Mad., 59

S. C. affirmed on appeal to Privy Council. **BARR v. ELLAIYA**

[12 W. R., P. C., 33; 13 Moore's L. A., 104]

**35** — *Settlement with talukhdar after his refusal to re-settle at increased rent—Waiver of refusal to pay enhanced rent.*—Where, upon a talukhdar's refusal at the end of the period of his settlement to re-settle with Government at an increased rate, the jumma was put up to auction, after which the Government did re-settle with the talukhdar upon the former conditions and the former description of the nature of the talukh, it was held that Government renewed the contract, and placed the talukhdar in exactly the position in which he would have stood had he never refused to pay the increased rent. **GOONIE COOMAR ROY v. KUNOLA KANY ROY** 11 W. R., 38

**36** — *Private rights—Limitation—Right of action as proprietor.*—Certain land having been settled by Government for a period of ten years, one S bought the benefit of that settlement at an auction-sale for arrears of rent, and afterwards sold his rights to one M. On the expiration of the temporary settlement, Government effected a permanent zamindari settlement with M. In the following year

**SETTLEMENT—continued.****6. EFFECT OF SETTLEMENT—concluded.**

(1865) the zamindari title was sold, and the purchaser now (1869) sues to recover possession of certain specified land. The lower Appellate Court, finding that none of the persons above mentioned had possession within twelve years immediately preceding the filing of the plaint, considered the suit barred. *Held* that the question was one solely of a private right, and that the plaintiff did not stand in the position of Government in regard to the statute of limitations. *Held* also that the plaintiff's claim was traceable solely through *M*, from whom he bought; that at the time of settlement Government has nothing more than a right of action by virtue of its being proprietor, and not the right of action *S* had as auction-purchaser; and only the former right passed by the settlement. *RUGHOO-NATH SURMAH v. GOBIND CHUNDER ROY*

[14 W. R., 170]

**37. —** Re-settlement of land by Government after High Court decision dealing with the land—*Beng. Reg. XI of 1825—Act XXXI of 1858.*—*Quare*—Whether a re-settlement of land by the Government, as the ruling power, with persons entitled to such settlement under Bengal Regulation XI of 1825 and Act XXXI of 1858, confers upon the settlers, the owners of the old settlement, a fresh right, when made subsequent to a judgment of the High Court dealing with such land. *MODHU SUDAN KUNDU v. PROMODA NATH ROY*

I. L. R., 20 Calc., 732

**7. MISCELLANEOUS CASES.**

**38. —** Permanent lease made by proprietor pending resumption.—Where the proprietor of resumed lakhiraj land leases it for valuable consideration, and at a stipulated jumma, while the settlement proceedings are under reference to the higher revenue authorities for confirmation, he cannot afterwards turn round upon the lessee and plead that he had no power to grant a permanent lease, on the ground that the settlement with him was temporary, and not permanent. *AMEER ALI v. AMBEROONISSA BEGUM*

11 W. R., 11

**39. —** Landlord and tenant—*Effect of settlement proceedings.*—A land-owner, seeking to bind his tenants by the settlement proceedings, should show distinctly that they were parties to the enquiry held by the Collector into the nature and extent of their holdings. *ALI AHMED v. DOORGA ROY*

[22 W. R., 455]

**40. —** Right of tenants to deduction for cost of collection—*Beng. Reg. VII of 1822, s. 9.*—Where tenants who were aymadars voluntarily signed a jumma bundi drawn up under Regulation VII of 1822, s. 9, specifying the amounts of rent payable by them to the Government farmers with whom the settlement was made,—*Held* that the tenants were not entitled to a deduction from such specified rents on account of costs of collection. *WATSON & Co. v. MOHENDRO NATH PAUL*

[23 W. R., 438]

**SETTLEMENT—continued.****7. MISCELLANEOUS CASES—concluded.**

**41. —** Powers of Revenue Boards—*Resumption—Cancellation of settlement.*—A settlement of a resumed lakhiraj estate being made by the Collector with the plaintiff, "subject to the orders of the Board of Revenue," the Board, or the Commissioner acting under rules laid down by them, may cancel the settlement at any time. *HARLAL TRWARI v. COLLECTOR OF BHAGULPORE*

[3 B. L. R., Ap., 82: 12 W. R., 6]

**42. —** Settlement of a Government khas mehal—*Enhancement of rent—Reg. VII of 1822—Beng. Act III of 1878—Beng. Act VIII of 1879, ss. 10, 14.*—In order to make the enhanced rent, stated in a jumma bundi settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement or else a compliance with the provisions of the rent law with reference to enhancement of rent in force at the time of such enhancement. *D'Silva v. Raj Coomar Dutt*, 16 W. R., 163; *Enayetollah Meah v. Nubo Coomar Sircar*, 20 W. R., 207; and *Reazooddeen Mahomed v. McAlpine*, 22 W. R., 540, followed. The rent of a Government khas mehal can only be enhanced by the same process as the rent on any private estate. *AKSHAYA KUMAR DUTT v. SHAMA CHARAN PATI-TANDA*

I. L. R., 16 Calc., 586

**8. EXPIRATION OF SETTLEMENT.**

**43. —** Revocation of sanad—*Bom. Act VII of 1863, s. 7—Jurisdiction of Civil Court.*—Where a sanad by way of summary settlement of land revenue has been granted by Government under Bombay Act VII of 1863, Government cannot reform or set it aside without the assent of all parties interested therein. To do so would be an assumption by Government of the function of a Civil Court. A Civil Court cannot, on the ground that Government has, by mistake, granted such a sanad to a person not the owner of the land, reform or set aside the sanad. S. 7 of Bombay Act VII of 1863 renders the quit-rent, fixed by the sanad, binding alike on Government and on the rightful owner of the land, but the latter may recover the land from the grantee of the sanad, subject to the quit-rent, fixed by the sanad, payable to Government; and such grantee will be declared to have taken the sanad as a trustee for the rightful owner. Where Government had granted seven sanads to certain garasis in respect of lands, part of which had been previously sold by the garasis and Government had attempted to revoke and cancel those sanads, and had subjected the lands to a full assessment on the ground that the garasis were not entitled to any of the said lands and that the sanads had been granted by mistake,—*Held* that such attempted revocation, cancellation, and re-assessment were void and of no effect, and that the grantees were entitled to hold the lands on the terms mentioned in the sanads, but, so far as regarded the sold portion of the said lands, in trust for the vendees thereof and their heirs, representatives, and assigns. *Quare*—Whether a Civil Court can give relief, either by

**SETTLEMENT—concluded****8. EXPIRATION OF SETTLEMENT—concluded**

termining or canceling, such sanads against mistakes, other than those relating to ownership, which may be found to exist in the sanads **DALSING BHAYASING & COLLECTOR OF KATRA**

[I. L. R., 4 Bom., 367]

**44. ——— Liability to ejectment—**

*Dependent to shikdars*—Dependent talukhdars admitted to temporary settlements for a certain number of years are not liable to ejectment at the close of those settlements. **HITROJODINDO BOSS & KALA CHAND SHAKHA**

6 W. R., Act X, 26

**45. ——— Dispossession—Dependent**

*talukhdars—Cause of action*—When a dependent talukhdar, holding under a temporary settlement, has that settlement placed in abeyance by the Collector taking the collections into his own hands khas the Collector's act is not one of dispossession from which limitation can count, but limitation will reckon from the date when the purchaser at a sale after the Collector had ceased to hold khas, had himself made collections, and so created cause of action by dispossession on of the former talukh. **MIRMOODDEEN & RAMMOHAN CHOWDHURY**

7 W. R., 183

**46. ——— Shikmi talukhdari right—**

*Payment in lieu of shikmi talukhdars right*—Where a shikmi talukhdar accepted from Government a pottah which admitted him to be a person having a right to a settlement and gave him as a separate and distinct allowance under the head of expenses (in addition to the usual allowance for collections, etc.) the allowance which had, under the previous settlement, been made to him under the head of malikana, —Held that, if he had notice and accepted the payment because he knew that his right as malik of the shikmi talukh was no longer recognized, then the shikmi talukhdari right came to an end at that time. **MAJMOODDEEN & HITRO CHOWDHURY DEWA**

[24 W. R., 247]

**SETTLEMENT AWARD**

See CASES UNDER ACT XIII OF 1843.

**SETTLEMENT OFFICER.**

See LIMITATION ACT 1877 ART 130 (1871, ART 130) I. L. R., 1 Bom., 586

See MADRAS FOREST ACT s. 4.  
[I. L. R., 17 Mad., 193]

See PUBLIC OFFICER.  
[I. L. R., 14 Bom., 395]

See SERVICE TEXTILE.  
[I. L. R., 1 Bom., 586]

See SOUTHERN PEGUNJANS SETTLEMENT REGULATION I. L. R., 18 Calc., 146

**Act or order of—**

See BENGAL TENANCY ACT, s. 104.  
[I. L. R., 20 Calc., 579  
I. L. R., 23 Calc., 257]

**SETTLEMENT OFFICER—continued**

See DECREE—CONSTITUTION OF DECREE—  
HINDU WIDOW I. L. R., 17 Calc., 246

See KHOTI SETTLEMENT ACT, ss. 20 AND  
21 I. L. R., 18 Bom., 244

See LANDLORD AND TENANT—CONSTITUTION OF RELATIONS—GENERALLY  
[I. L. R., 18 All., 238]

See LIMITATION ACT, 1877, ART 14.  
[I. L. R., 18 Bom., 244]

See THE JUDICATURE—COMPETENT COURTS—  
REVENUE COURTS  
[I. L. R., 23 Calc., 257]

Application to—  
See GUJARAT TALUKHDARS ACT, s. 10.  
[I. L. R., 16 Bom., 409]

Decision of—  
See ARBITRATION—ARBITRATION UNDER  
SPECIAL ACTS—N. W. P. LAND REVENUE ACT,  
I. L. R., 18 All., 172

See CASES UNDER KHOTI SETTLEMENT  
ACT ss 17 AND 20

See SUPERINTENDENCE OF HIGH COURT—  
CIVIL PROCEDURE CODE, s. 522.  
[I. L. R., 21 Calc., 935]

Entry in record of—  
See CASES UNDER KHOTI SETTLEMENT,  
ACT, s. 17

Order on appeal from—  
See SPECIAL OR SECOND APPEAL—ORDERS  
SUBJECT OR NOT TO APPEAL.  
[I. L. R., 16 Calc., 598  
I. L. R., 16 Bom., 408  
I. L. R., 21 Calc., 776, 935  
I. L. R., 23 Calc., 477  
I. L. R., 24 Calc., 462  
I. L. R., 25 Calc., 146]

Power of—  
See BENGAL TENANCY ACT, ss. 101—115.  
[I. L. R., 20 Calc., 577  
I. L. R., 21 Calc., 379  
I. L. R., 27 Calc., 394]

See BENGAL TENANCY ACT, s. 102.  
[I. L. R., 21 Calc., 38  
I. L. R., 23 Calc., 244]

See BENGAL TENANCY ACT s. 103  
[I. L. R., 19 Calc., 641, 643]

Statement of facts by—  
See EVIDENCE ACT, 1872, s. 35  
[I. L. R., 21 Bom., 695]

Suit to set aside order of—  
See SOUTHERN PEGUNJANS SETTLEMENT  
REGULATION I. L. R., 13 Calc., 245  
[I. L. R., 15 Calc., 765  
I. L. R., 18 Calc., 146]

**SETTLEMENT OFFICER—continued.**

1. ———— **Duty of settlement officer**  
*—Entries in wajib-ul-urz.*—A settlement officer should not receive for entry in the wajib-ul-urz of a village a mere expression of the views of a proprietor or enter it upon the records relating to the village, the wajib-ul-urz being intended to be the official record of local customs. *UMAN PARSHAD v. GAN-  
 DHARP SINGH* . . . I. L. R., 15 Calc., 20  
 [L. R., 14 I. A., 127]

2. ———— **Power of settlement officer**  
*—Question of payment and right to possession between mortgagor and usufructuary mortgagee.*—The duty of the settlement officer is to record the names of those whom he finds in possession of right, or whom he finds to have been wrongfully dispossessed of right within a certain period; but it is not his duty to determine the question whether the mortgagor in a usufructuary mortgage is entitled to possession by reason of the satisfaction of the debt out of the usufruct. *BHYRO RAI v. GOLAN SINGH*  
 [3 Agra, 303]

3. ———— **Powers of, in making entry in jummadundi.**—A settlement officer is bound to record in the jummadundi the existing rights of cultivators, and cannot impose an enhanced rent without notice on those entitled. If he enters a higher rate in spite of protest, such entry does not conclude the tenant from pleading non liability. *LEDLIE v. DOORGA MONEE DOSSEE. WATSON & Co. v. DOORGA MONEE DOSSEE* . . . 21 W. R., 410

4. ———— **Act XIV of 1863**  
*—Application under Act X of 1859, s. 28*—The powers which the Government was authorized by Act XIV of 1863 to confer on settlement officers were limited to powers for the decision of suits of the nature mentioned in s. 23 of Act X of 1859 or in Act XIV of 1863, and there was no authority given to Government to invest settlement officers with any other of the powers which were vested in a Collector by Act X of 1859, consequently an application under s. 28 of that Act could not be entertained by a settlement officer. *THAKOOREE v. DRULPEE SINGH*  
 [2 N. W., 261]

5. ———— **Act XIV of 1863, s. 8—Resumption and assessment.**—The powers given by s. 8 of Act XIV of 1863 to a settlement officer, for the decision of suits of the nature mentioned in s. 23 of Act X of 1859, or in Act XIV of 1863, did not give him power to try a right to resume and assess. *JEYCHUND v. KADHOREE*  
 [2 N. W., 244; Agra, F. B., Ed. 1874, 222]

6. ———— **Power to refer case to another officer for trial—Act X of 1859, s. 150—Act XIV of 1863, ss. 8 and 10.**—An officer employed in making or revising settlements of land revenue and invested by the local Government with the powers described in s. 8, Act XIV of 1863, was not thereby empowered to refer a suit, which he had jurisdiction to try by virtue of the provisions of the abovementioned section, to another officer for trial. The powers in s. 8 of Act XIV of 1863 were the powers spoken of in s. 150 of Act X of 1859, and were distinct from the powers given to a Collector by

**SETTLEMENT OFFICER—concluded.**

the second clause of s. 162. S. 10 of Act XIV of 1863 enacted that, if a suit for enhancement of rent be brought before any officers empowered under s. 8 to hear the same, such suit should be heard and determined by such officer, and it was not provided that he might refer it for trial and decision to another. *PUNCHUM SINGH v. HOORMUTOONNISA*  
 [5 N. W., 64]

7. ———— **Power to increase rent—Consent of raiyats.**—Where increased rent is imposed in the course of settlement proceedings, the Collector's jummadundi must show the consent of all the raiyats before they can be held to be bound by it. *REAZOODDEEN MAHOMED v. MCALPINE*  
 [22 W. R., 540]

8. ———— **Power of, in Sonthal Pergunnahs—Reg. III of 1872—Reference in settlement cases—Quare**—Whether, having regard to Regulation III of 1872 and the notification by the Lieutenant-Governor, dated 7th May 1872, a valid reference can be made in a settlement case in the Sonthal Pergunnahs by a settlement officer. *TARINI PROSAD MISSEER v. MAHAMMAD CHOWDHRY*  
 [6 C. L. R., 555]

**SHAREHOLDER.****Liability of—**

See CASES—UNDER COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.

**Right of—**

See COMPANY—MEETINGS AND VOTING.

[I. L. R., 15 Bom., 164]

See COMPANY—RIGHTS OF SHAREHOLDERS.

[I. L. R., 19 Bom., 1]

L. R., 21 I. A., 139

**SHARE WARRANTS.****Stamp on—**

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—COMPANIES ACT.

[I. L. R., 20 Calc., 676]

**SHARES.**

See CASES UNDER COMPANY.

**Agreement relating to sale of—**

See STAMP ACT, 1879, SCH. I, ART. 5.

[I. L. R., 13 Mad., 255]

I. L. R., 14 Bom., 316

**Assignment of—**

See INSOLVENCY—ORDER AND DISPOSITION.

[I. L. R., 2 Bom., 542]

**Cancellation of—**

See COMPANY—POWERS, DUTIES, AND LIABILITIES OF DIRECTORS.

[I. L. R., 20 Bom., 654]

**SHARES—continued.****"Holding shares," Meaning of—****See DECLARATORY DECREE, SUIT FOR—  
DECLARATION OF TITLE****[L. L. R., 17 Bom., 187****Sale of—****See CONTRACT—CONTRACTS FOR GOVERN-  
MENT SECURITIES OR SHARES****[2 Bom., 280, 297, 272, 2nd Ed., 246, 253, 258****3 Bom., O. C., 9, 69, 79****1 Ind. Jur., N. B., 17****Transfer of—****See CASES UNDER COMPANY—TRANSFER  
OF SHARES AND RIGHTS OF TRANSFEREES****Transfer of, Registration of—****See BANK OF BENGAL****[L. L. R., 3 Calc., 392****1. Transfer of shares—Blank**

*transfer—Cause of action*—Shares in the National Bank were sold by the allottee and a transfer in the form required by the articles of association of the Bank was executed but no name was inserted as transferee. The purchaser pledged them with the I. P. L. and China Bank and deposited with them the blank transfer. This Bank applied to the National Bank without producing a letter from the pledgor to regular their lien and on its refusal sold the shares to the plaintiff and delivered to him the transfer, also in blank. The plaintiff inserted his own name in the transfer, and requested the National Bank to register the shares in his name. In an action against the National Bank to recover the price of the shares, *Held* also that they were justified in refusing to register. *Held* also that the plaintiff, having received back from his vendors the price of his shares, had no cause of action. **KNOWLES v. NATIONAL BANK OF INDIA** 2 B. L. R., O. C., 168

**2. Transfer by way**

*of pledge—Right of transferee to have transfer registered and to have dividends*—A and B, proprietors of indigo factories, sold them to the E. B. Company receiving in part payment 1000 fully paid-up shares of the company, which was a company registered under Act XIX of 1957, A and B covenanting to indemnify the company from all loss and to guarantee a dividend of 8 per cent. for the term of two years. A, being indebted to C, deposited the shares with him as a security for the debt. C gave notice of this to the company before he made the advance to A, and the company assented to the deposit. A and B afterwards became jointly indebted to the company in respect of the covenant and guarantee. *Held* that C was entitled to have the deposit of the shares registered in the books of the company, and to be paid dividends upon them. **PINTSCH v. EASTERN BENGAL INDIGO COMPANY**

**[1 Ind. Jur., N. B., 278**

But where the deposit by A was accompanied by a contract with a power of sale of the shares, but nothing was said about receiving the dividend, *Held* that, under this contract of A, C could not receive

**SHARES—continued.**

the dividend, though he could under a contemporaneous general power of attorney from A. **ROYAL BANK OF INDIA v. EASTERN BENGAL INDIGO COMPANY** 1 Ind. Jur., N. B., 281

**3****Blank transfers—**

*Tenders*—On the 19th April plaintiff sold to defendants sixty shares in the N. Bank, to be delivered and paid for on Thursday, April 26th. The sold note was as follows: "Baloo Lall Mohun Vellick. Sold by your order, and on your account, to Messrs Peary Chand Mittra and Sons (Metcalfe Hall) sixty shares in the N. Bank at Rs premium per share. (Signed) Sree Kumar Sircar, Broker." The bought note exactly corresponded. On the 23rd April plaintiff received from defendants the following: "With reference to the sixty N. Bank shares sold by you, we shall thank you to send us three transfer deeds on Friday next, viz., two for twenty five shares each and one for ten shares." On the 26th April plaintiff sent to defendants sixty N. Bank shares, some standing in the name of H and some in the name of P, accompanied by transfers, all executed by P alone. These shares were all returned by the defendants, with the following memorandum: "The accompanying shares in the N. Bank purchased for delivery to-day are not in order." Later on the same day, the 26th, plaintiff took personally to defendants the same sixty shares with transfers, executed some by H and some by P, the name of the transferee corresponding number by number with the name in the shares. On this, as on the previous occasion, the name of the transferee was left blank. These shares were also rejected by the defendants as not in order. Plaintiff then, on April 27th, about 1 P.M., had the shares registered in his own name, and, within two hours afterwards, sent them to the defendants with corresponding transfers, and with the following letter: "In compliance with request in your memorandum of the 23rd instant, I now send you the sixty shares N. Bank, with three transfer deeds, and will feel obliged by your paying the amount to the bearer." The defendants declined to receive the shares, and they were re-sold at a loss. The plaintiff never had any personal interest whatever in the shares, either on the 26th or 27th April, and was a mere *benami* holder for H and P. The articles of association of the N. Bank required transfers to be in the form P appended to Act XIX of 1957. The transfers tendered by plaintiff were on each occasion in that form. The defendants swore that the "Friday the 27th April, mentioned in their memorandum of the 23rd April was inserted by accident, instead of Thursday," the 26th April, and that they consequently rejected the tender on the 27th. *Held* (1) that the contract, as it stood on the bought and sold notes, was a contract by the vendor (as in *Stephen v. De Medina*) that "in consideration of such a sum I will execute any proper conveyance which you tender me." (2) That the memorandum of April 23rd, coupled with the fact of the vendor having made tenders of transfers of the shares, was evidence enough to show that the vendor bound himself to tender a proper conveyance to his vendee. (3) That the document of conveyance must be complete at the

**SHARES—concluded.**

time of tender, or capable of being then made complete. (4) The transfers, with a blank for the name of the transferee, were incomplete and insufficient, the vendor showing no authority from H and P. (5) That the Court below must deal with the question of fact, whether or no the mention of Friday, the 27th, instead of Thursday, the 26th, was a mistake; and *semble* that, if the defendants had received the blank transfers and acted upon them, the waiver would have rendered them complete.

LALL MOHUN MULLICK v. PEARY CHAND MITTER

[1 Ind. Jur., N. S., 383

4. ——— Sale of shares for future delivery—*Refusal of purchaser to accept—Readiness and willingness to deliver—Pledge of shares to third person.*—Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares. *Semble*—The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so. DAYADHAI DIPCHAND v. MANIKLAL VIRJIBHUKAN 8 Bom., A. C., 123

5. ——— *Equitable assignment of right to sue—Readiness and willingness to deliver—Tender—Constructive tender.*—A contract for the delivery of shares at a future day is a contract that can be assigned in equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its breach in the Civil Courts in India. In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant. In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary, e.g., a tender will be dispensed with where the defendant has refused to perform the contract, or where, on the day for the performance of it, he has absconded, and, having closed his place of business, has left no agent or other person to represent him. DAYADHAI DIPCHAND v. DULLABHARAM DAYARAM

[8 Bom., A. C., 133

**SHEBATT.**

See CASES UNDER HINDU LAW—ENDOWMENT.

**SHERIFF.**

Liability of—

See ESCAPE FROM CUSTODY.

[6 Moore's L. A., 467

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . I. L. R., 2 Bom., 258

**SHERIFF—continued.**

— Sale by, under writ of fieri facias.

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL . 24 W. R., 366  
[8 C. L. R., 4

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . I. L. R., 1 Calc., 55  
[I. L. R., 3 Calc., 808  
L. R., 5 I. A., 116  
I. L. R., 8 Calc., 356

1. ——— Right of poundage—*Satisfaction of decree after attachment, but before sale.*—Certain immoveable property of the defendant was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, the defendant paid the balance and satisfied the plaintiff's claim in full. *Held* that the Sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt, and satisfaction of the decree was ordered to be entered, and the attachment withdrawn, subject to the payment of such poundage. ROYCHURN DUTT v. AMEENA BEBI . I. L. R., 2 Calc., 385

PEARSON v. MADHUB CHUNDER GHOSE

[I. L. R., 2 Calc., 387 note

2. ——— “Debt levied by execution”—*Ambiguity in document—Usage—Discharge of defendant, Effect of, on Sheriff's right.*—In a suit brought in the Bombay Court of Small Causes to recover Sheriff's poundage on the amount endorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested H, who applied to the High Court under s. 273 of Act VIII of 1859, and was ordered to be discharged from custody, the Judge found for the defendants with costs, subject to the opinion of the High Court. *Held* (1) that the words “debt levied by execution” used in the table of fees for the Recorder's Court, and continued in the subsequent tables, being ambiguous, the rule applies that “if an instrument be an ancient one and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction;” (2) that as the Sheriff is the officer of the Court, and his fees are received under its authority, it was unnecessary to refer the case back to the Small Cause Court in order that evidence of usage might be taken; (3) that having regard as well to the usage and practice of the Supreme Court as to the liability of the Sheriff at the time the old tables of fees were settled, the words used must be construed as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and (4) that if the Sheriff's right accrues upon his executing the warrant, the subsequent discharge by the Court of the defendant from custody ought not to divest him of it. VINAYAK VASUDEY v. RITCHIE, STEWART & Co.

[4 Bom., O. C., 139



**SHERIFF—concluded**

3. — *Compromise after attachment of property and before sale*—Where property is attached by the Sheriff after judgment, and the parties come to a compromise before the Sheriff sells any of such property, the Sheriff is only entitled to poundage on the amount received by the execution creditor, or in compromise of his claim. *IN THE MATTER OF BOMBAY JOINT STOCK CORPORATION. IN RE SHERIFF OF BOMBAY*  
[8 Bom., O. C., 22]

4. — *Sale by Sheriff—Civil Procedure Code (Act XIV of 1852) s. 214 cl. (c) ss. 287, 311 313—Belchamber's Rules and Orders of High Court Calcutta 551-55*—*Deficiency in area of land—Application on behalf of purchaser to set aside sale or for compensation*—A purchaser at an execution sale of immovable property held by the Sheriff applied to set aside the sale or for compensation on the ground of deficiency in the area of the land sold. *Held* also that, as the interest of the purchaser was adverse to the interest of the judgment-debtor, the former was not the representative in interest of the latter and therefore s. 214 of the Civil Procedure Code did not apply. *Jones v. Alexander v. Barker v. Bent* *Madhav Surkar I L. R., 24 Cal., 62* approved. Sales by the Sheriff differ from sales by the Registrar of the Original Side of the High Court. The rules of the Court governing sales by the Registrar direct that compensation shall be allowed for errors and misstatements if capable of compensation, while no such condition is imposed on sales by the Sheriff. *RAY v. NARAIN v. DWARKA NATH BHATTARY I L. R., 27 Cal., 284*  
[4 C. W. N., 13]

**SHIKMI TALUKHDARS**

*See SETTLEMENT—EVIDENCE of SETTLEMENT*  
[3 W. R., P. C., 5 10 Moore's I. A., 185]  
*See SETTLEMENT—RIGHT TO SETTLEMENT*  
[W. R., 1884, 262]

**SHIP**

at anchor, Duty of—

*See SHIPPING LAW—COLLISION*  
[I. L. R., 24 Cal., 627]  
[I. R., 24 I. A., 129]

Loss of—

*See CONTRACT—CONSTRUCTION OF CONTRACTS*  
[I. L. R., 13 Bom., 15]  
[I. L. R., 22 Bom., 189]

Measurement of—

*See MERCHANT SHIPPING ACT* ss. 24, 25.  
[I. L. R., 14 Bom., 170]

**SHIP—concluded**

Seaworthiness of—

*See BILL OF LADING* 8 W. R., 33  
[I. L. R., 13 Bom., 571]  
[I. L. R., 19 Bom., 639]  
*See CONTRACT—CONVENTIONS PRECEDENT*  
[2 B. L. R., O. C., 127]  
*See INSURANCE—MARINE INSURANCE*  
[5 Moore's I. A., 361]  
Cor., 5 2 Hyde, 107

**SHIP, ARREST OF—**

*See ARREST—CIVIL ARREST*  
[1 Hyde, 253]  
*See COSTS—SPECIAL CASES—ADMIRALTY OR VICE ADMIRALTY*  
[I. L. R., 17 Cal., 84]  
*See SALVAGE* I. L. R., 17 Cal., 84

*Deposit of security with Marshal—Application for arrest of deposit in another action—Admiralty Court Practice of—*The ship *M* having been arrested in an action promoted by the master of the ship *N* for damage caused by a collision, in which the *N* with her cargo was totally lost, deposited with the Marshal of the Court certain Government paper as security to answer the alleged damage on which the *M* was released. The cargo of the *N* had been insured, and on the loss thereof the Insurance Company paid the amount of the policy and instituted proceedings against the *M* in respect of the loss of the cargo. *Held* the Court had no power to grant an application by the Insurance Company for the arrest of the security in the hands of the Marshal, so as to make it answerable in their action. *TAYLOR v. INSURANCE COMPANY v. "MOONHILL" IN RE "MOONHILL"*  
[15 B. L. R., Ap. 3]

**SHIP, REGISTERING OF—**

*British ship—Stat 3 & 4 Vict., c. 36—Act X of 1841—Ship built in foreign port—*A ship built in a foreign port in India in 1817, within the limits of the Company's charter, by foreigners, and which sailed under foreign flags until 1833, when it was then and thereafter owned by and belonged to British subjects, resident at Bombay held to be entitled, under the proclamation of the Governor General in Council under 3 & 4 Vict., c. 36, and the Act X of 1841 of the Legislative Council of India, to be registered at Bombay as a British ship, for the purpose of trade within the limits of the Company's charter. *CRAWFORD v. SPOONER*  
[4 Moore's I. A., 179]

**SHIP, SALE OF—**

*See BOTTOMRY BOND* 5 B. L. R., 258  
[6 B. L. R., 323]

1. — *Sale in execution of decree—Form of transfer—Merchant Shipping Act, s. 55*

**SHIP, SALE OF—continued.**

—*Mandamus to Registrar to register transfer—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree.*—The transfer of a ship should be in the form, or as near the form as may be, laid down by the Merchant Shipping Act; therefore, where a ship sold in execution was transferred by the Clerk of the Court, in a form usual in sales in execution, but quite irregular, having reference to the Merchant Shipping Acts, the Court refused a mandamus to order the Registrar to register the transfer. *Quære*.—Whether a ship can be sold in execution of a decree of the Calcutta Small Cause Court, and *quære* whether the Clerk of the Small Cause Court can execute a transfer of a ship, supposing she is saleable, in execution of that Court's decree. **IN THE MATTER OF THE SHIP "SHAH CALANDER"** . . . 1 Ind. Jur., N. S., 263

2. — *Merchant Shipping Act (25 & 26 Vict., c. 63), s. 3—Transfer of a ship—Equitable title—Destruction after agreement for sale—Suit to recover purchase-money.*—The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase-money. *Held* that the plaintiff was not entitled to recover. **RAMANADAN CHETTI v. NAGOODA MARACAYAR** [I. L. R., 21 Mad., 395]

3. — *Contract between British subject and non-British subject as to registered ship in Calcutta—Merchant Shipping Acts, ss. 53, 55—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree—Form of transfer to purchaser.*—A, not a British subject, contracted with B, a British subject, for the purchase of a ship which was registered in the port of Calcutta in the name of C (also a British subject). A and B entered into the contract as if both had been British subjects. *Held* that, on the evidence, the parties contracted with reference to the Merchant Shipping Act, and that the intention was that a title under that Act should be given. *Held* also that, although it turned out that A's nationality prevented the possibility of his being registered as owner, this did not affect the liability taken upon himself by B to have himself put on the register as owner, or his liability to put A in a position to have a change of ownership noted in the register under s. 53 of the Merchant Shipping Act. *Held* further that B not having had himself put on the register as owner, and not having put A in a position to have a change of ownership noted under s. 53, and B having declined to take any further steps towards attaining either of these objects, A was entitled, although he had got possession of the ship, to rescind the contract, and to recover back a portion of the purchase-money which he had paid, and also to recover damages for the breach of contract. The Calcutta Court of Small Causes had power to seize and sell a vessel in execution of a decree of that Court, and the bailiff who sells the vessel is the person who ought to execute the bill

**SHIP, SALE OF—concluded.**

of sale to the purchaser. A British ship having, in execution of a decree of the Calcutta Court of Small Causes, been sold to a person qualified to be the owner of the British ship, *Held* that it was necessary that the transfer to the purchaser should be by bill of sale as prescribed in s. 55 of the Merchant Shipping Act, and the mere sale and delivery to the purchaser did not pass a title to him. **ESAU AHMED v. JASSIV BINSATF** . . . 2 Ind. Jur., N. S., 251

**SHIPMENT.****Contract for—**

*See CONTRACT—CONSTRUCTION OF CONTRACTS* . . . I. L. R., 12 Bom., 50  
[I. L. R., 13 Bom., 15  
I. L. R., 16 Bom., 389  
I. L. R., 17 Bom., 129  
I. L. R., 18 Bom., 299  
I. L. R., 22 Bom., 189  
I. L. R., 18 Mad., 63]

**See SALE OF GOODS.**

[I. L. R., 17 Bom., 62]

*See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—DAMAGES FOR BREACH OF CONTRACT.*

[I. L. R., 19 Mad., 304]

**Meaning of—**

*See CONTRACT—CONSTRUCTION OF CONTRACTS* . . . I. L. R., 17 Bom., 129

*See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS* I. L. R., 17 Bom., 129

**SHIPMENTS.**

1. — *Consignment of goods—Bills of exchange—Presumption of payment of—Sale of goods.*—The plaintiffs in London and the defendant in Calcutta had dealings, which consisted in the defendant shipping jute cuttings and rejections to the plaintiffs in certain quantities, and within certain limits as to price, the defendant drawing bills on the plaintiffs in respect of such goods, which the plaintiffs accepted. The plaintiffs alleged that there was an agreement between them and the defendant that in case of shipments in excess of the limits given by the plaintiffs they should at their option receive the goods on their own account, or treat them as consignments on account of the defendant, but the defendant denied there was any such arrangement. The defendant made several shipments in excess of the plaintiffs' limits, and the plaintiffs treated them as consignments on the defendant's account, selling them on defendant's account and forwarding him account sales, and drawing bills on the defendant for any balance due to them in the transactions, which bills the defendant refused to pay. In an action brought by the plaintiffs for the balance due to them from the defendant in respect of the shipments which had been treated by the plaintiffs as consignments in the defendant's

## SHIPMENTS—continued

account the defendant admitted he had sold the bills and received the money for them; they were produced by the plaintiffs, the acceptors. *Held* that the bills being produced by the acceptors after due date, and the defendant having received a notice of dishonour and no demand for payment of the bills, the presumption was that they had been paid by the plaintiffs. In exercising their option of treating shipments in excess of their limits as on their own account or as consignments on account of the defendant the plaintiffs were entitled to treat each shipment separately, and were not compelled to decide on an average of the shipments taken all together. **SHEARMAN & FLEMING** 5 B. L. R., 619

## 2. Bills of lading

*fraudulently signed*—Title of endorsements for value against holder of mate's receipts who has not paid.—The plaintiffs agreed with the defendant K M to purchase and ship cotton on account of K M and to retain the mate's receipts for the cotton so shipped until the purchase-money should be paid by A M. Under this agreement the plaintiffs shipped 600 bales on board the *Teresia*. Before the greater part of the 600 bales had been shipped and before paying for the same K M without production of the mate's receipts induced the master of the ship to sign bills of lading for the said 600 bales and endorsed over the bills of lading for 310 of such bales to J C & Co., bond fide endorsements for value without notice. In a contest between the plaintiffs, holders of the mate's receipts and J C & Co. endorsements for value of the bills of lading of the said 310 bales, it was held that the plaintiffs were entitled to the possession of the 310 bales to the exclusion of J C & Co. **RAJARAM GOYSDRAM & BROWN** 7 Bom., O. C., 87

## SHIPPING LAW

1. —Certificates—Suspension or cancellation of certificate.—Act I of 1853 ss 201, 202.—The local tribunal in India, appointed under ss 201 and 202 of Act I of 1853, can suspend or cancel the British certificate of a master or mate, and for that purpose its report need not be confirmed by the local Government. **EX PARTE HURST IN THE MATTER OF STEAMSHIP "JASON"** 1 Mad., 270

2. —Collision—Collision in port.—Port Rules 1856—Liability of ship for damage.—The ship T having got adrift in a dark night in consequence of a collision the harbour-master tried to anchor her, but failing to do so as her cable jammed, finally brought her up inside the ship A, which was moored off the Howrah side of the Hooghly, this being the only berth the T could then secure. The next flood swung both ships and the T fouled the A, damaging her, and raising her to part her cables, in consequence of which she suffered further damage from subsequent collisions. The owners of the A sued the T for the whole damage done. The defence was that the promovers, by adopting certain precautions, might have prevented the accident, that the T, being in charge of the port authorities, was not liable, and that no care or skill on her part could have prevented the accident. The T did not allege a liability

## SHIPPING LAW—continued

of any of the vessels subsequently collided with. *Held* that liability for damage occasioned by collision rests, *prima facie*, on the colliding vessel. That a ship in port is bound to be prepared for such exigencies only as might be expected to arise from the circumstances she knew to surround her, that is, a ship is protected by the port rules from liability for damage only when it is due to the acts or omissions of the officials in charge of her. *Held* also that the ship is liable for all the consequences occasioned by an accident that results from any defect in her equipment or want of care or skill of her crew, etc. **IN THE MATTER OF THE "THALATTA" BOURKE, Ad., 1**

*Held* on appeal that an accident to the gear of a ship does not of itself alone render her liable for damages for a collision of which it is a remote occasion; and that a ship at anchor in the port should keep a look-out, and be ready to take all reasonable means for her own safety in an emergency. **"THALATTA" & "ANNE" BOURKE, A. O. C., 87**

3. —Liability of ship for fault of pilot.—Port Rules, 1856—Act XXII of 1855.—The ship H in charge of a pilot (acting as harbour-master) when proceeding across the bow of the ship I S which was at anchor, to take up a clear mooring, came into collision with and slightly damaged her, and this suit was for the damage so occasioned. Both sides relied on Act XXII of 1855 and the Port Rules of 1856, the plaintiff contending that the officer in charge was not such officer as the said Act and Rules referred to; and the defendant that he was. The suit was dismissed with costs. *Held* that a ship is *prima facie* liable for damages occasioned by a collision resulting from an error in judgement of the officer in charge of her. *Held* also that a vessel is exempted from liability for the fault of a pilot in charge of her,—first, where a master is authorised to employ a pilot, and is exempted from responsibility if he elects to do so; and, secondly, where the employment of a pilot is compulsory, and the owners of the vessel so employing him are relieved from responsibility for his misconduct; that the legislation regarding the employment of pilots and other officers in the port of Calcutta is contained in Act XXII of 1855 and the Port Rules of 1856; that where no special regulation is made by the port authorities, under rules 2 and 7, a ship may move at her discretion in the port; and that it is unlawful, under s. 12 of Act XXII of 1855, to moor a vessel in the port without having a port officer on board to take command of the ship. **IN THE MATTER OF THE "HANOVER" BOURKE, Ad., 15**

4. —Collision from bore in the river—Inevitable accident.—The ship *Thames* was lying a mere hulk, waiting for repair when a bore drifted her stern foremost up the river, and she came into collision with another ship. No negligence was proved against the master, and the accident was held to be inevitable, and no costs were decreed on either side. **ABDOOLA ROMONAH MOOLAH & "THAMES" BOURKE, Ad., 21**

5. —Moving vessel in harbour.—Act XXII of 1855—Negligence of pilots.—Bombay Harbour Rules—Lights on vessels, Duty to carry or show.—The taking of a steam vessel in a

**SHIPPING LAW—continued.**

trial trip from Mazagon to the sea and back again is a moving of such vessel within the meaning of s. 12 of Act XXII of 1855. For such a trip, therefore, the employment of a pilot is compulsory. Where the employment of a pilot is compulsory on board a vessel, and such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew and partly that of the pilot, the owners are not exempted from liability. If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. Rules of Bombay harbour with regard to the showing of lights by vessels in the harbour considered. Independently of special regulation or legislation, there is no general obligation by maritime law on sailing vessels, either under way or at anchor, to carry a light throughout the night, although, for the sake of avoiding a misfortune, it may, under particular circumstances, become their duty to carry or show a light. Although that is so, yet the Court will go some way to treat the dark boat as the wrong-doer; and if a vessel be either under way or at anchor at night in a channel, fair way, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or show a light in order to indicate her position when other vessels are approaching her, and in sufficient time to enable them to avoid her. **MUHAMMAD YUSUF v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY** . . . 6 Bom., O. C., 98

**6. ——— Admiralty suit—**

**Both vessels to blame—Suit for damages by owners of cargo—Costs.**—The owners of cargo on board the *H* sued the owners of the steam-ship *S* for damages resulting from a collision which occurred between the *H* and the *S*. The Court found that both vessels were to blame for the collision. *Held*, following the English authorities, that the plaintiffs could only recover from the defendants half of the damages which they had sustained. *Held* also, following the *City of Manchester*, 5 P. D., 221, that in such suit each party should bear their own costs. **OOKERDA POONSEY v. STEAM-SHIP "SAVITRI"**

[I. L. R., 10 Bom., 408]

**7. ——— Damage by ship**

**under way colliding with another at anchor—Burden of justifying—Duty of ship at anchor.**—Where a ship under way comes into collision with another at anchor in a proper place, and showing at night an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way. At the same time there is an obligation on the anchored ship to keep a competent watch, to show an anchor light, and to do everything to avert a collision and lessen the damage from it. If, as was the case here, the damaged ship is placed in a difficulty entirely by the erroneous course or conduct of

**SHIPPING LAW—continued.**

the other, and is obliged to take a step on the instant, she is entitled to claim from a Court a favourable consideration for her action, even if that should afterwards appear not to have been the best possible. A steam ship, entering the fairway of a river with the tide flowing, collided with the promont's tug at anchor in a proper place, and showing an anchor light. Near the tug was a pilot brig, astern of which the steam-ship wanted to round, attempting to pass between the tug and the brig. She could, however, have taken a course astern of both. At the approach of the steam-ship both the anchored vessels, heading against the tide, hove on their anchors, and drifted back. The justification set up by the owners of the steam-ship was that she was misled by the pilot brig's drifting, the anchor light of the latter having been kept up. Blame to a third ship, if blame there were, was held to be no excuse for the colliding ship, as against the tug's complaint. The main charge against the tug was that she did not slack away chain as soon as there was danger, but hove on her anchor. It was found, however, that if the tug were already drifting when the collision took place, there was no reason to suppose that by slackening away chain at the earliest possible moment the collision would have been averted or lessened in force. On the other hand, the facts against the impugnants' steam-ship were: (1) that her course could, without difficulty, have been directed so that by going astern of the tug from the port side instead of crossing her bows, all risk of collision would have been avoided; (2) that there was a want of sufficient look-out on board the steam-ship, especially as regarded the tug; (3) that there was possibly also a miscalculation on the part of the steam-ship of the room to pass, with reference to the force and set of the tide. She was accordingly alone held to blame, and her owners liable in damages. **MARY TUG CO. v. BRITISH INDIA STEAM NAVIGATION CO.** . . . I. L. R., 24 Cal., 627

[L. R., 24 I. A., 129]

1 C. W. N., 329

**8. ——— Jettison—Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of ship-owner—Remedies of shippers—Lien on cargo saved in consequence of jettison.**—In jettison of part of a general cargo, the right of those entitled to contribution, and the corresponding obligations of the contributors, originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrong-doers, or those responsible for the latter) have been advisedly sacrificed, and the property of others has been thereby preserved. Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss v. Heriot*, 14 C. B. (N. S.), 59], and as that made in the refusal of contribution to shippers of deck-cargo when jettisoned, are in truth but limitations on the above rule, which have been introduced from equitable considerations. Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary, to jettison part

**SHIPPING LAW—continued**

of the cargo in order to save the remainder and the ship.—*Head* that proper owners of the jet-tisoned cargo were entitled to a general average contribution; but the owners of the ship were not entitled (their liability is now to the shipowner not having been varied by contract). The rules of Maritime Law as to the rights and remedies in a case of jettison are first, each owner of jettisoned goods becomes a creditor of the ship, and second, and second, he has a direct claim against each of the owners of the ship and cargo, for a *pro rata* contribution towards his indemnity. Contribution can be recovered by the owner of jettisoned goods either by direct suit or by enforcing through the ship-master who is his agent for this purpose a lien on each parcel of goods saved belonging to each separate consignee for a due proportion of his claim. *TRINCO STEEL & Co. v. Scott & Co.* L. L. R., 17 Cal., 382 [L. R., 16 I. A., 240]

9.—**Maritime lien—Sale of cargo to repair ship.**—The captain of an English ship, being unable to raise funds on a hot cargo and to repair damage caused to the ship by a case of weather sold portion of the cargo for such purpose and repaired the ship. A suit by the owners of the cargo against (1) the captain who was one of the owners of the ship, (2) a mortgagee of the ship and (3) the agent of the latter in whose name the ship was registered to recover the value of the cargo sold.—*Head* (1) that the owners of the cargo were not entitled to a personal decree against either the mortgagee or his agent, inasmuch as the captain was not their agent to pledge their credit for moneys required for repairs; (2) that the owners of the cargo were not entitled to a maritime lien on the ship which would take precedence of the mortgage. *MUTHIAH v. MUTHIAH* [L. L. R., 5 Mad., 334]

10.—**Authority of captain to bind owners for repairs of ship.**—The authority of the captain of a ship to bind her owners for repairs, and anything incidental thereto, can only exist by reason of his being their special agent for the purpose, which he will be presumed to be only in particular cases of necessity. *BATLEY v. TATE & SAIN'S FORKMAN* Bourke, O. C., 283

11.—**Master's lien on ship for wages.**—*Act I of 1859, s. 58.*—The master of a ship has by *statute* (Act I of 1859, s. 55) a lien upon the ship for the recovery of wages due. Is the MASTER OF THE BARQUE "AFRIK" [3 Hyde, 273]

12.—**Master's lien on ship for wages.**—*Repairs Lien for—Act I of 1852, s. 55.*—The *Perse* on a return voyage from Jeddah to Kappore, was driven into Bombay harbor through stress of weather. The owner, resident at Singapore, though frequently applied to, omitted to furnish funds to repair her or to pay the wages of the mariners, and the master being unable to raise funds for these purposes on the credit of the ship or owner on the application of the mariners, the ship was, in order to levy their wages, sold by the Mar-trade under the provisions of s. 55 and 56 of Act I of

**SHIPPING LAW—continued.**

1852. The master, who had been enraged at a voyage, then brought a suit on the admiralty side of the High Court to recover out of the surplus proceeds of the ship his wages up to the time when he could return to Singapore, and his passage-money to that port. He claimed that he was entitled to recover such wages and passage-money. Is the *PERSE*? *LI PANTS GARDNER* 6 Bom., O. C., 133

13.—**Lien on ship for repairs in port.**—*Ship in dock.*—A ship in the dock cannot be said to be delivered over to the possession of those who execute repairs; consequently no lien arose for repairs done. *Servas.*—If the ship had been under repair in a dock belonging to the plaintiff. *DAIS CATERER DASS v. COCHINAR* [Bourke, O. C., 338]

**SHIPPING ORDER.**

1.—**Construction of order.**—"*Ende to receive cargo.*"—The words "ready to receive cargo" inserted in a shipping order mean that the ship, on the day named in the shipping order shall be ready to receive a full cargo by whomsoever offered, and not merely ready to receive the quantum of cargo mentioned in the shipping order. *TAYLOR v. BROOKS* 1 Bom., Ap., 48

2.—**Measurement.**—*Right to have measurement taken.*—Where a shipping order authorized the receipt of "300 bales of cotton not exceeding 52 cubic feet measurement at the screw bales," the fair meaning of the contract was taken to be, considering that it was a mercantile contract and looking at the surrounding circumstances, that the measurement by which the parties were to be bound was measurement at the screw bales; and that, if the agent of the defendants was present there and passed the bales as of the proper measurement or waived the right to measure and did not measure, the defendants could not afterwards stand upon a right to measure or go into an enquiry of what was the size of the bales. *SCHMIDT & Co. v. COX, STEEL & Co.* 17 W. R., 545

**SHROFFS, USAGE OF—**

*See HYDE, LIABILITY OF*  
[L. L. R., 1 Bom., 23]

**SIGNATURE**

—**Acknowledgment of, by testator.**

*See WILL—ATTESTATION.*  
[L. L. R., 1 Bom., 547]

—**Alteration of contract after—**

*See CASES UNDER CONTRACT—ATTESTATION OF CONTRACTS—ATTESTATION BY PARTY*

—**Appearance of—**

*See FALSAE—PROOF OF WILL.*  
[L. L. R., 19 Cal., 65  
L. R., 18 I. A., 133]

**SIGNATURE—continued.**

## Cancellation of—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY THE COURT.  
[I. L. R., 3 Bom., 242]

## Comparison of—

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—EVIDENCE, MODE OF DEALING WITH  
Marsh., 322  
[22 W. R., 272]

## of Jailor.

See CIVIL PROCEDURE CODE, 1882, s. 87.  
[4 B. L. R., O. C., 51]

## of Judge.

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION AND POWER OF COURT, ETC.  
[I. L. R., 23 Calc., 480]

## of Magistrate, Warrant without—

See PENAL CODE, s. 186.  
[I. L. R., 23 Calc., 896]

## of witness to bond.

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.  
[I. L. R., 7 Bom., 418  
I. L. R., 12 Calc., 313  
I. L. R., 15 Bom., 44  
I. L. R., 15 Mad., 70]

## Proof of—

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—SIGNATURE.  
[1 Mad., 164  
I. L. R., 11 Bom., 680]

See EVIDENCE ACT, s. 73 . 21 W. R., 6

## Sufficiency of—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.  
[8 B. L. R., 305  
11 W. R., 216]

## to Memorandum of Association, Effect of—

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.  
[I. L. R., 12 Bom., 647  
I. L. R., 14 Bom., 196]

See LIMITATION ACT, 1877, s. 19 (1871, s. 20)—ACKNOWLEDGMENT OF DEBTS.

[I. L. R., 1 All., 683  
I. L. R., 6 Calc., 340  
I. L. R., 3 All., 347  
1 Mad., 358  
13 C. L. R., 112  
I. L. R., 5 Bom., 88, 89  
I. L. R., 5 Calc., 303  
I. L. R., 7 I. A., 8  
I. L. R., 18 Bom., 586]

**SIGNATURE—concluded.**

See MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.  
[I. L. R., 16 All., 59]

See PRACTICE—CRIMINAL CASES—SIGNATURE OF MAGISTRATE.

[I. L. R., 6 Mad., 396]

See WARRANT OF COMMITMENT.

[I. L. R., 6 Mad., 396]

See CASES UNDER WILL—ATTESTATION.

See WILL—EXECUTION . 21 W. R., 84  
[I. L. R., 25 Calc., 911]

1. ——— Signature of Rajah—*Title without name.*—A signature of a Rajah of the ancient Nuddea family was held to be valid, even though it did not contain the name of any particular individual.  
GUNEES BISWAS v. SREEGOPAL PAUL CHOWDHRY  
[8 W. R., 395]

2. ——— Signature of Magistrate—*Lithographed stamp of signature.*—A Magistrate ought not to use a lithographed stamp of his signature.  
QUEEN v. DEDAR NUSHYO . 14 W. R., Cr., 81

**SIR LAND.**

——— Description of—*Entry in revenue records, Effect of.*—The mere entry in the revenue records of land as sir will not make it sir land. Sir land is land which at some time or other has been cultivated by the zamindar himself, and which, although he may, from time to time, for a season, demise to shikmas, he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it.  
BUDLEY v. BUKHTOO . 3 N. W., 203

**SLANDER.**

See DEFAMATION I. L. R., 13 Mad., 34

See LIBEL . I. L. R., 14 Bom., 97

See PARTIES—ADDING PARTIES TO SUITS—PLAINTIFFS . I. L. R., 1 Mad., 383

See RIGHT OF SUIT—WITNESS.

[I. L. R., 15 Calc., 264  
I. L. R., 10 All., 425]

See WITNESS—CIVIL CASES—PRIVILEGES OF WITNESSES.

[I. L. R., 15 Calc., 264  
I. L. R., 10 All., 425  
I. L. R., 11 Mad., 477]

## of title.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.  
[I. L. R., 1 Mad., 65]

1. ——— Action for slander—*Misjoinder—Special damage.*—An action for slander cannot be brought jointly against several defendants: separate actions should be brought against each

**SLANDER—continued**

*Quere*—Whether words implying you are a drunkard, thief, cheat and the paramour of your sister in law your bastard" applied to a Brahmin are actionable *per se* without allegation of special damage  
NIRMADHAR MOOKERJEE v. DOORDEHAM KHOTTAR  
[15 B. L. R., 181]

2. — *Special damage*—An action for slander may be brought jointly against several defendants where the words spoken are not actionable *per se* but only become so by reason of the special damage which is the result of the conjoint action of all the defendants. WOOZEERUNISSA IBRAHIM v. MAHOMED HOSSEIN  
15 B. L. R., 188 note

3. — *Omission to give courtesy title in petition*—The omission of a mere courtesy cannot be taken to be equivalent to slander or libelling a man and is not an actionable wrong. SITARAMA KRISHNA RAYADAPPA PANGA RAO v. SANTASHI PANGA PEDDA BALIYARA SIMECHU  
[3 Mad., 4]

4. — *Slender and assault—Special damage*—Special damages are not necessary to be proved in a case of slander and assault. HOSSEIN v. BAKHT ALI  
[W. R., 1884, 302]

5. — *Verbal abuse—Hindus*—*Special damage*—In a suit between Hindus in the Bombay Presidency, damages may be recovered for mere verbal abuse without proof of actual damage resulting therefrom to the plaintiff. KASHIRAM TALAD KRISHNA v. BHADRU BHATTJI  
[7 Bom., A. C., 17]

6. — *Damages for verbal abuse*—Damages cannot be claimed for mere verbal abuses or threatening language. PHOOL-BAXTER KORE v. PARTUJ SINGH  
12 W. R., 368

7. — *Verbal abuse—Special damage*—While C was giving his evidence in open Court, in a suit of A against B A with the object of inducing the Judge to disbelieve C's testimony said to the witness that he was a drunkard. Held that the words were actionable without proof of special damage. SRINANTH ROY v. SATCOMI BHANJA  
3 C. L. R., 181

See SREENATH MOOKERJEE v. KOMUL KUMKORAR  
[18 W. R., 83]

HALI KUMAR MITTER v. RANGAM BHUTTA CHARI  
[6 B. L. R., Ap., 89 18 W. R., 84 note]

KANOO MUNDLE v. RAHMTOOLLAH MUNDLE  
[W. R., 1884, 269]

GROLAM HOSSEIN v. HIR GOBIND DASS  
[1 W. R., 19]

8. — *at weather*  
Singsong frequently was furnished funds to repair her or to the mariners and the master built funds for these purposes on the crew owner on the application of the mate was, in order to levy their wages and trade under the provisions of ss. 15 and 16 W. R., 151

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Singsong frequently was furnished funds to repair her or to the mariners and the master built funds for these purposes on the crew owner on the application of the mate was, in order to levy their wages and trade under the provisions of ss. 15 and 16 W. R., 151

**SLANDER—concluded**

8. — *Defendant on—Action for abuse no special damage to be alleged—Damages, Measure of*—The rule of English law which prohibits, except in certain cases an action for damages for oral defamation unless special damage is alleged being founded on no reasonable basis, should not be adopted by the Courts of British India. If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such he is entitled to recover damages without actual proof of loss sustains *Seemle*—An action will not lie for vulgar, a use or hasty expressions, but for malicious or culpable oral defamation an action will lie. Violent damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered and in the former to a sum sufficient to establish his innocence of the charges made. PARTHART v. MANRAN  
I. L. R., 8 Mad., 173

9. — *Cause of action—Defamation—Verbal abuse—Special damage*—A suit to recover damages for verbal abuse of a gross character may be maintained without proof of consequential damage. IBRAHIM HOSSEIN v. HAIDAR  
[I. L. R., 13 Calc., 108]

10. — *Defamation—Consequential damage*—A suit for damages for defamation of character involving loss of special position and injury to reputation will lie without proof of special damage. *Varadachari v. Mantri*  
I. L. R., 8 Mad. 175 and *Srinant Roy v. Satcomi*  
3 C. L. R., 181 followed. TRILOKYA NATH GHOSH v. CHANDRA NATH DUTT  
[I. L. R., 13 Calc., 424]

11. — *Cause of action—Damages for insult loss of reputation and men of pain by the use of abusive language—Suits for libel and slander—Special damage*—Held by the majority of the Full Bench (MACKENZIE C.J., MACPHERSON HILL, and JENNINGS J.J., GHOSH, J., dissenting.) that the mere use of abusive and insulting language, such as sala (wife's brother) baramada (base born or bastard) soor (pig) baper beta (son of the father, that is, ironically bastard) apart from defamation, is not actionable irrespective of any special damage. *Per GHOSH J.*—A case like the present should be decided according to the principles of justice, equity and good conscience, and therefore it is but just and right that a person thus vilified, who has suffered from insult and mental pain should be entitled to maintain an action irrespective of any special damage. GIRISH CHUNDER MITTER v. JAGADHARI SARKAR  
[I. L. R., 26 Calc., 653  
3 C. W. N., 551]

**SLAUGHTER HOUSE.**

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES  
7 B. L. R., 499, 516  
[25 W. R., Cr. 73]

**SLAUGHTER-HOUSE—concluded.**

1. ———— *Offence of using unlicensed slaughter-house—Beng. Act VII of 1865, s. 7—Slaughter-house license—Transfer of slaughter-house.*—*R* was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an *ijara* or lease to *A* to carry on the business. *R* was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without a license. He was fined Rs 200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was held (*per JACKSON, J.*) that *R*, by giving a lease to *A*, had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle; that s. 7 provides penalties only, and does not describe an offence or relate to a conviction. It is quite another question whether the act itself is an offence irrespective of s. 7, and whether *R* could be dealt with as an abettor. *Per MITTER, J.* (dissenting).—The Judge has found that the lease was given by *R* with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, "or allows cattle to be slaughtered." IN THE MATTER OF THE PETITION OF THE MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA

[8 B. L. R., Ap., 28; 14 W. R., Cr., 67]

2. ———— *Beng. Act VII of 1865, s. 1—Servant of licensee.*—No person is liable to any penalty under s. 1, Bengal Act VII of 1865, except a person who, without a license, uses a place or building as a slaughter-house, either by letting it out for such purpose or by employing servants and others for the purposes of killing cattle therein; but a person who may be the mere servant of a butcher killing cattle in a particular slaughter-house, or a butcher resorting accidentally or occasionally to a slaughter-house for the purpose of killing, and killing an ox or sheep there, does not use the place as a slaughter-house within the meaning of s. 1, Bengal Act VII of 1865. MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA v. ZAMIR SHAIKH

[16 W. R., Cr., 4]

3. ———— *Notice to licensees of slaughter-house—Beng. Act VII of 1865.*—The length of notice to be given to persons holding licenses for carrying on slaughter-houses under Bengal Act VII of 1865 must be determined in each case according to its own particular circumstances. IN RE HALDANE . . . 6 W. R., Cr., 77

**SLAVERY.**

See UNLAWFUL COMPULSION.

[I. L. R., 19 Calc., 572]

1. ———— *Act V of 1843—Mahomedan law—Succession—Will—Emancipated slaves.*—Assuming that, by the willa rule of the Mahomedan law, the heirs of the master who emancipates a slave are entitled to the property of which the emancipated

**SLAVERY—continued.**

slave dies possessed to the exclusion of his natural heirs, the effect of s. 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave," is to abrogate the rule of the Mahomedan law, and to secure the succession of the heirs of the emancipated slave, as if he had never been a slave. The provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing. The exclusion of the natural heirs of an emancipated slave in favour of the heirs of his emancipator is a disability arising out of the status of slavery similar in its nature to the exclusion, under the Mahomedan law, of the natural heirs of an emancipated slave by a master or his heirs; and since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in constructing it, to give it the widest remedial application which its language permits, and cannot consequently limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death, when the words of the statute allow of its being applied to the property of any one who had at any time been a slave. UJMUDDIN KHAN v. ZIA-UL-NISSA BEGUM

[I. L. R., 3 Bom., 422; 5 C. L. R., 11  
L. R., 6 I. A., 137]

In the same case, in the Court below, it was held that the effect of Act V of 1843 is to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery; and a suit, brought by the heir of the master of a slave girl, emancipated by and married to such master, in his lifetime, to recover, as such heir, property in the hands of persons descended from her, is one the cognizance of which is barred by s. 2 of the Act. AJMUDDIN KHAN v. ZIA-UNNISA BEGUM . . . 12 Bom., 156

2. ———— *Spiritual slavery of disciple to guru—Act V of 1843—Agreement to become slave.*—This was a suit brought in 1881 by the head of an *adhinam* for declarations that a *muth* was subject to his control; that he was entitled to appoint a manager; that the present head of the *muth* was not duly appointed, and his nomination by his predecessor was invalid; and for delivery of the possession of the moveable and immovable properties of the *muth* to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the *muth*. The *muth* was founded by a member of the *adhinam*. Many previous heads of the *muth* had agreed to be "slaves" of the head of the *adhinam*, but for over sixty years the head of the *adhinam* had exercised no management over the endowments belonging to the *muth*, and in a suit (compromised) of the year 1854 the present pretensions of the *adhinam* had been denied *in toto*. Held that the agreement of the head of the *muth* to become the "slave" of his guru could have no legal operation since 1843, and that the



**LAVERY—concluded**

verse possession of the defendant from that year  
a fatal to any claim of the plaintiff under such  
restraint. *GYANA SAMBANDHA PANDARA SAN-  
DRI v KANDASANI TAMBIRAN*

[I. L. R., 10 Mad., 375]

**LAVERY (CRIMINAL CASES)**

1. — *Penal Code, s 370—Buying or  
sponsoring of girl as a slave—B, having obtained  
possession of D, a girl about eleven years of age, dis-  
posed of her to a third person, for value with intent  
that such person should marry her and such person  
received her with that intent. Held that B could  
not be convicted of disposing of D as a slave under  
s 370 of the Penal Code. *Queen v Sikundur  
Jahangir, 3 N. W. 146*, remarked upon *EXPRESS  
v INDIA v RAM KURAR* I. L. R., 2 All., 723*

2. — *Treating kidnapped  
girl as slave—If knowing a girl has been kid-  
napped, a person wrongfully confines her, and sub-  
sequently detains her as a slave he is guilty of two  
separate offences punishable under the Penal Code.  
Slavery is a condition which admits of degrees and a  
person is treated as a slave if another asserts an  
absolute right to restrain his personal liberty, and to  
dispose of his labour against his will unless that  
right is conferred by law, as in the case of a parent,  
or guardian, or a jailer. *Queen v Sikundur  
Bukhrot* 3 N. W., 148*

3. — *Obligation of  
Judge to try charge of—The Sessions Judge was  
held bound to try the accused upon his commitment  
by the Deputy Magistrate on a charge, under s. 370,  
Penal Code, of having detained a woman against her  
will as a slave. *Queen v FIRMAN ALI*  
[18 W. R., Cr. 73]*

4. — *Meaning of term  
—S transferred to A for Rs 20 his rights in the  
person of B, a girl of thirteen years. In a docu-  
ment in which the transaction was recorded, B was  
described as a vellati r slave girl purchased by S  
from P. Held that A was guilty of buying B as a  
slave within the meaning of s. 370 of the Penal  
Code. *AMINA v QUEEN EXPRESS**

[I. L. R., 7 Mad., 277]

**SMALL CAUSE COURT, MOFUSSIL****SMALL CAUSE COURT, MOFUSSIL**

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- [I. L. R., 11 Mad., 130  
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## See DISTRICT JUDGE, JURISDICTION OF.

- [I. L. R., 11 Mad., 130  
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## See LOCAL GOVERNMENT.

- [I. L. R., 9 Mad., 112]

## See RES JUDICATA — COMPETENT COURT —SMALL CAUSE COURT CASES.

## See REVIEW—POWER TO REVIEW.

- [I. L. R., 5 Calc., 699]

## See REVISION — CIVIL CASES — SMALL CAUSE COURT CASES.

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## See SUBORDINATE JUDGE, JURISDICTION OF . . .

- I. L. R., 3 Bom., 219  
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## Claim under decree of—

## See DECLARATORY DECREE, SUIT FOR — DECLARATION OF TITLE.

- [I. L. R., 3 Calc., 612]

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- [I. L. R., 1 All., 87]

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- [I. L. R., 3 All., 710  
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## Jurisdiction of—

## See ATTACHMENT—SUBJECTS OF ATTACH- MENT—ALABY.

- [2 B. L. R., A. C., 109]

# SMALL CAUSE COURT, MOFUSSIL

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## See BENGAL RENT ACT, 1869, s. 93.

- [I. L. R., 1 Calc., 183]

## See CONTEMPT OF COURT — CONTEMPTS GENERALLY . . . 2 B. L. R., A. C., 188

## See SHIP, SALE OF.

- [1 Ind. Jur., N. S., 263  
2 Ind. Jur., N. S., 251]

## See CASES UNDER SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS.

## Transfer of decree of—

## See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, ETC

- [I. L. R., 5 Bom., 680  
I. L. R., 8 Bom., 230  
4 Mad., 331  
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# 1. LAW OF SMALL CAUSE COURTS, MOFUSSIL.

1. ——— Law of Civil Courts—*Matters of contract between Hindus.*—In all matters of contract and dealing between Hindus, the law applicable in Civil Courts of the country governs Courts of Small Causes. *WOODCOCK CHAND HALDER v. GOOROO CHURN MOJOMDAR* . . . 13 W. R., 148

2. ——— Rules and orders in Military Code.—*Held* that the rules and orders in the Military Code are not binding on a Small Cause Court. *RAICHAND MANGAL v. ABDULLA AMRUDDIN KOTVAL* [5 Bom., A. C., 99]

## 2. JURISDICTION.

3. ——— General cases—*Act XI of 1865, s. 12—Act XLII of 1860, s. 6.*—Small Cause Courts have sole jurisdiction within their local limits, therefore an action for cattle, or the value of cattle, cannot lie in a Civil Court having jurisdiction within the local limits of a Small Cause Court jurisdiction. *ANONYMOUS* . . . 2 W. R., S. C. C. Ref., 5

4. ——— Suits cognizable by Village Munsif under Mad. Reg. IV of 1816, s. 5.—A Small Cause Court had concurrent jurisdiction to try suits for a sum not exceeding Rs. 10, cognizable by a Village Munsif under s. 5, Regulation IV of 1816. *PARASOORAMA PILLAY v. RAMASAWMY alias COOLLA RAMASAWMY* . . . 5 Mad., 45

5. ——— Village Courts Act (Mad. Act I of 1889), s. 13—*Civil Procedure Code, s. 15—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif*—The term "Court of lowest grade" in the Civil

## SMALL CAUSE COURT MOFUSSIL

—cont. sued

## \* JURISDICTION—cont. sued

Procedure Code s. 10 refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter. *MIRKHAN v. KADARNA* I L R., 13 Mad., 146

## 6 — Suits cognizable

by District Munsif a jurisdiction of Small Cause Court.—A suit was brought in the Small Cause Courts to recover two sums of money, one cause of action being for money lent and the other for goods sold and delivered. The amount of both claims was within the jurisdiction of the Small Cause Court, but the pecuniary claim in each case was cognizable by the District Munsif on the Small Cause Court's side. It is that the Small Cause Court had jurisdiction to entertain the suit. *ANTYACHILLAM CHETTI v. GANGATHARAM AITAN* 5 Mad., 287

7 — Suits not cognizable against some of the defendant.—A suit is not cognizable by a Small Cause Court unless it is cognizable by it against all the defendants. *PANSHOTAM LAKSHMIAM v. PEMA HARI* [I L R., 21 Bom., 121]

8. — Suits for sum on bond the whole amount of which is beyond jurisdiction.—A Small Cause Court can try a suit for an amount within its jurisdiction notwithstanding that it is upon a bond the amount of which is beyond its jurisdiction. *SEKER MOHAR DEBIA v. HIRAR MORTON LOCKERJEE* 8 W R., Civ Ref., 8

9. — Suits on kabuliat under which more than Rs 500 are payable.—That jurisdiction of a Small Cause Court, in a suit on a kabuliat for damages not exceeding Rs 500 is not affected because damages exceeding that sum may be payable under the same kabuliat. *SMITH v. GOPAL SRINIVAS* 3 W R., S C C Ref., 14

10. — Suits for portion of sum due under agreement.—Where the plaintiff sued for a portion of grain in the nature of net rent which had fallen due that amount being within its jurisdiction, although the whole amount payable from first to last under the agreement would be in excess of its jurisdiction.—It is that the suit was cognizable by a Court of Small Causes. *NARASIMHA VET v. MARANA KATUDAN* 2 Mad., 440

11. — Suits for interest on bond for more than Rs 500.—Where a suit was brought for interest amounting to less than Rs 50 due upon a bond for Rs 1,000 not then payable.—Held that a Court of Small Causes had jurisdiction to try the case, the plaintiff having had a separate and complete cause of action upon the bond entitling him to recover the annual interest as it accrued due. The fact that the forgery of the bond is set up as a defence makes no difference. *ANANTHA NARAYANAPATTANAYAL v. ASHATA PILLAY v. GANAPATH AITAN* [3 Mad., 469]

## SMALL CAUSE COURT MOFUSSIL

—cont. sued

## 2 JURISDICTION—cont. sued.

*CHETU NARAYANA PILLAY v. ANANTHAKMAL AMMALOM* 4 Mad., 447

12. — Suits for profits of land.—Prayer for account.—Quest on of title.—The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. By merely asking in the alternative for an account of the profits, a suit cognizable by a Small Cause Court cannot be converted into one of a different nature. *NARAYAN BHASKAR v. BALAJI BAPUJI* I L R., 21 Bom., 248

13. — Separate causes of action on each with a Munsif's jurisdiction.—Several claims, each of which separately is within the Small Cause Court jurisdiction of a District Munsif may be joined together and form the basis of a suit in the Small Cause Court. As where there was an agreement that defendant should occupy land for two years and deliver a certain quantity of paddy at four specified periods; in a suit for rent.—Held that, though the plaintiff might have sued for each instalment of rent as it fell due the aggregate of such unpaid instalments should be deemed to be one cause of action. *CHOCKALINGA PILLAY v. KUMARA VIKKATHALAM* 4 Mad., 334

14. — Act XI of 1850 s. 34.—Cause of action.—Decree.—There is no provision in the Mofussil Small Cause Courts Act (XI of 1850) similar to s. 34 of the Presidency Small Cause Court Act (IX of 18 0) which forbids a plaintiff's availing any cause of action for the sake of bringing two or more suits in the Small Cause Courts of the Presidency. *UMED DHOOLCHAND v. PIR SAHAR JIVA MITRA* [I L R., 7 Bom., 134]

15. — Provincial Small Cause Courts Act (IX of 1887) s. 23.—Civil Procedure Code s. 556.—Suits of the nature cognizable by Courts of Small Causes.—A suit is none the less a suit cognizable by a Court of Small Causes because that Court may have exercised the discretion conferred on it by s. 23 of the Provincial Small Cause Courts Act, and returned the plaint to be presented to a Court having jurisdiction to determine a question of title raised thereon. *Kal Krishna Tagore v. Irfat-un-Nissa Khatun*, I L R., 24 Cal., 537 followed. *SADA BHASKAR v. BRIS MOHAN DAS* [I L R., 20 All., 480]

16. — Dwelling or carrying on business.—"Dwell" in "Actual residence".—The actual presence of the defendant within the jurisdiction of the Court is not necessary if he was there dwelling at the commencement of the suit and a temporary dwelling is sufficient to give jurisdiction to a Small Cause Court. *ANANTHA NARAYANA v. PERIYANA KONE* 5 Mad., 101

17. — Dwelling or carrying on business.—"Dwell" in "Actual residence".—Act XLII of 1860 s. 4.—Mere casual presence or even residence for a temporary purpose without the intention of remaining, is not dwelling

# SMALL CAUSE COURT, MOFUSSIL —continued.

## 2. JURISDICTION—continued.

within the jurisdiction of a Small Cause Court within the meaning of s. 4 of Act XLII of 1860. A person, resided at Coimbatore, but had some cultivated land within the local jurisdiction of Ootacamund, to which place he came to answer another demand against him. *Held* that he did not dwell within the jurisdiction of the Ootacamund Small Cause Court. *SAMINATHA PILLAI v. VARISAI MAHOMED RAYATTAN* . . . 2 Mad., 304

18. *Temporary absence—Dwelling—Act XI of 1865, s. 8.*—Although a defendant may be temporarily absent from his dwelling-house, yet if he retains the same, he will be held to dwell there within the meaning of the Small Cause Court Act (XI of 1865). To dwell in a place is to have one's permanent abode there. *MADHO DOSS v. SITA RAM* . . . 3 N. W., 121

19. *Temporary absence from imprisonment—Residence.*—Temporary imprisonment beyond the jurisdiction of a Small Cause Court was held not to bar the jurisdiction of that Court in respect of defendants who formerly resided within its jurisdiction and whose families continued to reside within it, the inference from the latter fact being that the defendants had an intention of returning to their former place of abode on the termination of their imprisonment. *GOPAL CHUNDER SIRCAR v. KURNODHAR MOOCHEE*  
[7 W. R., 349]

20. *Dwelling—Temporary residence—Attendance at race meeting.*—In the case of a person attached to a regiment stationed at Shahjehanpore, who had been gazetted to two years' furlough in India, served with a summons issued out of the Small Cause Court at Meerut whilst attending a race meeting at the latter place in respect of a debt contracted beyond the jurisdiction of that Court, *Held* that, if he had not availed himself of furlough, but was only present on short leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Court, or if, having availed himself of furlough, he retained his permanent residence at Shahjehanpore, and merely visited Meerut for a few days, he was in that case also not dwelling at Meerut, but if, having availed himself of furlough and having retained no permanent place of residence at Shahjehanpore nor having any permanent place of residence elsewhere, he attended the race meeting at Meerut with the intention of leaving that place after the races and of proceeding elsewhere in the enjoyment of his furlough, in such case he must be held to have been dwelling at Meerut when the summons was served. *MATHEW v. TULLOCH* . . . 4 N. W., 25

21. *Residence as domestic servant.*—A suit is not maintainable at K against a defendant who is employed as a domestic servant at M, and who is not shown to have any immediate or early intention of returning to X, where his family are continuing to reside; the word "dwell" in s. 8, Act X of 1865, it being held, must be used in

# SMALL CAUSE COURT, MOFUSSIL —continued.

## 2. JURISDICTION—continued.

the strict sense of actual residence. *PORGASH PARAY v. HACHIM* . . . 7 W. R., 417

22. *Act XI of 1865, s. 8—Place of dwelling.*—A servant residing within the jurisdiction of one Small Cause Court who has a family house within the limits of the jurisdiction of another Small Cause Court in which his father lives, and which he himself occasionally visits, does not dwell within the local limits of the latter Court within the meaning of s. 8 of Act XI of 1865, and although the cause of action may have arisen there, a suit against him will not lie in that Court. *GENDU MALHARI v. GOVIND ATMARAM* . . . 10 Bom., 409

23. *Suit against wife—Husband not in jurisdiction.*—A suit against a woman living under the protection of her husband is not cognizable in a Small Cause Court, if at the time of the commencement of the suit the husband does not dwell, nor personally or through a servant or agent carry on business or work for gain within the local limits of the jurisdiction of the Court. *BOWMAN v. SHAW* . . . 10 W. R., 240

24. *Commission agent—Residence—Carrying on business.*—A person who carries on business at a place by a commission agent, to whom he only consigns goods, cannot be said to carry on business or personally to work for gain within the local limits of a Court where the commission agent resides. *GOPEE MOHUN ROY v. PRATAP CHUNDER ROY* . . . 11 W. R., 530

25. *Act XI of 1865, s. 8—Residence—Zamindari business.*—Zamindari business is not such business as is intended by Acts XI of 1865, s. 8, and mookhtears and karpurdazes carrying it on are not servants or agents within the meaning of s. 11. Where zamindars from the mofussil come in occasionally to the head-quarters of a Small Cause Court to prosecute or defend suits, settle business with creditors or for social intercourse or medical treatment, and remain in their boat or put up at the houses of their mookhtears and karpurdazes, they cannot be said to have a "lodging" within the limits of the Court, such as is intended by s. 8, expl. A. *NOBIN CHUNDER v. BURODA KANT SHAHA* . . . 19 W. R., 341

ANONYMOUS . . . 23 W. R., 223

26. *Act XI of 1865, s. 9—Suit against Agent of Governor General.*—A suit against an Agent to the Governor General, on the part of Government, is substantially a suit against Government, and ought, under s. 9, Act XI of 1865, to be brought in a Court having jurisdiction at the seat of Government. *ROOPUN TEWABEE v. BUCKLE* . . . 10 W. R., 142

27. *Residence in Cantonment—Practising in Small Cause Court jurisdiction.*—Where a pleader resides within the limits of a cantonment, and practises as a pleader within the jurisdiction of a Small Cause Court, both the Cantonment Magistrate and the Small Cause

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2. JURISDICTION—continued

Court Judge have concurrent jurisdiction over him to the amounts respectively cognizable by them. SHAPTEJI JEHANGIR & MORGAN

[4 Bom., A. C., 187

23. — Dwelling—Act XI of 1865 s. 8.—The defendant an officer in a regiment stationed at Vellore was sued for money due for the rent of a house occupied by him at Madras. While absent on leave on medical certificate he rented the plaintiff's house at Madras, where he was residing at the time of the institution of the suit; but he returned to Vellore previous to the hearing of the suit. The Small Cause Court Judge of Vellore held that the defendant was dwelling at Vellore at the time of the institution of the suit within the meaning of s. 8 Act XI of 1865. Held that there was nothing in point of law to prevent the Judge from affirming his jurisdiction. ARUN SING & SINGH

[5 Mad., 471

29. — Defendant residing out of jurisdiction—Act XXIII of 1861, s. 4.—The provisions of s. 4 of Act XXIII of 1861 were applicable to Courts of Small Causes; the municipal. ANANDARAI & SAKHARAM JAGANNATH

[6 Bom., A. C., 256

30. — Cause of action—Defendant residing out of jurisdiction—Act XXIII of 1861 s. 4.—When a cause of action had arisen within the local jurisdiction of a Small Cause Court, but one of several defendants resided out of such jurisdiction sanction might be given, under s. 4 of Act XXIII of 1861, by the High Court to the Small Cause Court to try the suit. MATHURANATH JAGANNATH & NATHA BABA

[6 Bom., A. C., 131

MORRIS RAM MOONER &amp; KARRAREE SINDAR

[18 W. R., 312

31. — Suit against joint obligors—Act XLII of 1860, s. 21.—An order from the High Court was necessary to enable a Court of Small Causes to entertain a suit against several obligors, one of whom at the time of filing the plaint was neither resident nor personally working for gain within the limits of its jurisdiction. Such order should be applied for after the reception of the plaint, upon a statement of the circumstances of the particular case. S. 21 of Act XLII of 1860 was to have the same operation as if Act XXIII of 1861 had formed part of Act XLII of 1860 when it became law. SAKHAPATI MUDALI & MUTTUVAMI MUDALI

[1 Mad., 103

32. — Madras Civil Courts Act (III of 1873)—Act XI of 1865, s. 8.—Since the passing of the Madras Civil Courts Act (III of 1873) the general control over all the Civil Courts is vested in the District Judge, to whom the application should be made. It is only in cases where the defendant is beyond the local jurisdiction of the District Court, and the Court before whom the suit is instituted has not otherwise jurisdiction under Act XI

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2 JURISDICTION—continued.

of 1865, s. 8, that a reference to the High Court is necessary. ANONYMOUS. 8 Mad., Ap., 10

33. — Suit for debt against defendants with joint liability—Act XXIII of 1861 s. 4.—A suit for debt against two defendants whose liability was joint, but one of whom at the time of filing the plaint was neither resident nor personally working for gain within the limits of the jurisdiction, might be tried by a Small Cause Court within whose jurisdiction the other defendant was resident at the time of the commencement of the suit, provided an order was obtained from the High Court under s. 4 of Act XXIII of 1861. RUDOLPH PILLAI & CHINNASAMI PILLAI

[3 Mad., 374

34. — Joint bond—One of parties out of jurisdiction—Act XI of 1865, s. 12.—In a suit brought on a bond jointly executed by the defendants, one of whom resided in Calcutta, and the other within the jurisdiction of the Munsif's Court at Alipore, it was held that it was cognizable by the Small Cause Court although the authority of the High Court was necessary before it was tried, and therefore under a 12, Act XI of 1865, the Munsif had no jurisdiction to try the suit. ANODA BAKSH MISHRA & BISTI MANDAL

[6 B. L. R., 719 note; 14 W. R., 156

35. — Account—Suit by gomastha for excess expenses.—A suit by a gomastha for excess expenses incurred by him over and above the amount of rents collected by him was held to be cognizable in the Small Cause Court, notwithstanding that the nature of the defence might render it necessary to investigate the accounts of the mahal. PRADYOTO CHUNDER POT & SREENATH SREENANNA

[7 W. R., 422

36. — Suit to recover balance of account by tehsildar.—A suit to recover the balance of nikasi papers furnished by defendant in his capacity of tehsildar there being an allegation in the plaint that the defendant verbally promised to pay part of the sum claimed under the circumstances mentioned therein, was held not to be cognizable by a Court of Small Causes. SRINIVASACHARI BOKK & SHAMA CHUN GHOSH

[14 W. R., 53

See GRANT &amp; RAM TOTOO BROODICK

[10 W. R., 63

37. — Act XI of 1865, s. 6.—Suit for balance due on account of rents.—A suit for a balance due on account of rents collected from the plaintiff's zamindars by the defendant's father acting as agent of the plaintiffs is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI of 1865. Where the amount claimed in such a suit does not exceed Rs. 100 it is cognizable by a Small Cause Court notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. DIENCKES NUNDEY SING & MUDHOOD MUTTI GOOPRA

[1 L. R., 1 Cal., 123; 24 W. R., 478

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

38. ———— *Suit against guardian and manager of property for rents collected by him—Trustee bound to account.*—In a suit to recover from the guardian of a minor and the manager of his property who had granted to himself, benami, a farming lease of the minor's property, rents collected by him for which he did not account, —Held that the defendant could not be considered simply as an agent to collect plaintiff's rents, but was bound as a trustee to account for the proceeds of the property, and that the claim was therefore not cognizable in a Small Cause Court. *RAM JOY MOJOMDAR v. KEDAR NARAIN ROY* . . . 25 W. R., 75

39. ———— *Suit by principal against agent—Question of accounts.*—A suit by a principal against an agent for adjustment and investigation of disputed items of account which could not be determined within six weeks, and which charged the agent with colluding with judgment debtors, was held to be properly triable by the Civil Court, and not by the Small Cause Court. *KRISHNA KINKAR ROY v. MADHUB CHUNDER CHUCKERBUTTY* . . . [21 W. R., 283]

40. ———— *Act XL of 1858, s. 3—Defending suit without certificate.*—A Court of Small Causes, constituted under Act XI of 1865, is competent, under s. 3, Act XL of 1858, to allow any relative of a minor to institute or defend a suit in his behalf without a certificate of administration, where it has jurisdiction in relation to the subject-matter of the suit. *KHANTO BEWAH v. NUND RAM NATH* . . . [15 W. R., 369]

41. ———— *Alternative relief—Act XI of 1865, s. 6.*—In a suit by A, asking that B might be ordered to fill up an excavation or to pay him Rs 25 as damages for the same, it appeared that there was no ground for the first relief sought. Held the suit was cognizable by the Court of Small Causes. *NANDA KUMAR BANERJEE v. ISHAN CHANDRA BANERJEE* . . . [1 B. L. R., A. C., 91: 10 W. R., 130]

42. ———— *Arbitration—Civil Procedure Code, s. 327.*—When a matter had been referred to arbitration without the intervention of any Court, a Small Cause Court in the mofussil had jurisdiction to entertain an application, under s. 327 of Act VIII of 1859, to file the award, provided it related to a debt not exceeding the amount cognizable by such Court, and the defendant resided within its jurisdiction. *ELAY PARAMANICK v. SOJAITULLAH* . . . [1 B. L. R., A. C., 43: 10 W. R., 85]

*BRIDGE v. FDALJI MANCHARJI. VITHAL ANDARAY v. DAYABHAI MURLIDHAR* . . . 10 Bom., 54

*GANGAPPA v. KAPINAPPA* . . . 5 Mad., 128

43. ———— *Arbitration award—Act XI of 1865, s. 6—Liability arising under an award.*—A liability arising under an award is not one of such a nature as to fall within the terms used in the Small Cause Court Act to denote the

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

claims cognizable by such Court. *GUNESHEE v. CHOTAY LAL* . . . 3 N. W., 117

*DURJAN SINGH v. SIBIA* . . . 7 N. W., 329

44. ———— *Provincial Small Cause Courts Act (IX of 1867), sch. II, cl. 24—Civil Procedure Code, ss. 525, 526—Suit to recover money under an award—Application to file award.*—A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a subordinate court or the Small Cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. Held, on reference by the District Judge to the High Court, that the suit was cognizable by a Court of Small Causes, and accordingly that the order made by the Subordinate Judge returning the plaint was wrong. *SIMSON v. McMASTER* . . . [I. L. R., 13 Mad., 344]

45. ———— *Army Act—Army Act (44 & 45 Vict., c. 58), s. 144—Proviso—Jurisdiction.*—A suit for recovery of a debt will lie in a Small Cause Court as a Civil Court against a soldier in Her Majesty's service up to judgment, under proviso to s. 144 of the Army Act (stat. 44 & 45 Vict., c. 58), however small may be the amount of the debt. The question whether the defendant is a soldier or not arises only when the plaintiff seeks to execute his decree. *KISANDAS BUDHMAL v. HALPIN* . . . [I. L. R., 10 Bom., 218]

46. ———— *Army Act (44 & 45 Vict., c. 58), ss. 148 and 151—Courts of Request, their jurisdiction—Court of Small Causes, Power of—Construction of s. 151, cl. 1, of the Army Act.*—The Army Act (44 & 45 Vict., c. 58) gives jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court. Held also that the words "within the jurisdiction" in s. 151, cl. 1, referred to "actions," and not to "persons." *SHERE ALI v. PRENDERGAST* . . . [I. L. R., 13 Cal., 143]

47. ———— *Army Act of 1851, ss. 144, 151—Civil Procedure Code, s. 468—Jurisdiction of Small Cause Courts over soldiers.*—A soldier to recover a debt not amounting to £30. Held that the suit was cognizable by a Court of Small Causes. *Semble*—The commanding officer of the defendant was bound to cause the summons of the Small Cause Court to be served on him. *MAHOMED v. AGGAS* . . . I. L. R., 10 Mad., 319

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2 JURISDICTION—continued

48 — Attachment—*Attachment of immovable property before judgment*—A Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. A Small Cause Court therefore cannot grant an attachment before judgment of immovable property. *MAR. THEMMIA v. KITTU SHERGARA* 6 Mad., 91

49 — Cess—*Suit to recover arrears of cess*—A suit brought to recover arrears of a cess is not a suit of the nature cognizable by Small Cause Courts. *KASIM ALI v. SHADER* 3 N. W., 21

50 — — — — — *Act XI of 1859, s. 6*—*Suit for zamindari dues and cesses*—The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realized by auction-sale through the Court of the Munsif of certain houses situate on land subject to a village custom whereby a proprietary due of the above amount was recognized and payable to the zamindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zamindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes.—*Held* by the Full Bench that the claim as brought did not fall within any of the classes of suits cognizable by the Courts of Small Causes *aliter* if the due was payable in virtue of a contract. *NANU v. BOARD OF REVENUE*

[I. L. R., 1 All., 444]

51. — — — — — *Suit to recover road cess*—*Road Cess Act (Beng. Act X of 1871)*.—A suit to recover road-cess and public works cess is not a claim for money on a bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature and does not fall within the provisions of s. 6 of the mofussil Small Cause Court Act. *DAVID v. GRISH CHUNDER GITA* I L. R., 9 Cal., 183 I L. R., 305

52. — — — — — *Act XI of 1859—Jurisdiction*—*Water-cess*—*Payment by landholder—Implied contract by tenant to recover*—If a landholder pays to Government water-cess which his tenant is legally bound to pay a Small Cause Court, court ruled under Act XI of 1859, has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder. *VEKKATRAMAYA v. VIRATA*

[I. L. R., 8 Mad., 4]

53. — — — — — *Claim to property seized in execution—Act XI of 1859, s. 6—Title, Question of*—A Small Cause Court had no jurisdiction to entertain a suit by a decree-holder to establish his judgment-debtor's title to property seized in execution which had subsequently been released to a claimant under s. 248, Act VIII of 1859 and to recover the value of the property from the successful claimant. *RAM DUTY BISWAS v. KAPAL BISWAS*

[I. L. R., S. N., 10 I. W. R., 141]

54. — — — — — *Suit to establish right to personal property and to recover value of it*—A suit on the part of an unsuccessful claimant to

## SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2 JURISDICTION—continued

establish his right to personal property and to recover the value of the same is not cognizable by a Small Cause Court. *MOODNEEN GAZER v. DISOCHYDROO GOSSAMER* 13 W. R., 99

This latter case is not to be taken as extending the rule laid down in *Ram Dutt Biswas v. Kapil Biswas* 1 B. L. R., S. N., 10, in suits by unsuccessful claimants under s. 248, Act VIII of 1859. *PRABHU v. OODY* 18 W. R., 337

*See MOOMESH CHUNDER POSS v. MUDDER MOHAR SIKAR* 2 W. R., 44

and *ANONYMOUS* 2 W. R., S. C. C. Ref., 5

55 — — — — — *Civil Procedure Code, 1877—Owner to recover moveable property under Rs 500*—The plaintiff was owner of moveable property attached in execution of a decree and, his claim to such property having been rejected under s. 216 of Act VIII of 1859, he brought this suit to recover possession. *Held* that the suit was cognizable by a Mofussil Court of Small Causes. *Quarries*—Whether the new Civil Procedure Code (Act X of 1877) prevents or allows a suit, like the present, to be brought in a Court of Small Causes. *NATHU GANESH v. KALIDAS UMED* I L. R., 2 Bom., 385

56. — — — — — *Suit to establish right to property attached under decree—Jurisdiction—Civil Procedure Code 1877, s. 213—Act XI of 1859, s. 12*—A suit brought by a defeated claimant, under s. 213 of Act X of 1877, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court is within the jurisdiction of, and must therefore, under Act XI of 1859, s. 12 be instituted in, a Small Cause Court. *GORDHAN PEMA v. KASANDAS BALMUKUNDAS* I L. R., 3 Bom., 179

57 — — — — — *Attachment of moveable property—Suit to establish right—Civil Procedure Code, s. 283*—A suit under s. 283 of the Civil Procedure Code by a party against whom an order under s. 231 has been passed to establish his right to moveable property attached in execution of a decree passed by a Civil Court and for such property, the same being less than Rs 500 in value, is not a suit cognizable in a Court of Small Causes. *ILAH BUXH v. SITA* I L. R., 5 All., 462

58 — — — — — *Claim for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1859, s. 6*—A suit to recover moveable property attached in execution of a decree and damages for its wrongful attachment, and to set aside the order disallowing an objection to its attachment, is not a suit cognizable in a Court of Small Causes. *MUKUND LAL v. NASIRUD DIN* I L. R., 4 All., 416

59. — — — — — *Suit for personal property—Suit to establish right—Civil Procedure Code, s. 283—Act XI of 1859, s. 6*—A person who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

Civil Procedure Code, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property" within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283 of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes. *Janakiammal v. Vithenadien*, 5 *Mad.*, 191; *Kandeme Naine Boosche Naidoo v. Ravoo Lutchmeepaty Naidoo*, 8 *Mad.*, 36; *Gordhan Pema v. Kasandas Balmukundas*, 1. L. R., 3 *Bom.*, 179; *Chhaganlal Nagardas v. Jeshan Rav Dalsukhrum*, 1. L. R., 4 *Bom.*, 503; *Balkrishna v. Kisansingh*, 1. L. R., 4 *Bom.*, 505 note, and *Radha Kishen v. Chotey Lall*, 3 *N. W.*, 155, dissented from. *Godha v. Naik Ram*. . . 1. L. R., 7 *All.*, 152

60. ———— *Suit to recover moveable property wrongly attached—Suit to set aside order of Munsif.*—A suit brought by an owner to recover moveable property of which he has been dispossessed by an attachment order may, when the value of the property is less than Rs500, be maintained in a Court of Small Causes, it being a suit for personal property. A suit "to have sold by auction certain property in respect of which the plaintiff obtained a decree for a right of lien," and also "to set aside the miscellaneous order passed by the Munsif," is not cognizable by a Court of Small Causes. *Radha Kishen v. Chotey Lall*. . . 3 *N. W.*, 155

*Balmokund v. Lekhray*. . . 3 *N. W.*, 156 note

61. ———— *Suit to establish right to personal property seized in execution of decree.*—A suit to establish the plaintiff's right to the exclusive possession of personal property, of which the plaintiff and her husband had been dispossessed by actual seizure in execution of a decree against the plaintiff's husband, is cognizable by a Small Cause Court. *Janakiammal v. Vithenadien*

[5 *Mad.*, 191.

62. ———— *Act XI of 1865, s. 6—Suit as to title to property taken in execution.*—A suit brought by a decree-holder to have it decided whether moveable property taken in execution is or is not the property of his judgment-debtor is not a suit cognizable by a Court of Small Causes. *Jethabhai Bhaichand v. Bai Lakhu*

[6 *Bom.*, A. C., 27

63. ———— *Personal property—Suit by decree-holder.*—A suit by a decree-holder to establish his right to attach and sell moveable property as belonging to his judgment debtor is not a suit for personal property within the meaning of s. 6 of Act XI of 1865, and a mofussil Court of Small Causes has no jurisdiction to entertain it, even

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

though the value of the property be such as to fall within its pecuniary limit. *Chhaganlal Nagardas v. Jeshan Rav Dalsukhrum*

[1. L. R., 4 *Bom.*, 503

*Balkrishna v. Kisansingh*

[1. L. R., 4 *Bom.*, 505 note

64. ———— *Suit by owner for personal property*—The defendant, who was a farmer of revenue, attached a buffalo for arrears due from a third party. In a suit brought by the plaintiff for a declaration that the defendant was not entitled to attach the buffalo, —*Held* that the suit should be filed in the Court of Small Causes, inasmuch as it was a suit by the owner to recover personal property, and fell within the ruling in *Chhaganlal Nagardas v. Jeshan Rav Dalsukhrum*, 1. L. R., 4 *Bom.*, 503. *Pagi Partap Hamir v. Varajlal Mulchand*. . . 1. L. R., 8 *Bom.*, 259

65. ———— *Suit to declare moveable property not liable to attachment—Civil Procedure Code, 1832, s. 253.*—Certain moveable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred by *M* and rejected. *M* then brought a suit in the District Munsif's Court for a declaration that the property was his and was not liable to be sold in execution. The suit was dismissed on the ground that it was cognizable by a Court of Small Causes. *Held* that *M* was not bound to sue for recovery of the property, and that the suit was not cognizable by a Small Cause Court constituted under Act XI of 1865. *Mahomed Koya v. Kasim*. . . 1. L. R., 9 *Mad.*, 208

66. ———— *Civil Procedure Code (Act X of 1877), ss. 280, 281, and 283—Goods sold under execution*—S. 283 of the Civil Procedure Code enables a party, against whom an order has been made in execution proceedings, to bring a suit to establish his rights, whatever they may be; but it says nothing as to the nature of the suit or the Court in which it is to be brought. Whether the party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced. Where goods have been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value will lie in a Small Cause Court, if the value of the goods is within the amount limited by law for the jurisdiction of such Court; but if the plaintiff makes the decree-holder and the judgment-debtor parties to the suit and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court. *Shiboo Narain Singh v. Mudden Ally. Natabar Nandi v. Kalidass Pal*

[1. L. R., 7 *Calc.*, 608; 9 *C. L. R.*, 8

67. ———— *Suit for value of sheep wrongly attached and sold in execution of decree.*—Where plaintiffs' sheep had been attached in



## SMALL CAUSE COURT, MOFUSSIL

— continued —

## 2 JURISDICTION continued.

satisfaction of a decree against a third party and the second defendant had purchased the property at the Court sale. *Held* that a suit merely to recover the share of the value is cognizable by a Small Cause Court. *ABDUL NAHID BHOON NAIDOO v. RAYDO LUTCHMEPATY NAIDOO*. 8 Mad., 36

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*Suit for property wrongfully seized in execution—Civil Procedure Code (Act XIX of 1852) ss. 275-283—Attachment of some property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s. 275—Order made under s. 281—Suit by claimant to establish right.* The first and second defendants obtained a decree in suit No. 1545 of 1897 against *E.* described as the owner of the Wahalan Mills, and attached property on the mill premises. Twelve other creditors also brought twelve other similar suits as to the same decrees against other persons who were also described as owners of the Wahalan Mills and all attached the same property. In suit No. 1545 of 1897 *R. H.* (the present plaintiff), and s. 28 of the Civil Procedure Code, claimed the property. His claim was allowed, and he was ordered to bring a suit under s. 283. No claim or order was made in the case of the other twelve suits. *Plaintiff* now sued in pursuance of the above order to recover his property and be included as defendants not merely those defendants (Nos. 1 and 2) who had been plaintiffs in suit No. 1545 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under s. 281, Civil Procedure Code. *Held* that the Court of Small Causes had jurisdiction to try the suit. In substance the suit was a suit for goods, though, as a matter of form, the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under s. 42 of the Specific Rel. of Act (I of 1877), that although the value of the property claimed by the plaintiff was admittedly over Rs. 200 the Court of Small Causes had jurisdiction. The plaintiff was entitled to stand in part of his claim. *RAGHUNATH MEKUNDA v. SARGUN KAMA*. I. L. R., 23 Bom., 268

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*Compensation for acquisition of land—Provincial Small Cause Courts Act (I.L. of 1899), s. 11 arts 11 and 12—Claim for compensation awarded under Land Acquisition Act—Interpleader suit—Civil Procedure Code (1852), ss. 470 and 622—Jurisdiction of Munsif—Superiority of High Court—Land having been compulsorily acquired under the Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation, and the District Court having declined to determine it under Land Acquisition Act, s. 15, an interpleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the*

## SMALL CAUSE COURT, MOFUSSIL

— continued —

## 2 JURISDICTION—continued.

District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under s. 622, Civil Procedure Code. *Held* that the interpleader suit was not within the jurisdiction of a Provincial Small Cause Court, and was rightly brought on the ordinary side of the District Munsif's Court, and consequently, where the petitioner's remedy was by way of second appeal, the petition for revision was not admissible. *Illustration RAST v. VISRAM RAST*. I. L. R., 20 Mad., 163

70. — *Contract—Suit for breach of contract on failure to register—A suit to recover money paid as the price of land in consequence of vendor's failure to complete the bargain by registration of the deed of sale is maintainable in a Court of Small Causes, being substantially a suit for breach of contract for sale of land.* *CHANDU KHAIR v. MOOKDARMOYEE*. 8 W. R., 488

71. — *Suit for sales of produce not paid under contract.*—Where a cultivator is a mere servant of the landlord, a suit for damages will lie against him in the Small Cause Court. If the cultivator is a tenant to whom the landlord has sub-let the land, a suit for non fulfilment of his contract by the tenant will not lie in the Small Cause Court, but in the Revenue Courts under Act X of 1829. *ANANTH DUTT v. DWAR DUTT*. 2 W. R., S. C. C. Ref., 2

72. — *Suit for payment on bond.*—A suit to recover a quantity of rice or its value (Rs. 500) in return for some paddy which had been taken by the defendant under contract was held to be cognizable by the Small Cause Court within the meaning of Act XIII of 1861, s. 27. *DON HENRI v. DOMINGO DUTT SCHEMAN*. 23 W. R., 259

73. — *Hindu son's liability for family debt.*—The manager of a Hindu family, having borrowed money for a proper and necessary purpose, — his son's marriage, — gave a bond to secure the debt. *Held* that a suit against the father and son to recover the money lent was cognizable by a Court of Small Causes under Act XI of 1853. *PUNYA KARPAPPA PILLAI v. VINAYAKA PILLAI*. I. L. R., 6 Mad., 277

74. — *Suit against son to undivided family to enforce debt incurred by father.*—A suit against the undivided son of a deceased Hindu father to enforce payment of a debt incurred by the latter is within the jurisdiction of a Small Cause Court, and that jurisdiction is not ousted by a plea that the debt was contracted for immoral purposes. *GOPAL KRISHNA SASTRI v. RAMAYANAL*. [I. L. R., 4 Mad., 238

75. — *Civil Procedure Code, s. 556—Mofussil Small Cause Courts Act (XI of 1865), s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.*—In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's

# SMALL CAUSE COURT, MOFUSSIL —continued.

## 2 JURISDICTION—continued.

sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held* by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. *Held* further by the Divisional Bench that the decree against the sons was bad. **NARASING v. SUBBA**

[**L. L. R., 12 Mad., 139**

**76.** ————— *Share of trees cut by tenants—Second appeal.*—A suit by a zamindar for one-fourth of the price of trees cut by tenants is, when based upon contract, one of the nature cognizable in a Court of Small Causes, and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. The principle laid down in *Nanku v. Board of Revenue, T. L. R., 1 All., 444*, followed. **HARI SINGH v. LALDFO SINGH** . . . **L. L. R., 2 All., 905**

**77.** ————— *Suit for share of produce of trees—Landlord and tenant—Wajib-ul-urz—Jurisdiction of Revenue Court—Second appeal.*—A suit by a landholder against a tenant for Rs130, being the value of a moiety of the produce of a grove of mango trees held by such tenant, such amount being claimed in virtue of an agreement recorded in the wajib-ul-urz, and not in virtue of any custom or right is not cognizable in the Revenue Court, but is cognizable in a Court of Small Causes, and consequently no second appeal in the suit will lie. **SARNAM TEWARI v. SAKINA BIDI**

[**I. L. R., 3 All., 37**

**78.** ————— *Act X of 1859, s. 10—Suit for share of value of crops.*—The plaintiff as burgahdar, to whom the defendant had sub-let his jote land, for the purpose of raising crops of kharif, under a contract to share the produce between themselves, sought to recover from the defendant Rs7-14 as the value of his share of the crops, which he (the defendant) appropriated to his own use. The defendant denied the existence of any such contract, and contended that an action of this nature would lie only in the Revenue Court, and not in the Small Cause Court. *Held* that the plaintiff's claim was not one for a sum exacted in excess of rent within the meaning of s. 10 of Act X of 1859, and consequently the suit would lie in the Small Cause Court. **GABIBULLA PARAMANICK v. FAKIR MAHOMED KOLU**

[**1 B. L. R., S. N., 13; 10 W. R., 203**

**79.** ————— *Suit on contract.*—Plaintiffs, having obtained a sum from defendants on a bond, let certain land to them in ijara for a term of years on condition that the latter, after realizing rents from the riyats, would give credit on account of interest on the said bond, pay rent due to plaintiff's landlord, and pay the balance to plaintiffs. Having failed in the engagements, defendants were sued in the Small Cause Court. *Held* that the suit was a suit on a contract, and was cognizable by the Small Cause Court. **NOBIR CHUNDER VODRO v. KEDAR NATH CHUCKERBUTTY** . . . **16 W. R., 228**

# SMALL CAUSE COURT, MOFUSSIL —continued.

## 2. JURISDICTION—continued.

**80.** ————— *Suit against co-contractor—Suit for money due on a contract.*—Plaintiff, defendant, and another party had jointly and separately contracted with Government to do certain work, depositing security and stipulating that a percentage upon the worth of the work done should be retained in the hands of Government to meet the contingency of the Government incurring expense in case of failure on the part of the contractors. The contract was completed by one of the contractors, who received the amount which had been deducted as above, and gave a joint receipt for the same. *Held* that there was nothing in law to prevent plaintiff from recovering from defendant his share of the said amount. Such a suit was not one for money due on a contract, and was not cognizable by a Small Cause Court. **NARAIN DOSS v. RAM COOMAR MITEE**

[**15 W. R., 513**

**81.** ————— *Act XI of 1865, s. 6—Contract, Suit on.*—The word "contract" in s. 6, Act XI of 1865, was intended to include a suit to recover money received by the defendant to a share of which the plaintiff is entitled; the foundation of the claim being that the defendant, with regard to the portion of the money which belonged to the plaintiff, received it for, and on behalf of, the plaintiff, upon an implied contract to pay it over to him. **SUNKUR LALL PATLUCK GYAWAL v. RAM KALEE DHAMIN**

[**18 W. R., 104**

**82.** ————— *Suit to recover share in varshasam—Claim on implied contract.*—Suit to recover a share in a varshasam payable by the Gaekwar's Government and received by the defendant as the eldest member of the original grantee's family is cognizable by a Court of Small Causes in the mofussil, the claim being one on an implied contract, viz., a contract, by the defendant, to pay to the plaintiff money received by the defendant to the use of the plaintiff. **SUNKUR LALL PATLUCK GYAWAL v. RAM KALEE DHAMIN, 18 W. R., 104**, followed. **Keshav Bhat v. Bhagirthi Bai, 3 Bom., A. C. 75**, overruled. **RATAN SHANKAR REVASHANKAR v. GULAB SHANKAR LALSHANKAR** . . . **10 Bom., 21**

*See BHIMRAV JIVAJI v. BHIMRAV GOVIND*

[**11 Bom., 194**

**83.** ————— *Suit to recover share of annual allowance.*—A suit to recover a share of arrears of a varshasam or annual allowance paid by the Gaekwar of Baroda to the defendant, in which the plaintiff alleged he was entitled to a third share, is maintainable in a Court of Small Causes. **RATANSHANKAR REVA SHANKAR v. GULABSHANKAR LALSHANKAR** . . . **4 Bom., A. C., 173**

**84.** ————— *Act XI of 1865, s. 6—Suit to recover arrears of annuity from endowed property.*—In a suit by a widow of one of the descendants of the grantee of a varshasam or annual allowance paid from the Government treasury for the performance of religious service in a Hindu temple to recover arrears due to her husband's branch

## SMALL CAUSE COURT, MOFUSSIL ' SMALL CAUSE COURT, MOFUSSIL

—continued

—continued.

## 2 JURISDICTION—continued.

of the family from another descendant who had received the whole stipend.—*Held* that this was not a suit for money due on a contract or 'for personal property otherwise' within the meaning of s. 6 of Act XI of 1860 cognizable by a Court of Small Causes in the mofussil. **KESAVABHAI v. PHAGITHIBAI**

[3 Bom. A. C. 75]

## 85 — Act XI of 1865

s. 6—*Suit for money borrowed by servant on understanding it would be repaid by master*—A servant borrowed on account of his master a sum of money which was partly spent in satisfaction of his master's debt and partly taken by the latter and spent for his own private purposes. No repayment having been made by the master the lenders took out a decree against the servant who then sued the master to recover the money. *Held* that there was a legal presumption that the money was advanced on account of the defendant on the understanding that it would be repaid and that the action was one for debt within the meaning of s. 6 of the Small Cause Courts Act XI of 1860. **LASH MOYER DEBIA v. RAJANAM SIRCAR**

[15 W. R. 88]

## 86 — Act XI of 1865

s. 6—*Suit for money on implied contract*—Plaintiff took a lease from defendant and a bakajal setting forth a certain sum (Rs. 73-10) as due from the tenants on account of rent, and on the faith of the bakajal paid that sum to the defendant. He then sued the tenants for the same, and was met with pleas either of payment to the defendant or of payments by assignment for the defendant's debts. He then sued defendant for a refund. *Held* that the claim was for money due under an implied contract for the repayment of a sum under Rs. 500 and cognizable by a Small Cause Court under Act XI of 1865, s. 6, cl. 4. **WEISER MULLICK SIRCAR v. NIT-MENON DEBIA**

[18 W. R. 484]

## 87 — Implied contract

—*Contract to indemnify against claim of superior landlord*—If A buys a tenure at a public auction bearing in the name of B he impliedly contracts to indemnify B against the claims of the superior landlord, and a suit by B against A to recover the amount of a decree obtained against him by the superior landlord will lie in a Small Cause Court. **KADARESHU MOOKERJIA v. GOOROO CHITEN MOOKERJIA**

[2 C. L. R. 388]

## 88. — Second appeal—

*Relation resembling contract*—*Contract Act, s. 70*—Act XI of 1865, s. 6—On the death of A, a dispute arose among her heirs as to the succession to the share of a village of which she was the recorded proprietor. In January 1874 B, who was not one of her heirs and who was not a shareholder in such village, was recorded in the revenue register as landholder in respect of her share and was so recorded until February 1878, when his name was expunged and the name of B, who was one of the heirs, was recorded as proprietor. In a suit by B against A to recover Rs. 70, being the amount he had paid on account of revenue in respect

## 2 JURISDICTION—continued.

of such share for the period between January 1874 and February 1878.—*Held* that the suit was one for damages under s. 70 of Act XI of 1872 within the meaning of s. 6 of Act XI of 1865, and accordingly of the nature cognizable in a Court of Small Causes, and no second appeal in the suit would lie. **NATH PRASAD v. BALI NATH** . I. L. R. 3 All. 66

## 89 — Payment of

revenue by a person for another—*Suit for reimbursement*—A suit by the proprietor of one village who has been compelled to pay the revenue payable by the proprietor of another village for reimbursement is, where the amount of such payment does not exceed Rs. 500, a suit of the nature cognizable in a Mofussil Court of Small Causes. **Nath Prasad v. Bai Nath**, I. L. R. 3 All. 66, followed. **QUTUB HUSAIN v. ABDUL HASAN** . I. L. R. 4 All. 154

## 90 — Relations resembling

*contract*—*Act IX of 1872 (Contract Act), s. 69, 70—Payment of land revenue*—*Act XI of 1865, s. 6*—The plaintiffs purchased land belonging to the defendant at an execution sale, at which it was notified that arrears of revenue were due in respect of the land. The plaintiffs paid such arrears, and also the arrears which had accrued in the period between the sale and the date the plaintiffs obtained possession. They then sued the defendant in the Munsif's Court to recover the amount they had paid. *Held* that, with reference to the principle laid down in **Nath Prasad v. Bai Nath** I. L. R. 3 All. 66, the suit should have been instituted in the Court of Small Causes. **IN THE MATTER OF THE PETITION OF ALI MAZHAR** . I. L. R. 4 All. 153

## 91. — Contract Act

(IX of 1872), s. 69, 70—*Small Cause Court Act (XI of 1865), s. 6—Palm rent—Implied contract*—The plaintiff, a purchaser in execution of a patta right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the patta right, a sum of money which she had been compelled to pay to the zamindar for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court.—*Held* that, assuming the suit to be independently of any express promise, it was one cognizable by a Court of Small Causes, and no appeal would therefore lie. **Rambhar Chitlange v. Modhoooodas Paul Choudhary** B. L. R., Sup. Vol. 673: 7 W. R. 377, distinguished. Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. **Nath Prasad v. Bai Nath**, I. L. R. 3 All. 66 approved. **KRISHNO KAMATH CROWDERANI v. GOPI MORTEN GHOSH HAZRA**

[I. L. R. 15 Calc., 853]

## 92. — Provincial Small

*Cause Courts Act* s. 11, Art. 41—*Civil Procedure Code, s. 556—Suit for contribution—Joint property*—*Suit relating to contract*—*Contract Act, s. 65*—Lands of which part belonged to the plaintiffs and

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

part to the defendant were comprised in a pottah which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs, who now sued to recover Rs200, being the amount so paid together with interest. *Held* the suit was of a nature cognizable by a Court of Small Causes, and therefore no second appeal lay. *Krishno Kamin Chowdhurani v. Gopi Mohan Ghose Hazra, I. L. R., 15 Calc., 652, followed. SRINIVASA v. SIVAKOLUNDU,*

[I. L. R., 12 Mad., 349]

93. ——— Contribution—*Suit for contribution.*—A Small Cause Court has no jurisdiction to try a suit for contribution. *TAMIZEDDIN MINHAH v. GAFFUR KHAN . 7 B. L. R., Ap., 40*

94. ——— Provincial Small Cause Courts Act (IX of 1857), sch. II, cl. 41.—Cl. 41, sch. II of the Provincial Small Cause Courts Act (IX of 1857), excludes a suit for contribution from the jurisdiction of the Small Cause Court, and restores the law laid down in *Rambux Chittangeo v. Modhoooodun Paul Chowdhry, B. L. R., Sup. Vol., 675 7 W. R., 577. BHATOO SINGH v. RAMOO MAHTON . . . I. L. R., 23 Calc., 189*

95. ——— *Suit for contribution where there is no contract.*—A suit for contribution, where there is no contract, express or implied, cannot be entertained by a Small Cause Court. *SREEPUTTY ROY v. LOHARAM ROY*

[B. L. R., Sup. Vol., 687; 7 W. R., 384]

ITCHA MOYEE DOSSEE v. BAMA SOONDUREF DOSSEE . . . 25 W. R., 73

96. ——— *Suit against co-sharer for money recovered on joint decree.*—A suit against a co-sharer for a sum of money recovered by the plaintiff upon a decree which was joint property may be brought in a Small Cause Court. *HURO MOHUN ROY v. KHETTRO MONEE DOSSEE*

[12 W. R., 372]

97. ——— *Suit for contribution under joint decree—Act XI of 1865, s. 6.*—A Small Cause Court has jurisdiction to entertain a suit by one of several debtors against whom a decree for rent had been enforced against his co-debtors for contribution. The meaning of the word "contract" in s. 6, Act XI of 1865, considered. *GOTINDA MONAYA THIRUNAN v. BAPU*

[5 Mad., 200]

98. ——— *Decree against several defendants jointly—Second appeal.*—A suit for contribution not founded upon contract, but in respect of money for which the plaintiff and the defendants in the contribution suit had been by a former decree made jointly liable, is not within the cognizance of a Court of Small Causes, which cannot deal with questions of equity. A second appeal will therefore lie in such a suit. *Rambux Chittangeo v. Modhoooodun Paul Chowdhry, B. L. R., Sup. Vol., 675, followed. Nath Prasad v. Baij Nath,*

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

I. L. R., 3 All., 66] distinguished. *FUTTEH ALI v. GUNGANATH ROY*

[I. L. R., 8 Calc., 113; 10 C. L. R., 20]

99. ——— *Money paid in satisfaction of joint decree.*—A suit for contribution for money paid by one judgment-debtor in satisfaction of a joint decree against him and others cannot be entertained by a Court of Small Causes. *Rambux Chittangeo v. Modhoooodun Paul Chowdhry, B. L. R., Sup. Vol., 675 7 W. R., 411; Shaboo Majee v. Noorai Mollah, B. L. R., Sup. Vol., 691, followed. Nath Prasad v. Baij Nath, I. L. R., 3 All., 66, dissented from. RAMJOY SURMA v. JOYKATH SURMA I. L. R., 9 Calc., 395; 12 C. L. R., 314*

100. ——— *Suit to recover a share of money recovered by co-plaintiff under a decree—Act XI of 1865 (Mofussil Small Cause Courts Act), s. 6.*—*Held* that a suit to recover a share of money which had been recovered by a co-plaintiff under a decree was a claim for money due on a contract within the meaning of s. 6 of the Mofussil Small Cause Courts Act (XI of 1865), and was therefore a suit of the nature cognizable by a Court of Small Causes in which, under s. 586 of the Civil Procedure Code, no second appeal could lie. *DEBI DAS v. LACHMAN SINGH I. L. R., 7 All., 896*

101. ——— *Hindu law—Co-parceners—Family debt.*—A decree having been passed against the plaintiff and defendant, undivided Hindu brothers, jointly for a family debt, and the decree-holder having levied the sum decreed from the plaintiff, a suit was brought by him in a Small Cause Court for contribution against the defendant. *Held* that, although that Court could entertain a suit for contribution, such suit could not be brought by the plaintiff against the defendant under the circumstances of the case. *CHELLAPILLA RAU PANTULU v. BALARAMAKRISHNAN PANTULU*

[I. L. R., 6 Mad., 424]

102. ——— *Agency—Recovery on joint decree.*—Plaintiff and defendant having been co-sharers in a decree in which the respective shares of the decree-holders were definitely fixed, defendant amicably received from the judgment debtor his own share and plaintiff's share on her behalf. The latter brought the present suit to recover the same from defendant, whose plea was that the amount had been paid to the plaintiff. *Held* that, if defendant acted as agent of the plaintiff, there was a contract implied between them that the former would recover what was due from the latter, and pay it over or account for it to her, and that therefore the case came within the jurisdiction of the Small Cause Court. *Held* that, as the Subordinate Judge before whom the case came in appeal was also Small Cause Court Judge, he might have dealt with the case without referring the above point for the decision of the High Court. *SHUMDHONATH MOZOOMDAR v. KASHEESUREE DEBEE . . . 13 W. R., 100*

## SMALL CAUSE COURT, MOFUSSIL

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## 2 JURISDICTION—continued

103 — *Suit against co-sharer for contribution in respect of Government revenue*—A suit by a co-sharer for contribution in respect of Government revenue paid by him in excess of his quota is not cognizable by a Small Cause Court as the extent of the share in respect of which contribution is sought cannot be determined without deciding a question of title. **KALEE NATH POT v. NILA RAM PURAMATHICK** 7 W. R., 32

104 — *Suit for contribution in respect of money paid as revenue to save estate from sale*—A claim for money below Rs 500 paid as revenue by one partner in an estate on account of another in order to save the estate from sale is due under an implied contract between them and is therefore cognizable by a Small Cause Court. **RAM MONEY DOSSIA v. PEARY MONTY MOZOOMDAR** [6 W. R., 325]

105 — *Suit to recover arrears of revenue compulsorily paid*—A suit to recover arrears of revenue which the plaintiff was compelled to pay by the revenue authorities, but which the defendant was liable to pay is cognizable by a Court of Small Causes. **PARASCHAMA CHEDUM BRATTAN v. KRISHNAIAH** 6 Mad., 492

106 — *Suit by co-sharer for contribution to Government revenue*—A suit by a co-sharer for contribution in respect of arrears of revenue paid by him in excess of his quota to save the entire estate from sale is not cognizable by a Small Cause Court. **BROOKWOOD GOOWANEE v. PRASAD CHOWDREY** 7 W. R., 17

107 — *Suit for contribution by co-sharer who has paid whole Government revenue*—Where one of several co-sharers in an estate paying revenue to Government has paid the revenue due upon the whole estate to prevent it from being sold, a Small Cause Court has no jurisdiction to entertain a suit brought by him against the other co-sharers for contribution. **PANDEY CHITTARAO v. MOHMOOSOODER PATEL CHOWDREY** [B. L. R., Sup. Vol., 675]

2 Ind. Jnr., N. S., 155 7 W. R., 377

**MOHMOOSOODER MOZOOMDAR v. BINDORASHY POMEER** 6 W. R., Civ. Ref., 15

108 — *Suit for contribution—Co-sharers*—No suit for contribution between co-partners in a revenue-paying estate or for contribution between co-partners in a jamma, will lie in the Small Cause Court. **JOSEPH ANISHA CHAKRAVARTY v. PATEL KUMAR CHAKRAVARTY BENKI JAN BIR v. MUHAMMAD HOSEIN** [I. L. R., 7 Cal., 605 8 C. L. R., 90]

109 — *Suit for share loans paid by mortgagee*—A suit by a mortgagor to compel a mortgagee to repay him the sum of Government assessment, which he has been a suit to pay when in occupation of the mortgaged property, is an obligation in equity to repay,

## SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2 JURISDICTION—continued

and is not cognizable by a Court of Small Causes. **VITHOBA BIK KESHADEET v. SHABALIRAV** [5 Bom., A. C., 122]

110 — *Suit to recover money paid to co-sharers as excess of rent*—A suit to recover money alleged to have been paid in excess of plaintiff's share of rent on account of his co-sharers was held to be a suit for contribution and as such not cognizable by the Small Cause Court. **PRASAD CHUCKERBITTY v. BHIRUPATH PALREY** [15 W. R., 52]

111. — *Suit cognizable by Revenue Court—Suit to recover money paid to prevent sale for arrears of rent*—The plaintiff sued to recover money paid in order to prevent his land from being sold at the instance of the defendant for non payment of arrears of rent under Madras Act VIII of 1860, the plaintiff's allegation being that no rent was due to the defendant. Held that the Small Cause Court had no jurisdiction because the suit was cognizable before a revenue officer. **HARY KARA DEBBIAN v. VELLAYAN CHITTY** 5 Mad., 179

112 — *Suit by surety against principal for recovery of money paid on his account—Suit for contribution*—A suit by a surety for recovery of a sum not exceeding Rs 500 which he had to pay on account of his principal, is cognizable by a Small Cause Court. A suit for contribution is not cognizable by a Small Cause Court, unless there is a contract express or implied between the parties. **SHABOO MAJEE v. MOORAI MOHAMMAD JONKER v. NABOO BHARTY CHUNDER DUTT v. DENGAR GORE** [B. L. R., Sup. Vol., 681; 7 W. R., 388]

113. — *Suit by one surety against another for contribution—Act XI of 1865, s. 6*—A suit by one surety against another for contribution where the sureties are bound by the same instrument is a suit on an implied contract, and therefore within the jurisdiction of a Court of Small Causes. **Gorinda Manaya Tirugan v. Rupu 5 Mad., 200, and Ratan Banker v. Galakshakar, 10 Bom., 21, f. Dowd. HARI TRINAK v. ADARSH** [I. L. R., 4 Bom., 321]

114. — *Provincial Small Cause Court Act (IX of 1857), s. 11 arts. 2, 41, 42 and 44—Suit for costs paid by one of two persons jointly liable*—N. C. granted a lease of three plots of land to B. S. The heirs of the former lessee brought a suit against N. C. and B. S. to recover possession of the same three plots of land. The suit was decreed with costs; and the costs, amounting to Rs 50 and annas 6 were recovered from B. S. alone. Thereupon B. S. brought this suit against N. C. in the Court of Small Causes at Pooné for the recovery of that amount. Held that the suit was one which did not come under art. 2, 41, 42 or 44 of sch. II, Act IX of 1857, and was cognizable by the Small Cause Court. **BHAY NATH SHAR v. NARA KUMAR CHOWDHARY** [I. L. R., 15 Cal., 713]

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

115. ——— *Suit for share of costs of repairs of channel—Provincial Small Cause Courts Act (IX of 1887), s. 15, and sch. II, art. 41.*—The plaintiff sued to recover from the defendant R227, being his share of the cost of repairing a channel which was the property of the plaintiff and defendant. Held the suit was cognizable by a Court of Small Causes. FISCHER v. TURNER

[I. L. R., 15 Mad., 155]

116. ——— *Copyright—Jurisdiction of Presidency Small Cause Courts—Copyright Acts (XX of 1847 and XII of 1876), s. 1—District Courts.*—As the class of cases provided for by s. 7 of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865. But sch. I of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts. IN THE MATTER OF THE PETITION OF HAMEEDULLAH. HAMEEDULLAH v. MAHOMED ASGHUR HOSSEIN

[I. L. R., 6 Calc., 499; 7 C. L. R., 471]

117. ——— *Costs—Suit for costs incurred in suit to compel registration of document.*—An action lies in a Small Cause Court for recovery of costs incurred by the plaintiff in a suit to compel registration of a document. CHENGUVA RAYA MUDALI v. THANGATCHI AMMAL

6 Mad., 192

118. ——— *Crops—Standing crops—Immoveable property—Suit for enforcement of lien—Provincial Small Cause Courts Act, sch. II, art. 6.*—Standing crops are immoveable property in the sense of the General Clauses Consolidation Act (I of 1868), and of sch. II, cl. 6, of the Provincial Small Cause Courts Act. A Small Cause Court therefore is not competent to try a suit for enforcement of a lien in respect of standing crops. CHEDA LAL v. MULCHAND. MINDAI v. KUNDAN SINGH

[I. L. R., 14 All., 30]

119. ——— *Act XI of 1865, s. 6—Suit to establish right to crops on basis of title to land on which they are grown—Question of title.*—A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature. Godha v. Naik Ram, I. L. R., 7 All., 152, and Shiboo Narain Singh v. Madden Ally, I. L. R., 7 Calc., 609, relied on. DAKHYANI DEBEA v. DOREGOBIND CHOWDHURY

[I. L. R., 21 Calc., 430]

120. ——— *Customary payments—Proprietary due, suit for.*—A suit for rumssam (a proprietary due) not claimed as rent nor under a contract, but by custom payable by cultivators in occupation of the land either as proprietors or raiyats,

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

is not of a nature triable by a Small Cause Court  
EBRAHIM SAIB v. NAGASAMI GURUKAL

[I. L. R., 3 Mad., 9]

121. ——— *Suit for inamdar for proprietary dues.*—Suits for proprietary dues, to which the inamdar, as the owner of the village, lays claim, are not cognizable by a Court of Small Causes. They are not paid as rent, nor are they claimed under any contract SUBRAMANIAN CHETTI v. PRINCE OF ARCOT

[I. L. R., 2 Mad., 146]

122. ——— *Suit for share of jumman's collections.*—A suit for a share of the collections made from "jummans" in return for spiritual instruction is not of the nature cognizable by a Court of Small Causes under Act XI of 1865. CHOONEE LALL v. GOUREE SHUNKUR

1 Agra, 84

123. ——— *Damages—Act XI of 1865, s. 6—Suit for damages for personal injury.*—By s. 6 of Act XI of 1865, suits to recover damages for personal injury cannot be brought in a Mofussil Small Cause Court, unless actual pecuniary damage has resulted from the injury. That section excludes from the jurisdiction of the Mofussil Small Cause Courts suits for defamation, infringement of right, and the like, where no actual pecuniary damage has been sustained by the plaintiff and where the measure of damages to be awarded is often a question of some nicety, but does not exclude suits for actual damages merely because, beside the actual pecuniary loss sustained, the plaintiff asks for something additional for loss of character or other indefinite injury. DURGA PERSHAD v. ASA JOHANA

[I. L. R., 5 Calc., 925; 6 C. L. R., 487]

124. ——— *Suit for damages—Loss of reputation.*—Where actual pecuniary damages have resulted from personal injury, the suit for damages as a whole will lie in the Small Cause Court, even though it should include damages for loss of reputation or other claim for damages not cognizable in the Court. GUNGA NARAIN MONTRO, v. GUNGADHUR CHOWDHURY

13 W. R., 434

MANSING LAJUNG v. THERAM DORJEE

[22 W. R., 395]

125. ——— *Suit for damages for malicious prosecution.*—A suit properly alleging a malicious prosecution and special pecuniary loss resulting therefrom is cognizable in a Small Cause Court. SITARAMAN v. SUSA PILLAI

[2 Mad., 254]

126. ——— *Provincial Small Cause Courts Act (IX of 1887), sch. II, cl. 35 (c)—Suit to recover costs of a criminal prosecution.*—Costs incurred in defending a criminal prosecution are recoverable only by a suit for damages for malicious prosecution. Such a suit is one for "compensation" within the meaning of cl. 35 of sch. II of the Provincial Small Cause Courts Act (IX of 1887), and is excluded from the jurisdiction

## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued

of a Small Cause Court. **MAHOMED ALI v. DAYAMA**  
[I. L. R., 14 Bom., 100]

127.

*Suit for damages for personal injury—Actual pecuniary damage*—The plaintiff, in a suit for damages laid at Rs200, claimed Rs50 on account of medical expenses caused by an assault committed on him by the defendants, Rs50 as the costs of a criminal prosecution which he had brought against them, and Rs100 for injury to his reputation and feelings. *Held* that, inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury the whole suit was, with reference to s. 6, prov (3), of the Mofussil Small Cause Court Act (XI of 1855) of a nature cognizable by a Court of Small Causes, and that under s. 86 of the Civil Procedure Code no second appeal in such suit would lie. **Gunga Narain Moytra v. Gudadhar Choudhary**, 15 W. R. 434, referred to. **JIVA RAM SINGH v. BHOLA**. I. L. R., 10 All., 49

128.

*Compensation for personal injury—Actual pecuniary damage*—The plaintiff in a suit for compensation for malicious prosecution claimed Rs500 as compensation for the mental annoyance caused him by such prosecution and Rs25 the actual expense incurred by him in defending himself from the charge made against him. *Held* with reference to s. 6 (3) and s. 13 of Act XI of 1855, that the suit being one for the recovery of damages on account of an alleged personal injury, from which actual pecuniary damage had resulted, it was cognizable and should have been instituted in the Court of Small Causes having local jurisdiction. **Gunga Narain Moytra v. Gudadhar Choudhary**, 15 W. R. 434 and **Broja Soondar v. Ekshun Chunder Roy**, 15 W. R., 179, followed. **DEBI SINGH v. HANUMAN UPADHYA**

[I. L. R., 3 All., 747]

129.

*Act XI of 1855, s. 6—Suit for damage to crops*—The term "damages" in s. 6 of Act XI of 1855 includes damages to crops and a suit to recover damages for the wrongful reaping and carrying off the produce of certain fields is cognizable by a Court of Small Causes. **DACH SINGH v. RAGHUNATH SINGH**

[3 N. W., 101]

130

*Suit for value of produce carried off by defendant cultivating plaintiff's land without consent*—A suit to recover the value of produce carried off without plaintiff's consent from his land, which had been forcibly retained in the cultivation of defendant No. 1, assisted by defendant No. 2 was held to be a suit not for rent but for damages. **KABOO KAHAR v. NATHOO SYRON**

24 W. R., 380

131

*Provincial Small Cause Courts Act (IX of 1887)—Suit for damages for the forcible cutting and carrying away of grass*—Act IX of 1887 does not exclude from the jurisdiction of the Small Cause Court a

## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued

suit for damages for the forcible cutting and carrying away of grass. **Sungram Singh v. Jaggan Singh**, 2 N. W. H. C., 13, **Daur Siska v. Raghunath Siska**, 3 N. W. H. C., 101, **Darma Ayyan v. Rajapur Ayyan**, I. L. R., 2 Mad., 131; and **Mamappa Medali v. McCarthy** I. L. R., 3 Mad., 192, referred to. **KRISHNA PROSAD NAG v. MAJZUDDIN BISWAS**. I. L. R., 17 Cal., 707

132.

*Provincial Small Cause Courts Act (IX of 1887), s. 11, cl. 31—Suit for profits of land*—A suit to recover with interest from the date of suit Rs200, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession is not a suit for the profits of land within cl. 31 of s. 11 of Act IX of 1887; such a suit is not excepted from the jurisdiction of the Small Cause Court under that Act. **ANJAMALAI v. SUBRAMANIAM**

[I. L. R., 15 Mad., 268]

133.

*Suit for damages for value of timber washed up and taken away by Government*—Where a landowner sued for damages for the value of timber carried away by Government after being washed on to his estate and to have his right declared as against Government to all timber that in future might be washed on to his estate, *Held* the suit was not one which was cognizable by a Court of Small Causes. **CHUTTER LALL SINGH v. GOVERNMENT**. 9 W. R., 97

134.

*Suit to recover value of fishing nets*—The plaintiffs sued the defendants in the Small Cause Court to recover the value of certain nets, the property of the plaintiffs, of which the defendants had taken wrongful possession, and damages for the loss sustained by the plaintiffs, in that they were unable to carry on their business as fishermen by reason of the detention of their nets by the defendants. *Held* that the Small Cause Court had jurisdiction to entertain the suit. **MADRATHAN v. SERRIER**. 6 Mad., 34

135.

*Suit for damages for illegal attachment—Civil Procedure Code, 1859, ss. 81 and 84*—Certain moveable properties, fishing nets etc., having been attached under Act VIII of 1859, s. 81, the suit was eventually dismissed and costs awarded to the defendants who thereupon sued the plaintiffs to recover damages sustained consequent on the attachment, viz., first for what could have been earned by means of the fishing nets had they not been under attachment, and second, for injury suffered by the nets owing to carelessness and exposure. *Held* that the suit was properly cognizable in the Small Cause Court, and the Judge was at liberty to take into consideration on both elements of damage. Such a suit would only be barred when compensation had been awarded under s. 88 of the Civil Procedure Code. **GOVENDERU MAJHEE v. BANKER CHUNDER DOSA**. 21 W. R., 373

136.

*Provincial Small Cause Courts Act (IX of 1887), s. 35—Suit for compensation for illegal attachment—Suit to recover*

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

*money paid in excess.*—The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle. *Held* that the suit was cognizable by the Small Cause Court. **KARUPPAN AMBALAM v. RAMASAMI CHETTI**  
[I. L. R., 21 Mad., 239]

137. ———— *Suit for damages for breaking wall.*—In a suit for damages for breaking down and removing bricks from a wall, where defendant's plea was *bona fide* purchase for value from plaintiff's predecessor, and plaintiff replied that the sale was invalid, as one made by a Hindu widow without legal necessity, — *Held* that the suit was cognizable by a Court of Small Causes. **SHRIMATHO CHUNDER MULLICK v. PRAN KRISHNA MULLICK**  
[13 W. R., 105]

138. ———— *Suit for damages for obstruction of watercourse—Provincial Small Cause Courts Act (IX of 1887), sch. II, cl. 35 (i)—"Diversion," Meaning of.*—If by obstruction the flow of water is diverted from a plaintiff's lands, such obstruction amounts to "diversion" within the meaning of cl. 35 (i) of sch. II of Act IX of 1887, and a suit for damages for such obstruction will not lie in the Small Cause Court. **PERIAKARUPPAN v. PALANIVANDI**  
[I. L. R., 18 Mad., 28]

139. ———— *Suit for damages for injury caused by diversion of watercourse—Provincial Small Cause Courts Act (IX of 1887), sch. II, cl. 35 (i).*—A suit to recover damages for injury to a wall caused by the diversion of a water-course is cognizable by a Provincial Small Cause Court. Such a suit does not fall within the exception of art. 35 (i) of sch. II to Act IX of 1887. **IN RE HAUSAMDHAI ABDULHAJI**  
[I. L. R., 20 Bom., 283]

140. ———— *Suit for damages for omission to certify payments to the Court.*—*Held* that a suit will lie in the Small Cause Court for damages sustained in consequence of decree-holder fraudulently omitting to certify to the Court the payments made by plaintiff in satisfaction of a decree out of Court, when there was a contract made that he should so certify them. **BUGGOBAN TANTEE v. GORIND CHUNDER ROY** . 9 W. R., 210

But unless there is actual damage, the suit should be dismissed. **MOHIM MUNDUL v. KALA CHAND NAEK** . . . . . 13 W. R., 147

141. ———— *Suit to recover money paid to save estate from sale.*—A suit to recover money as damages, measuring the loss to which plaintiff was put by having to pay on behalf of defendant money which defendant had agreed to pay out of the purchase-money in order to save from sale in execution of a decree an estate which plaintiff had purchased from him, is a suit cognizable by a Small Cause Court, from whose decision no special appeal lies. **RANGUTTI GANGOOBY v. KURALEE PERSHAD GANGOOBY** . . . . . 17 W. R., 446

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

142. ———— *Suit to recover money paid for defendant—Act XI of 1865, s. 6.*—A suit to recover money which plaintiff has paid for defendant is in the nature of a suit for damages, as described in s. 6 of the Small Cause Court Act. **GOPAL SUBHOKAR v. GOTARAM SIRCAR**  
[13 W. R., 273]

143. ———— *Act XI of 1865, s. 6—Suit for damages.*—A suit to recover the price of the skin and flesh of an ox, brought by a Mahar who asserted an hereditary right to carry away dead animals of the village to which he belonged, and take their skins, is a suit for damages and cognizable by a Court of Small Causes. **KHANDU VALAD KERU v. TATIA VALAD VITHOBA** . . . 8 Bom., A. C., 23

144. ———— *Civil Procedure Code (1882), s. 556—Suit for money paid and damages incurred by distraint of crops—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 35, cl. (j)—Small Cause Court, Mofussil, Jurisdiction of.*—A suit to recover money paid to redeem crops which had been distrained by the defendants for rents due from persons other than the plaintiffs, and also for damages sustained on account of the distraint, is, so far as the claim relates to damages, a suit coming under cl. (j), art. 35 of the Provincial Small Cause Courts Act (IX of 1887), and is therefore not entirely a suit of the nature of a Small Cause Court suit. S. 556 of the Civil Procedure Code (1882) does not bar a second appeal in such a suit. **DEWAN ROY v. SUNDAR TEWARY**  
[I. L. R., 24 Calc., 163]

145. ———— *Code of Civil Procedure (1882), s. 556—Suit for compensation for use and occupation of land valued at less than ₹500—Provincial Small Cause Courts Act (IX of 1887), ss. 15 and 23, sch. II, art. 8.*—A suit for compensation for money realized by the defendants from the actual occupants of land, who were stated to have been the plaintiff's tenants, is a suit not for rent, but for damages of a nature cognizable by the Small Cause Court; therefore no second appeal lies to the High Court in such a suit valued at less than ₹500 notwithstanding that the plaint was returned by the Small Cause Court to be filed in the Civil Court under s. 23 of the Provincial Small Cause Courts Act; on the ground that the suit involved a question of title. **Mohesh Mahto v. Piru, I. L. R., 2 Calc., 470, and Muttukaruppan v. Sellan, I. L. R., 15 Mad., 98, referred to. KALI KRISHNA TAGORE v. IZZATANNISSA KHATUN** I. L. R., 24 Calc., 557

*See MAKHAN LALL DUTTA v. GORIBULLAH SARDAR.* . . . . . I. L. R., 17 Calc., 541

**SADA SHANKAR v. BIRJ MOHAN DAS**  
[I. L. R., 20 All., 460]

**VIRA PILLAI v. RANGASAMI PILLAI**  
[I. L. R., 22 Mad., 149]

146. ———— *Suit for damages—Act XI of 1865, s. 6.*—An action to recover from the hands of defendants money collected from a



## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued

landed estate which had been charged with the payment thereof under an instrument to which the defendants had not been parties was held to be a personal act of damages without the meaning of Act XI of 1865 s. 6. **BHUGOBBETT CHETAN RAJPALE v. SHARODA PRESHAD SOOKUL**

[22 W. R., 298]

147 ———— *Suit to recover as damages profits from service lands—Mad Dec VI of 1831, s. 3.*—A Small Cause Court has no jurisdiction to entertain a suit to recover damages claimed in respect of the profits which the plaintiff would have derived from service isam lands by reason of a 3 of Reg VI of 1831. **TIPPYA PILLAY v. PRUDOO PILLAY** 5 Mad., 383

148 ———— *Suit by representative for share of debt due to deceased—With drawal of money on deposit by other representatives—Wrongful act.*—The legal representatives having allotted the estate of the deceased in certain shares among themselves a sum of money less than Rs 50 the entire amount of a debt due to the deceased was deposited with a banker by the debtor and was withdrawn by certain of the legal representatives. The others thereupon sued in the ordinary Civil Court for their proportionate share. Held that the suit was a suit for damages caused by the wrongful act of the defendants in withdrawing the whole amount, and was therefore cognizable by a Small Cause Court. **KURUNYESHA v. SAIJAN**

[10 C. L. R., 31]

149 ———— *Suit for damages for fraudulent concealment and misrepresentation.*—A suit to recover Rs 700 paid by plaintiff to defendant under a fraudulent concealment of the fact that defendant was engaged as moonshiner for another party who had brought a suit against plaintiff and upon a fraudulent misrepresentation by defendant that he was conducting plaintiff's case when in fact he was acting for the opposite party was held to be substantially a suit to recover damages for the injury sustained by plaintiff by reason of the fraudulent concealment and misrepresentation and to be cognizable by a Small Cause Court. **PATYKA PUDUM v. MOOSA**

18 W. R., 128

150 ———— *Suit for damages for withholding receipt for rent.*—A suit for damages for withholding a receipt for rent is not cognizable by a Court of Small Causes, and therefore was held not to come under the purview of Act XIII of 1871 s. 27. **SHOTLENDRO GIER v. UNWASER v. PATOO DOOS BURANSA**

23 W. R., 304

151 ———— *Suit for recovery of money paid to, but misapplied by, a landlord.*—A suit for the recovery of money alleged to have been paid by the plaintiff to an landlord on account of arrears of rent, when the same has not been applied to the purpose for which it was given, or when a receipt for it is withheld from the plaintiff, is not cognizable by a Small Cause Court, but by a Munsif

## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued.

under s. 11, Bengal Act VIII of 1819. **BRONJOYAN DEY v. SHUNBOO CHUNDER CHATTERJEE**

[18 W. R., 25]

152 ———— *Act XI of 1865, s. 6—Suit for overpayment by mistake—Contract Act, s. 72.*—A suit under s. 72 of the Contract Act to recover from a creditor the amount of an overpayment made to him by mistake is a suit for damages within the meaning of Act XI of 1865, s. 6 and is accordingly cognizable by a Mofussil Court of Small Causes. **HADRUYESHA v. MEHAMKAD JAY**

[I. L. R., 3 All., 671]

153. ———— *Declaratory decree—Suits to determine co-parceners' rights in moveable property.*—A Small Cause Court has no power to entertain a suit for a declaratory decree. There is nothing to prevent a Small Cause Court from determining whether a person who has been made a co-plaintiff and claimant as a co-parcener of the original plaintiff has any right to the property sued for. The decree in such a case, if given in favour of the plaintiff, must order that the parties do recover possession of the property sued for in such shares as the Judge may consider them to be entitled. A declaratory decree of the relative rights of the parties cannot be made. **AKBAR ALI v. JAZZUDIN** I. L. R., 8 Cal., 399

154 ———— *Suit for declaration of right to bring property to sale as liable to attachment.*—A suit in which the plaintiff sues for a declaration of his right to bring certain property to sale as the property of his judgment-debtor cannot be entertained by a Small Cause Court. **RAJESHER KULWAR v. BEHARER SETH**

[3 N. W., 206 Agra, F. B., Ed. 1874, 254]

155. ———— *Suit for declaration of right and for consequential relief.*—A suit in which the plaintiff prays the Court to consider and declare his right as heir, and for consequential relief, is not within the cognizance of a Small Cause Court. **KOLA ANEER v. SAJNA ANEER**

[3 N. W., 105]

156 ———— *Act XI of 1865, s. 6—Declaration that bond is satisfied—Claim for money on bond.*—A claim for money on a bond as specified in Act XI of 1865, s. 6, does not include a case for a declaration that the bond has been satisfied and is unoperative. A suit of that description, if maintainable must be brought in the regular Court. **AGUR MULLICK MENDUL v. DEBNATH CHATTERJEE**

[24 W. R., 190]

157 ———— *Suit for declaration of right to moveable property or usufruct taken.*—Where a suit is brought for property wrongfully taken by the defendant praying for restoration of such property either to the plaintiff directly or to some other person wholly or partly as agent for the plaintiff it is a "suit for property" within the meaning of the Small Cause Court Act (XI of 1865), and if the property is moveable and of less than

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

R500 in value, the suit is then a small cause. Accordingly where the plaintiffs, who were co-members with the defendants of a division of a caste, and as such tenants-in-common with them of certain cooking vessels of less than R500 in value, were excluded by the defendants from possession and common use of the vessels, and sought for a declaration that the plaintiffs and the defendants were equally entitled to the use of the said vessels, and for restoration of the same to some third person who should hold them to the use of the plaintiffs and defendants,—*Held* that the suit was not a suit for a declaratory decree, but for the recovery of property within the meaning of the Small Cause Court Act (XI of 1865), and as such was exclusively triable by Small Cause Court. The proceedings of the lower Courts were pronounced null, and the plaint directed to be returned for presentation in the proper Court. *KALIAN DAYAL v. KALIAN NARER*. . . I. L. R., 9 Bom., 259

158. ———— A suit for a declaration of right by a person against whom an order has been passed under s 250 of the Civil Procedure Code, 1877, will not lie in the Small Cause Court. *Ramdhani Biswas v. Kefal Biswas*, 1 B. L. R., S. N., 10: 10 W. R., 141; *Moozdeen Gazeer v. Dinobundhoo Gossamee*, 13 W. R., 99; and *Woomesh Chunder Bose v. Muddun Mohan Siriar*, 2 W. R., 44, discussed and explained. *SHIBOO NARAIN SINGH v. MUDDEN ALLEY. NATABAR NANDI v. KALIDASS PALI*. . . [I. L. R., 7 Cal., 608: 9 C. L. R., 8

159. ———— Decree—*Suits to recover certain decrees, and claim to execute them.*—In addition to a claim to recover certain decrees, amounting together in value to less than R500, the plaintiffs claimed a decree authorizing them to put the same into execution. The suit was not a suit of the nature cognizable by a Court of Small Causes. *BALAM DAS v. DWARAKA DAS*. . . 7 N. W., 88

160. ———— Suit on decree of Civil Court.—A suit cannot be maintained in a Small Cause Court in the mofussil to enforce the decree of a Civil Court. *MANCHHARAM KALLIANDAS v. BAKSHI SAHEB MIR MAINUDIN KHAN*. . . [6 Bom., A. C., 231

161. ———— Suit for balance due on decree of Small Cause Court.—A suit cannot be maintained in a Small Cause Court in the mofussil to recover the unsatisfied balance of a decree of such Court. *SANDES v. JOMIR SHAIKH*. . . 9 W. R., 399

162. ———— Suit for instalment of decree under Act X with stipulation for execution of decree in default.—Where a defendant agreed to pay the amount of a decree under Act X by two instalments, and the remedy provided for the enforcement of the contract in the event of the defendant making default was the execution of the decree, and not a suit in the Civil Court,—*Held* that a suit would not lie in the Small Cause Court to

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

recover the amount of the second instalment. *AGHORE CHUNDER MOOKERJEE v. WOOMASOONDEREE DEBEA*. . . [7 W. R., 216

163. ———— Suit to set aside decree of Small Cause Court.—A suit to set aside a decree of a Small Cause Court when no defect of jurisdiction is manifest on the face of the proceeding, and where there is no reason to suppose that the decree was obtained by fraud or collusion, cannot be maintained in a Court of Small Causes. *BAMA SOONDUREE DEBEE v. KAMINER BEWA*. . . 10 W. R., 352

164. ———— Deed—*Suit for re-formation of a deed.*—A Small Cause Court has no jurisdiction to entertain a suit for the re-formation of a deed. *GULABHAI MONDAS v. DAYABHAI GOVARDHANDAS*. . . [10 Bom., 51

165. ———— Suit as to validity of gift or deed of sale by Hindu law.—A Small Cause Court has jurisdiction in cases involving questions as to the validity or otherwise under the Hindu law of a deed of gift or a deed of sale. *GRISH CHUNDER ROY v. GOBIND SINGH*. . . 17 W. R., 88

See *ROGHORAM BISWAS v. RAMCHUNDER DOBEY* [W. R., F. B., 127: B. L. R., Sup. Vol., 34

and *HURBE PERSAD MALEE v. KOONJO BEHARY SHAHA*. . . Marsh., 99: 1 Hay, 238

166. ———— Dower—*Suit for dower under kabinnamah.*—A suit for the maujil or exigible portion of dower due to plaintiff under a kabinnamah is cognizable by a Small Cause Court, under s. 6, Act XI of 1865, notwithstanding that questions of very considerable difficulty may be raised in it collaterally with regard to the validity of the marriage. The decision of the Small Cause Court on such collateral matters has not the same effect as the decision of the Court which had jurisdiction to determine them in a suit regularly brought for that purpose. *HALA KHOORY BIBE v. BASOO KOSHYE*. . . [17 W. R., 512

167. ———— Suit for deferred dower—*Act XI of 1855, s. 6.*—A suit for deferred dower or muwajjal, payable to the wife by the husband upon her divorce, or upon the husband's death by his heirs out of his estate, is cognizable by a Small Cause Court. *HAYATUNNISSA BIBE v. AZHMOODDEEN*. . . 18 W. R., 304

168. ———— Suit for property conveyed in lieu of dower.—*Held* that a suit for R100 would not lie in the Small Cause Court upon a deed by which the defendant conveyed to the plaintiff, in lieu of the amount (R100) due to her as a dower, a half share in all his property, moveable and immoveable, and under which deed, therefore, the plaintiff was entitled to a moiety of all such property, but could not sue for the sum originally stipulated for. *NEELOO BEBEE v. MISSEER BISWAS*. . . [6 W. R., Civ. Ref., 12

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2. JURISDICTION—continued

169 ——— Endowment—*Suit by Mahomedan for share of property under terms of certificate of endowment Provincial Small Cause Courts Act (IX of 1887), sch II cl 13.*—A suit by a Mahomedan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by cl. 13 of sch. II of the Provincial Small Cause Courts Act (IX of 1887), and therefore not cognizable by a Court of Small Causes. **MIR ALI SHAH v. MUHAMMAD HUSEIN**

[L. L. R., 14 All., 413]

170 ——— Foreign judgment—*Jurisdiction—Suit on foreign judgment.*—A suit upon a foreign judgment is not cognizable by a Court of Small Causes established under Act XI of 1865. **ANAKATIL NARAYANA KRISHNAN KARTHYOTT v. SOCHET PILO PILO**

L. L. R., 6 Mad., 191

171 ——— *Suit on foreign judgment—Judgment of Court of Native State.*—No suit is maintainable in a Small Cause Court in British India founded upon the judgment of a Court created in a Native State. **BRHAVANISHANKAR SHY VAKRAM v. PURSADAI HALIDAS**

[L. L. R., 8 Bom., 232]

172 ——— Government *Suit to which Government officials are parties.*—Act XI of 1865, ss 1 & 2—*Local Government.*—A suit within the pecuniary and other limits prescribed for Courts of Small Causes, in which an officer of Government as a party in his official capacity may be entertained by a Court of Small Causes in the mofussil. The phrase "Local Government" used in s. 2 and defined in s. 1 of Act XI of 1865 does not apply to the Collector of a district but rather to the Governors or Lieutenant-Governors of Presidencies or Commissioners of Provinces. **DEBALI MANJILI v. HERMANATHI LAMAI HATHARAKTHA**

10 Bom., 308

173 ——— *Suit for compensation for damages against the Secretary of State.*—*Provincial Small Cause Courts Act (IX of 1887), sch II art 3.*—A suit was brought against the Secretary of State in a Mofussil Small Cause Court for compensation for damages done to an oil mill by the officials of the Vadhali State Railway. *Held* that the suit was not within Art. 3 sch. II of Act IX of 1887, and that it was cognizable by the Small Cause Court. **PUTWARI LAL MOOKERJEE v. SE RETARY OF STATE FOR INDIA**

[L. L. R., 17 Calc., 280]

174 ——— *Provincial Small Cause Courts Act (IX of 1887), sch II art 3.*—*Karnam is a zamindar—Officer of Government—Public servant.*—The plaintiff, being the lessee of a settled zamindari, brought a suit in a Small Cause Court against a karnam in the zamindari to recover damages sustained by reason of the defendant's default in keeping certain accounts etc. *Held* that the karnam was not an officer of Government and that the suit was maintainable under the Provincial Small Cause Courts Act. **ORE v. NEELANJAN PHILLAI**

L. L. R., 18 Mad., 395

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2. JURISDICTION—continued

175 ——— Immoveable property—*Provincial Small Cause Courts Act (IX of 1887), sch II arts 4 and 13—II redutory allowance—Rowley General Clauses Act (Bom. Act III of 1886).*—Plaintiffs sued in the Court of Small Causes at Poona to recover Rs 40 for arrears alleged to be payable to them under an agreement by the defendant's father to pay Rs 150 per annum, of which Rs 50 were for maintenance of plaintiffs in their and the residue was to be applied towards defraying the expenses of a temple. The terms of the agreement showed that it was intended that the payment for the expenses of the temple should be continued in perpetuity. The Judge dismissed the suit holding that being for a hereditary allowance it was a claim for immoveable property and came under s. 4 (4) and (13) of sch II of the Provincial Small Cause Courts Act (IX of 1887). On application by the plaintiffs to the High Court under s. 25 of the Provincial Small Cause Courts Act IX of 1887, *Held* reversing the decree, that the suit was not for possession of immoveable property or recovery of an interest in such property within the meaning of art. 4, nor did it come within the purview of art. 13 of sch II of the Act. The Small Cause Court had therefore jurisdiction to entertain the suit. **VISHNU GAYKAR JOSHI v. YASHA VANTAO**

L. L. R., 21 Bom., 387

176 ——— Intestacy—*Suit for money due share under an intestacy.*—The decree of a Small Cause Court was annulled as made without jurisdiction in a suit to recover money as personal property in respect of a share under an intestacy. **GHAN CHUNDER SINGH v. ARYA DOSSER**

17 W. R., 46

**NOBIN CHUNDER GOSSAMER v. DEBBO MOYER DEBBER**

17 W. R., 520

177 ——— *Suit for possession of personal property as heir under former decree.*—A suit for possession of personal property to which the plaintiff has been, by a decree in a former suit declared entitled as heir of a third person, is not a suit coming within the second exception to s. 6 of Act XI of 1865 and is therefore where the value is not beyond the jurisdiction cognizable by a Court of Small Causes and consequently no appeal lies from the decree in such a suit. **MOHESHTER MOYDUL v. KAILASH NATH MOYDUL**

7 C. L. R., 71

178 ——— Maintenance—*Suit for arrears of maintenance—Right to maintenance.*—A Small Cause Court has jurisdiction only as regards arrears of fixed maintenance but not to determine the right to receive it. **BHUGWAN CHUNDER BOSE v. BISHNOOASHANKER DOSSER**

6 W. R., 286

179 ——— *Suit for arrears of maintenance.*—*Held* that a suit by a widow for arrears of maintenance fixed by a Munsif's decree, where defendant urged non-maintenance on the ground that the property of plaintiff's husband was exhausted, and that defendant had already brought an action in the Munsif's Court for release from his liability, was

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

not cognizable by the Small Cause Court. *KAMINEE DOSSEE v. BISHONATH SHAHA*. 9 W. R., 214

*HAMA KOOREE v. AJODHYA FERSHAD*  
[24 W. R., 474]

180. ———— *Maintenance, Suit for arrears of—Fixed maintenance—Small Cause Courts (Provincial) Act (IX of 1887), sch. II, cl. 38*—A suit for arrears of fixed maintenance is a suit relating to maintenance within the meaning of that term as used in cl. 38 of sch. II of the Provincial Small Cause Courts Act (IX of 1887), and is therefore not cognizable by a Court of Small Causes. *AMRITOMY DASSA v. BHOGBUTH CHUNDA*

[I. L. R., 15 Calc., 164]

181. ———— *Provincial Small Cause Courts Act (IX of 1887), cl. 38, sch. II—Suit for arrears of maintenance due under a bond or agreement*—A suit for arrears of maintenance due under a bond or agreement is not cognizable by a Provincial Court of Small Causes under cl. 38 of sch. II of Act IX of 1887. *BHAGVANTRAO v. GANPATRAO*

I. L. R., 16 Bom., 267

182. ———— *Suit for arrears of maintenance—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 38*—A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court. *SAMINATHA AYYAN v. MANGALATHAMMAL*

[I. L. R., 20 Mad., 29]

183. ———— *Suit by Hindu widow*—Held that a suit for maintenance by a Hindu widow is cognizable by a Court of Small Causes in the mofussil. *JUDAL KOM RANCHHOD MOLJI v. HIRA MOLJI*

4 Bom., A. C., 75

*RAMCHANDRA DIKSHIT v. SAVITRIBAI*  
[4 Bom., A. C., 73]

But see *quare* in *RAMABAI v. TRIMBAK GANESH DESAI*

9 Bom., 283

184. ———— *Suit for maintenance*—In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the mofussil. *SIDLINGAPA v. SIDAVA KOM SIDLINGAPA*

I. L. R., 2 Bom., 624

*NOBIN KALEE DEBEA v. BINDUBASHINEE DEBEA*  
[5 W. R., S. C. C. Ref., 5]

185. ———— *Suit for maintenance*—In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage,—Held (following *Sidlingapa v. Sidava Kom Sidlingapa*, I. L. R., 2 Bom., 624) that the suit, although for a sum under Rs500, was not cognizable by a Court of Small Causes under Act XI of 1865, there being no allegation that the maintenance claimed was secured by bond or other special contract. *Nobin Kalee Debea v. Bindubashinee Debea*, 5 W. R., S. C. C. Ref., 5, followed. *APAJI CHINTAMAN DEVDHAR v. GANGABAI*

[I. L. R., 2 Bom., 632]

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

186. ———— *Act XI of 1865, s. 6—Civil Court—Suit by the mother of a child to recover from the father the cost of its maintenance*—A Mahomedan wife, divorced by her husband while pregnant, subsequently gave birth to a son. The father refused to maintain the child, which was therefore maintained by the mother, who now sued the father to recover the amount expended by her in the child's maintenance. Held that the obligation on which the suit was based was one, if it existed at all, that was imposed on the father by the law, and did not arise out of any contract, express or implied; hence the suit was one not cognizable by a Court of Small Causes, but by the ordinary Civil Court. *NURHBI v. HUSEN LAL*

I. L. R., 7 Bom., 537

187. ———— *Suit for breach of agreement for payment in nature of maintenance*—Where the defendant entered into an agreement in writing with the plaintiff (the widow of defendant's brother) to deliver to her every year a specified quantity of paddy by way of maintenance,—Held that the Small Cause Court had jurisdiction to entertain a suit for a breach of the agreement. *PATPAMMA v. CHINNA REDDY*

5 Mad., 432

188. ———— *Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 38—Suit for maintenance based on a family arrangement*—A suit for maintenance based on a family arrangement is within the jurisdiction of a Mofussil Small Cause Court. *KOMU v. KRISHNA*

[I. L. R., 11 Mad., 134]

189. ———— *Suit for maintenance fixed by decree of Court*—A suit for maintenance fixed by a Court's decree is not cognizable by a Small Cause Court. *PAHLUD SINGH v. AHLUD SINGH*

6 N. W., 91

190. ———— *Suit for maintenance fixed by decree*—A suit by a Hindu widow for arrears of maintenance, based on a decree charging immoveable property with the payment of the maintenance allowance, is not a suit of the nature cognizable in a Court of Small Causes. *Pahlud Singh v. Ahlud Singh*, 6 N. W., 91, followed. *BHARAM CHAND v. JANEI*

I. L. R., 5 All., 389

191. ———— *Suit for arrears of maintenance fixed by award*—A suit for arrears of maintenance, at a rate ascertained by an award, is not a suit of the nature cognizable by a Court of Small Causes (*Guneshee v. Chotay Lal*, 3 N. W., 117). The suit was bad, being based upon an award in which the arbitrators had exceeded their powers. *DURJAN SINGH v. SIBIA*

7 N. W., 329

192. ———— *Marriage—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 35, cl. (g)—Suit for actual pecuniary damages for breach of contract of marriage—Jurisdiction*—A suit for actual pecuniary damages for breach of contract of marriage comes within cl. (g) of art. 35, sch. II of Act IX of 1887, and as such is excluded

## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued

from the jurisdiction of the Small Cause Court.  
*HALL CHANDR DASS v. KOTIAH CHANDR DASS*

[I. L. R., 15 Calc., 833]

183 Meene profits—*Suit solely for meene profits*—A suit for meene profits only, no other question arising, is cognizable by a Small Cause Court.  
*CHANDRAN BISHN v. JAGANNATHAN*

[2 N. W., 18]

184 — *Suit for meene profits*—*Provincial Small Cause Courts Act (IX of 1887), sch. II art. 31*—A suit for the meene profits of land for a period during which the plaintiff had been dispossessed by the defendant comes within art. 31 of sch. II of Act IX of 1887, and therefore is not cognizable by a Small Cause Court.  
*SHIRAM AMANTIA v. KALIDAS DEVI*

[I. L. R., 18 Calc., 81]

185 — *Provincial Small Cause Courts Act (IX of 1887), sch. II art. 31*—*Suit for meene profits under § 500 Civil Procedure Code (Act VII of 1859)*, is not cognizable in Courts of Small Cause where the value of the subject in dispute is less than ₹500 and art. 31 of sch. II of the Provincial Small Cause Courts Act is not applicable thereto. Such a suit falls within the provisions of s. 553 of the Civil Procedure Code and no second appeal lies from a decision in it.  
*AWOJO BAHADUR SINGH v. MADHUB CHANDRAN GHOSH* [I. L. R. 23 Calc., 884] followed.  
*SESHAGIRI ATTAR v. MARAKATHAMMAL*

[I. L. R., 23 Mad., 198]

*LINGAYYA ATTAVAR v. MALIKARAYANA ATTAVAR*  
 I. L. R., 22 Mad., 198 note

189 — *Military men—Military Courts*—A Court of Small Causes has no jurisdiction to try an action brought against a military officer in a military cantonment where a Court of Requests is established.  
*ABOO SAIT & Co v. ABBOTT ABOO SAIT & Co*  
 DALE 2 Mad., 439

187 — *Military Courts*—*Act XIII of 1860—Art. XIII of 1860*, s. 6 prohibits an interference with the jurisdiction of the Military Courts of Requests constituted by stat. 21 & 21 Vict., c. 66 s. 67.  
*SHANMUGA v. MENDENHORN* 1 Mad., 443

188 — *Liability*—*European soldiers and their salaried wives to Small Cause Court jurisdiction*—Reference to the High Court regarding the amenability of European soldiers and their salaried wives to Small Cause Courts in action for debt.  
*KAPIN v. CHRISTIAN*

[5 W. R., S. C. C. Ref., 21]

189 — *Non-Commissioned officer or soldier not serving in the army but employed in the civil department and residing beyond military cantonments* is amenable to the jurisdiction

## SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2 JURISDICTION—continued.

of the Small Cause Court as a Civil Court, even in cases below thirty pounds.  
*CONY v. MCCARTHY*  
 [14 W. R., 231]

200 — *European soldier acting as army schoolmaster*—A European soldier doing duty as an army schoolmaster, not being liable to a Court of Requests, is not exempted from liability to a Cantonment Court of Small Causes. The Mutiny Acts give soldiers no privileges as to liability to jurisdiction or actions.  
*MAWADY BEN-JAMSOO v. HAYNES* 6 Mad., 83

201. — *Suit against military officer—Military Court of Requests—Mutiny Act 1862 s. 103*—An action was brought in a Small Cause Court against a military officer residing at M. at which the only other military persons stationed were staff officer and two sergeants. Held that the Court had jurisdiction to try the case, the suit not being one exclusively cognizable by a Court of Requests under s. 103 of the Mutiny Act of 1862.  
*BASTIAN v. TIREMAN* 2 Mad., 389

202 — *Mutiny Act 30 & 31 Vict., c. 13, s. 99—Camp-followers—Jurisdiction of Civil Court*—The defendant, a native of India, attached to the mass of a European regiment stationed at Bimhal, was held to come within the provisions of s. 2 of the Mutiny Act (30 & 31 Vict., c. 13) as being a "follower in or of Her Majesty's Indian forces" and therefore to be, by s. 99, exempt while in that position from the jurisdiction of the Civil Court.  
*NAIRUDDIEN v. KHODABAKSH* 2 B. L. R., S. N., 7

S. C. MURTHOODIEN v. KHODA BAKSH  
 [10 W. R., 388]

203 — *Military officers*—The 9th section of the Mutiny Act (30 & 31 Vict., c. 13) exempts officers in all places in India, where anybody of Her Majesty's force may be serving from the jurisdiction of the Civil Courts in respect of personal actions. Where the defendants were residents of Bimhal and Jalipahar, and attached to the troops stationed there, Held that they were not amenable to the jurisdiction of the Small Cause Court at Dargajing.  
*HOSSEIN v. DICKINSON* 2 B. L. R., S. N., 3

S. C. HOSSEIN v. DICKINSON 9 W. R., 113

204. — *Money illegally exacted*—*Suit for money illegally exacted from plaintiff—Mamlatdar's order—Bomb. Act V of 1879 s. 87*—A suit for an amount less than ₹500, which the plaintiff alleged to have been illegally exacted from him by the defendant as rent, under a Mamlatdar's order, held to be cognizable by a Court of Small Causes, and not by a Subordinate Civil Court.  
*GABRIEL HATHI v. MENTA YANAKATRA HANJIVAT*  
 [I. L. R., 8 Bom., 188]

205. — *Suit to recover illegal exaction of rent*—A suit to recover an illegal

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

exaction of rent will not lie in the Small Cause Court. *SURBO CHUNDER DOSS v. WOOVANUND ROY* [11 W. R., 412]

**208.** — *Suit to recover assessment by Government officials levied wrongfully*—*District Judge, Jurisdiction of.*—A suit to recover less than Rs500, levied as assessment by Government officials, is cognizable by a Court of Small Causes; and therefore, under s. 27 of Act XXIII of 1861, no special appeal lay. District Judges should ordinarily try such suits when brought in the District Court, and should not delegate the trial to their assistants. *RAMCHANDRA BHUKAJI v. COLLECTOR OF RATNAGIRI* . . . 10 Bom., 305

**207.** — *Money had and received*—*Suit for money had and received for plaintiff's use*—*Implied contract—Zamindari due.*—A zamindar as such claimed and realized from a tenant Rs20, being one-fourth of the price of trees cut down and sold by the tenant, basing his claim on general usage. The tenant sued to recover such money, denying that any such usage existed. *Held* that the suit was in the nature of one for money had and received by the defendant for the plaintiff's use, and therefore cognizable in the Court of Small Causes. *Lachman Prasad v. Chammi Lal, I. L. R., 4 All., 6*, followed. *COLLECTOR OF CANNORE v. KEDARI* [I. L. R., 4 All., 19]

**208.** — *Suit by assignee of profits against lambardar.*—The transferee of a mortgage of a share of an undivided estate sued the lambardar of the estate for the profits of such share for a certain year, the amount claimed being Rs500. *Held*, regarding such suit as one for money had and received to the plaintiff's use, that it was one of the nature cognizable in a Court of Small Causes. *MUHAMMAD BEGAM v. ABHAS ALI KHAN* [I. L. R., 5 All., 531]

**209.** — *Money deposited under agreement to return mortgaged property.*—*C*, a mortgagee, the mortgage having been foreclosed, sued *D*, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with *D* to surrender the mortgaged property to him if he deposited the mortgage-money in Court by a specific day. *D* borrowed the money for this purpose by means of a conditional sale of the property to *L* and deposited it in Court; the deposit was made after the specified day, and consequently *C* took possession of the property. The money deposited by *D* remained in deposit, and while there *C* caused it to be attached in execution of a money-decree he held against *D*, and it was paid to him. *L* thereupon sued *C* in the Munsif's Court to recover the money which amounted to Rs350. *Held* that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes. *LACHMAN PRASAD v. CHAMMI LAL* . . . I. L. R., 4 All., 6

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

**210.** — *Suit for money received for plaintiff's use.*—When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint creditors. Such implied contract falls under the purview of s. 6 of Act XI of 1865, and a suit will lie in the Small Cause Court by a creditor to recover his share. *Lachman Prasad v. Chammi Lal, I. L. R., 4 All., 6*; *Huro Mohun Roy v. Khettramonee Dossee, 12 W. R., 372*; *Sinkur Lal Pattuck Gyawal v. Ram Kalee Dhamin, 18 W. R., 104*, referred to. *SOHAN v. MATHURA DAS* . . . I. L. R., 6 All., 449

**211.** — *Suit for share of compensation awarded for land acquired for public purposes.*—A suit was brought by some of the co-sharers in a putti of a mahal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the putti for the proportion due to them out of a sum of money which had been awarded as compensation for the acquisition of the land, and which the defendants had received. *Held* that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Sohan v. Mathura Das, I. L. R., 6 All., 449*, followed. *UMRAI v. RAM LAL* . . . I. L. R., 7 All., 384

**212.** — *Suit to recover share of profits of inam villages.*—*Provincial Small Cause Courts Act (IX of 1887), sch. II, cls. (4), (31), s. 23, cl. (1).*—In a suit for the recovery of a certain share in the profits of inam villages, of which the defendant was the manager, the only relief claimed by the plaintiffs being payment of money, namely Rs130,—*Held* that the suit was for money had and received for plaintiffs' use, and was cognizable by the Court of Small Causes. It did not fall under cl. (4) of sch. II of the Provincial Small Cause Courts Act (IX of 1887), as it was not a suit for the possession of immoveable property, or for recovery of an interest in such property. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then the suit would have fallen under cl. (31), sch. II of the Act. *DAMODAR GOPAL DIKSHIT v. CHINTAMAN BAKERISHNA KARVE* . . . I. L. R., 17 Bom., 42

**213.** — *Mortgage—Money decree on mortgage-bond.*—A Small Cause Court has jurisdiction to give a simple money-decree in a suit upon a bond in which landed property is hypothecated. *DOORHAR ROY v. DULSINGAR SINGH* [12 W. R., 367]

**214.** — *Money decree on mortgage bond.*—The Small Cause Court has no jurisdiction in the case of a claim for money due under a bond for less than Rs500, where the property pledged under the bond is made liable. *TRIPPOORA SOONDURAR v. KOTLASH CHUNDER BOSE* [15 W. R., 265]

**215.** — *Suit to enforce contract pledging moveable property.*—Plaintiff sued

## SMALL CAUSE COURT, MOFUSSIL

—cont. need

## 2 JURISDICTION—cont. need

for recovery of a sum of money lent upon the pledge of personal property and asked that the moveable property pledge in it be declared liable. Held that a Small Cause Court had jurisdiction to entertain a suit to enforce a contract pledging moveable property. *APPARU PILLAI v. SUBBAYA MUPPEN* [2 Mad 474]

[2 Mad 474]

216 *Suit on bond*  
*App. de England* In a suit for money due on a bond in which the payment is secured by mortgage of immovable property the Judge of a Small Cause Court is competent to try whether any debt is due upon the bond or not, but he cannot declare whether or not the particular land mentioned in the bond is charged for the payment of the debt, nor can he attach the land in execution of the decree. *PAN SNEWEE Sahoo v. FITTO I OR* 12 W R 184

*WEEK v. PINCH DEY* 14 W R 214

217 *Suit to recover money on bond and to declare lien on property mortgaged by bond* A suit for the object of which is not only the recovery of money due upon a bond, but also a declaration of the plaintiff's lien on the property mortgaged by the bond is not cognizable by the Small Cause Court. *PAN NARAYAN MOOKERJEE v. SARODA DEBI* 6 B L R, Ap 39

218 *Suit for enforcement of hypothecation on goods not moveable property—Act XI of 1865 (Mofussil Small Cause Courts Act) s 6*—A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons, who had purchased them at an auction sale in execution of a decree against the original defendants and who were added as defendants under s 39 of the Civil Procedure Code 1882. Held that the suit was not cognizable by a Small Cause Court inasmuch as it did not fall under the category of a suit for money due on a bond or other contract, nor of a suit for personal property or for the value of such property within the meaning of s 6 of the Mofussil Small Cause Courts Act (XI of 1865). *Ram Gopal Shah v. Ram Gopal Shah* 9 B R 136 and *Godka v. V. K. Ram, I L R 7 A L J 132* referred to. *SCRAJPAI BHOW v. JATRAMOIS* 1 L R 7 All, 855

219 *Suit for enforcement of hypothecation on goods not moveable property—Act XI of 1865 s 6* A suit by a registered mortgagee to enforce the hypothecation of certain crops on land situated within the jurisdiction of a Small Cause Court suit with a second appeal would be barred by s 135 of the Civil Procedure Code. *Jas. Singh v. I L R 7 All 550* followed. *Gopal Shah v. Ram Gopal Shah* 9 B R 136 referred to. *KALKA PRASAD v. CHANDAN S* 474

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## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued

220 *Suit for order to enforce mortgage-decree against person and property of defendant*—A suit to obtain an order from the Court that a decree upon a mortgage of a certain house shall be enforced against the person and property of the plaintiff who had purchased the house at auction subject to the plaintiff's mortgage, but had subsequently removed the materials of the same and so deprived the plaintiff of his lien, even not being a claim for debt damages, or for the recovery of property is not cognizable by a Court of Small Causes. *OMER KHRIM v. LALA SHAWAN I ALL* 4 C L R, 291

221 *Mortgage of moveable property—Suit for redemption*—Where moveable property has been pledged in a mortgage-bond as security for a loan and the amount due on the mortgage is tendered but declined by the mortgagee's suit for possession will lie in the Small Cause Court. But if there has been tender and the suit is for possession after assertion of defendant's lien on the property, the Small Cause Court has no jurisdiction in the matter. *BRECHOTANINDE GHOSANI v. JERGER NATH TEWARY* 18 W R, 58

222 *Moveable property—Act XI of 1865 ss 19 and 20—Huts*—Huts are not moveable property within the meaning of Act XI of 1865. *1st CHUNDER ROSE v. DHARMACHANDRA ROSE*

[2 B L R, A C, 77 8 B L R, 510 note 10 W R, 418]

*PORINI KANT GHOSH v. MAHABHARAT NAG* [8 B L R, 514 note 10 W R, 258]

223 *Suit for execution of decree of Small Cause Court—1st of purchaser*—A hut is not moveable property within the meaning of s 19 of Act XI of 1865. A Small Cause Court has no jurisdiction to sell a hut. A purchaser of a hut sold by a Small Cause Court in execution of a decree acquires no title to it. *HATTI MIRAN v. NANDRANI*

[8 B L R, F R 508 17 W R, 309]

*Contra KASI CHANDRA DUTT v. JADUNATH CHATTERJEE*

[8 B L R, 513 note 10 W R, 29]

224 *Immovable property—Act XI of 1865 s 19*—Held that for the purposes of the Mofussil Small Cause Court Act standing timber is not "moveable" property. *Vasir Khan v. Asmat Khan I L R, 3 All 185* referred to. *UMED RAM v. DAULAT RAM* [I L R, 5 All, 584]

225 *Sugar mill—Moveable property*—A stone sugar-mill was held to be moveable or personal as distinguished from immovable property. *HARMUNGAL SINGH v. ATHUL SINGH* 4 N W, 15

226 *Trees—Growing crops—Moveable property*—Trees and growing

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

crops are not moveable property. TOFALL AHMUD  
v. BANEE MADHUB MOOKERJEE . 24 W. R., 394

227. ——— *Growing crops.*  
—Growing crops are “immoveable property,” and  
execution of a decree of a Small Cause Court cannot  
be had against them under s. 17 of Act XI of 1865.  
GOPAL CHANDRA BISWAS v. RAMAN SIRDAR  
[5 B. L. R., 194: 13 W. R., 275]

MUHAMMAD SILEMAN v. SATU VALAD HAEJI  
[5 Bom., A. C., 90]

228. ——— *Suit for possession of tree or delivery of produce—Suit for definite quantity of produce of tree.*—A Small Cause Court cannot entertain a suit for the possession of a tree, nor for the annual delivery of the produce, so long as the tree should be productive. But a suit for a definite quantity of the produce of the tree, or the value thereof, may be entertained by a Small Cause Court if the value be within the prescribed limit. SHANTI LAKSHMINARASAMMA v. YEPA VENKATRAMADAS  
[3 Mad., 237]

229. ——— *Suit for fruit upon trees—Suit for compensation for the wrongful taking of fruit upon trees—Immoveable property.*—When the damage or demand does not exceed in amount or value the sum of five hundred rupees, a suit for the fruit upon trees, or damages in lieu thereof, is a suit cognizable in a Mofussil Court of Small Causes, the fruit upon trees not being immoveable property, but being moveable property within the meaning of s. 3 of Act XI of 1865. NASTIR KHAN v. KARIMAT KHAN . I. L. R., 3 All., 168

230. ——— *Thatch.*—Suit to recover a thatch of a value less than Rs50 must be brought in the Small Cause Court. A thatch, especially when severed from the house, is moveable property. RAJKUMAR MOOKERJEE v. PRANNATH MOOKERJEE 7 B. L. R., Ap., 41: 15 W. R., 499

231. ——— *Suit to recover baluta leviable on the crops of village lands.*—A suit to recover baluta leviable on the crops of village lands is not a suit for an interest in land, but for a share of produce severed from land, and is cognizable by a Mofussil Court of Small Causes. NARU PIRA v. NANO SHIDHESHVAR . I. L. R., 3 Bom., 28

232. ——— *Act XI of 1865, s. 6—Suit by cotandar mahars to recover “aya”*  
—Immoveable property, What is.—A suit for baluta or aya is a claim in respect of a hak belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and one in respect of immoveable and not moveable or personal property. A Mofussil Small Cause Court has no jurisdiction to entertain a suit for such a claim. There is no difference in principle between the haks of hereditary officiating mahars of a village and the haks appertaining to the hereditary office of a village joshi, or the office of an hereditary priest of a temple and its emoluments. The

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

haks of the former are not personal property.  
APPANA v. NAGIA . I. L. R., 6 Bom., 512

233. ——— *Suit for share of hakwamtance allowance.*—A suit by an alleged sharer in a hakwamtance allowance to recover from the defendant, who received the whole of such allowance from Government, the plaintiff's share in it, was held not to be a suit cognizable by a Court of Small Causes. VENKAJI LAKSHMAN DESHPANDE v. YAMUNABAI . 7 Bom., A. C., 114

234. ——— *Suit for malikana allowance.*—A suit for a malikana allowance concerns the proprietary right in land. A dispute concerning it may be regarded in the same light for the purposes of jurisdiction as a dispute concerning the proprietary right itself. A suit therefore of this special description is not one for a Small Cause Court. MAHOMED KARAMUTOOLAH v. ABDUL MAJEED  
[1 N. W., 205: Ed. 1873, 288]

235. ——— *Act XI of 1865, s. 6—Suit to recover price of buffaloes after sale.*—A obtained an ikrar from B by which B pledged to A certain buffaloes which B purchased with money borrowed from A. The ikrar also stipulated that B would not alienate his rights in the buffaloes till the sum borrowed was repaid. A obtained a decree against B for the amount of the loan and attached the buffaloes in execution. This attachment was set aside at the instance of C, who purchased the buffaloes from B after the date of the ikrar given by B to A. A sued C (making B a party) in the Small Cause Court, praying for the sale of the buffaloes pledged to him by B, or, in default of that, for the sum due to him. Held that such a suit was not a suit within s. 6, Act XI of 1865, to recover personal property, or the value of personal property, and was not cognizable by the Small Cause Court. RAM GOPAL SHAH v. RAM GOPAL SHAH . 9 W. R., 136

236. ——— *Madras Rent Recovery Act, 1865—Suit to recover moveable property.*—A suit to recover moveable property attached under colour of the Rent Recovery Act (Madras Act VII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865. DAVID BEG v. KULLAPPA . I. L. R., 11 Mad., 264

237. ——— *Municipal Commissioners—Act XI of 1865, s. 9—Suit against Municipal Commissioners.*—S. 9, Act XI of 1865, is no bar to a suit against Municipal Commissioners being brought in a Court of Small Causes. HURISH CHUNDER TALAPATTUR v. O'BRIEN . 14 W. R., 248

238. ——— *Municipal tax—Suit to recover Municipal tax.*—A suit to recover a Municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865. LOGAN v. KUNJI  
[I. L. R., 9 Mad., 110]

239. ——— *Wrongful assessment of profession tax—Madras District Municipalities Act (Mad. Act IV of 1884), ss. 49, 50—Provincial Small Cause Courts Act (IX of*



## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2 JURISDICTION—continued

1887), *sch II para 1—Order of a Local Government*. The Municipality at Tuticorin demanded Rs 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapattinam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court. *Held* the Court had jurisdiction to hear and determine the suit, *ss 49 and 50 of the Madras District Municipalities Act of 1881 and sch II cl. 1 of the Provincial Small Cause Courts Act (IX of 1887) are not applicable to such a suit.* TUTCORIN MUNICIPALITY v SOUTH INDIAN RAILWAY CO.

(I L R, 13 Mad., 78)

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Provincial

*Small Cause Courts Act (IX of 1887), sch II, arts 8 and 13—Calcutta Municipal Consolidation Act (Beng Act II of 1888) ss 117 and 119—Suit to recover occupier's share of tax by the owner of a house—A suit by the proprietor of a house for the recovery of Municipal taxes from the owner of a hut in the house is cognizable by the Provincial Small Cause Courts.* BROJONATH MITTRA v (OFF) BAKRANI

I L R, 23 Cal., 835

241—Order of Civil Court—

*Suit to set aside miscellaneous order of Civil Court—A Small Cause Court has no jurisdiction to set aside a miscellaneous order passed by a Civil Court.* BISEKHUR v KUDDEY LALL

(I N W., 112, Ed 1873, 188)

242—Partnership account—Suit

*for partnership account—A suit for an account of a partnership is not cognizable by a Small Cause Court.* SHUBERT CHUNDER KUR v RAM SURENDER SENHAR

10 W R, 214

243—Act XI of 1863

*s 6—Where defendant had been plaintiff's servant in charge of plaintiff's shop, on the understanding that he was to be remunerated by a small share of the profits in lieu of fixed wages a suit to recover the balance after deduction of such remuneration was held to be a suit on a demand cognizable by a Small Cause Court and not for balance of partnership account.* RAM KANAYE SHANA v BYKENTYATH SHANA

15 W R, 89

244—Suit involving

*quest of partnership account—A B, and C, the joint owners of an estate, sued their tenant in the Munsif's Court for rent; the tenant defeated the suit by proving payment of the entire rent to B. A then brought a suit in the Small Cause Court against B for damages equal in amount to the one-third of rent due to him and the costs incurred by him and award against him in the rent-suit in the Munsif's Court. B pleaded that he had expended the share of rent due to A for the benefit of the joint estate and that A had collected the rents of other mohals belonging to the joint estate, and had not accounted for such rents. Held that the suit, being one which involved questions of partnership account between*

## SMALL CAUSE COURT, MOFUSSIL

—continued—

## 2. JURISDICTION—continued

the joint proprietors of an undivided estate, could not be entertained in a Court of Small Causes. RAMTONG ACHARJE v PRANTMOUY ACHARJE

(I L R, 6 Calc., 551; 7 C L R, 557)

245—Provincial

*Small Cause Courts Act (IX of 1887), sch II, art 29 (c)—Suit by a retired partner for the consideration due on account of his retirement—A suit by a retired partner for money alleged to have been agreed to be paid to him by the continuing partners in consideration of his retirement is not a suit for balance of a partnership, and is not excluded from the jurisdiction of a Court of Small Causes.* PATEL LAL v CHANGA MAL

(I L R, 19 All, 513)

246—Settlement of

*accounts—Promise to pay balance—The plaintiff and defendant, having carried on business in partnership, settled their accounts and struck a balance of Rs 196 which the defendant agreed orally to pay in 12 months. The plaintiff now sued in a Small Cause Court for the amount, not asking for an account to be taken. Held that the suit was maintainable.* MARIMUTHU v SAMINATHA PILLAI

(I L R, 21 Mad., 336)

247—Prisoners' Testimony Act

*(XV of 1860)—Mofussil Small Cause Court, Judge of—Defendant in custody—A Judge of a Small Cause Court in the mofussil could direct the jailor to bring up before the Court at the hearing of the suit, a defendant committed to custody, under s 78 of Act VIII of 1859, without having recourse to the procedure under Act IV of 1860.* HILARAK MAJI v NARAYAN DAS

(5 B L R, 215; 13 W. R., 278)

248—Purchase money—Civil Pro-

*cedure Code s 315—Suit to recover purchase-money—Suit by purchaser at Court sale when debtor had no saleable interest—A suit brought, under s 315 of the Code of Civil Procedure, by a purchaser at an execution sale to recover the purchase-money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act VI of 1865.* PACHAYAPAN v NARAYANA

I L R, 11 Mad., 269

249—Provincial Small

*Cause Courts Act (IX of 1887), sch II, art 11—Suit to recover purchase-money by purchaser ejected from possession of his purchase by a third person—Where a plaintiff brought a suit in the Small Cause Court to recover from the defendant the purchase money which he had paid for a piece of land, but from which however, he had been ejected by order of a Civil Court at the instance of a third person, it was held that the exception to art. 11 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) was no bar to the maintainability of the plaintiff's suit, although, as a defence to the action, it*

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

may be necessary for the defendant to show that he had a good title. GOOL KHAN v. TETAR GOALA 4 [4 C. W. N., 63

250. ——— Receiver—Power to appoint receiver—Attachment and sale of bond—Civil Procedure Code, 1877, s. 268.—A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, which, by s. 268 of Civil Procedure Code, 1877, is six months from the date of the attachment, cannot be made available for satisfaction of the judgment creditor's debt. NURSINGDAS RUGHUNATHDAS v. TULSIRAM BIN DOULATRAY [I. L. R., 2 Bom., 558

251. ——— Registration Act—Suit on bond under s. 52, Registration Act, 1864.—The Court which had jurisdiction in a proceeding to enforce payment, under the provisions of the Registration Act, XVI of 1864, of a registered bond was the Court in which a suit for the amount claimed was maintainable. A Small Cause Court therefore had jurisdiction in an application under that section on a bond on which not more than Rs. 10 was due at the time of the application. KESHAB LAL MITTER v. MASABDY MUNDUL 4 W. R., S. C. C. Ref., 11

SREEMUNT SEN v. GORAI GAZEE 18 W. R., 199 which was a suit under s. 53 of Act XX of 1866.

252. ——— Bond registered under Act XX of 1866, s. 53.—A suit upon a bond specially registered under the provisions of s. 53 of Act XX of 1866 for an amount less than Rs. 100 is cognizable by a Mofussil Court of Small Causes, and under s. 546 of the Code of Civil Procedure, 1877, no second appeal lies to the High Court against an order passed on an application for execution of a decree made in such a suit. BULOY BHUTACHARJEE v. BABURAM CHATTOPADHYA I. L. R., 11 Cal., 169

253. ——— Rent—Suit for money for permission to tap date-trees.—Suit for money for which plaintiff agreed to let defendant tap certain date-trees and appropriate the produce for a single season.—Held that such a suit was not one for rent, but for the breach of a contract in respect of which a Small Cause Court has jurisdiction. DEB NATH GHOSE v. PACHOO MOLLAH 6 W. R., Civ. Ref., 8

254. ——— Suit by landholder against purchaser of produce of tenant's land for rent—Damages.—B, who held a decree for money against G, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by G, and such produce was purchased by S. The landholder, to whom G owed rent for the land sued G and S for the amount of the rent, on the ground that under s. 56 of the N. W. P. Rent Act the produce of the land was hypothecated for the rent. Held that the defendants could only be held responsible *ex delicto*, and the suit was therefore one for damages, and the amount claimed, being under Rs. 100, one cognizable in a Court of Small Causes. SHIBRA v. HULASI I. L. R., 5 All., 518

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

255. ——— Suit for rent under agreement—Failure to prove agreement.—In a suit for rent of a holding which the plaintiff alleged to be included within certain homestead land which he owned in virtue of a sale certificate in execution of a decree, the defendant urged that the said holding was expressly excluded from the certificate. The plaintiff contended further that the defendant had agreed to pay him rent for the land in dispute. Held that the material issue was as to the alleged agreement, and that, if the plaintiff failed to prove it, the issue would be as to whether the land belonged to him or to the defendant, and would require to be settled in the Civil Court. KHUDEHRAM BISWAS v. KORAI BUDONEE DOSSEE 21 W. R., 379

256. ——— Tenant and under-tenant—Assignment of rent—Set-off.—The plaintiff held an under-tenure within a jote jumma held by B within D's zamindari and under an assignment from B paid to the zamindar D a sum of money as rent due by B to D. Ultimately D, ignoring such payment, recovered the rent from B by a separate suit in which no plea of payment was raised, and the latter again recovered his due from plaintiff by a separate suit. Held that an action was not maintainable in the Small Cause Court against the zamindar defendant D. Held that, in the absence of any authority from B to plaintiff to set off his payment to D against the rent due to B, the Collector had no jurisdiction to try whether B owed the plaintiff a sum equal to the rent, and that the Judge of the Small Cause Court was competent to try whether the plaintiff did pay money for the use of B at B's request, and if so, to give plaintiff a decree for the same. DEANUT MUNDUL v. BISSUAT MOYEE DOSSIA 12 W. R., 190

257. ——— Suit for use of land—Damages—Rent.—Suit for rent or hire of land which defendant used and caused to be used for passing and repassing to and from his steamer.—Held that, if there was no express hiring, the defendant ought to be sued for damages for trespassing upon the plaintiff's land; that if he agreed to pay for the use of a way across the land, it would not be rent, and that in either case the Small Cause Court was competent to entertain the suit. BRICE v. TOO-GOOD 5 W. R., S. C. C. Ref., 18

258. ——— Suit for rent of land with buildings.—In a suit for rent of land, where the principal subject of the entire occupation is bastu land, the residue (if any) of the holding being merely subordinate, the Small Cause Court has jurisdiction. But when the principal subject is agricultural land, the building or buildings being mere accessories thereto, the Small Cause Court will not have jurisdiction. CHUNDESBURFF v. GHIFENAF PANDEY 24 W. R., 152

259. ——— Arrears of rent of homestead, or bastu land, Suit for—Provincial Small Cause Courts Act (IX of 1887), sch. II, cls. 7 and 8.—A Mofussil Small Cause Court

## SMALL CAUSE COURT, MOFUSSIL

—continued

## 2 JURISDICTION—continued.

has no jurisdiction to entertain a suit for arrears of rent of homestead or bastu land under the provisions of the Provincial Small Cause Courts Act (IX of 1857) *UMA CHURN MANDAL v. BIRAJI BEWAN* I L R, 15 Bom., 174

280

*Suit for sums stipulated to be paid for use of private path*—A suit upon a contract for the payment of a stipulated sum per mensem to the owner for the leave granted by him to the defendants to use a path across his land is cognizable by the Small Cause Court. *WOOMA PESSAD SHAW v. SUDAMBER SINDAR*

[4 W. R., S. C. C. Ref., 10

281

*Suit on instalment bond for nuzzur or salami*—Plaintiff sued in a Small Cause Court on an instalment bond for Rs 1. The bond had been executed for nuzzur or salami contemporaneously with the execution of a pottah and kabuliat by which the defendants agreed to pay the plaintiff Rs 35 a year for two years as rent for certain land. The pottah and kabuliat had not been registered. A previous suit brought by the plaintiff, under Act X of 1859 had been therefore dismissed, and no oral evidence was admitted to prove the terms of the pottah and kabuliat. Held the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for rent, nor was it an abwab or illegal cess, whether it was nuzzur or salami was immaterial. *DIYANATH MOOKERJEE v. DEBATH MULLICK*

[5 B. L. R., Ap., 1; 13 W. R., 307

282.

*Suit for rent and a sum as penalty for non payment*—Where a party sued for Rs 178 as rent, and a like sum as penalty for non payment thereof, it was held that he was in fact suing for a penalty equal to double the amount due, and that a Small Cause Court was competent to entertain the suit. *HINGUN SOWDAGER v. BOISTUM CHURN OJAN* 6 W. R., Civ. Ref., 5

283.

*Suit for arrears of rent and assessment of rate*—A suit for arrears of rent of land for which no rent has ever been paid where the plaintiff also asks for assessment of the rate of rent is not cognizable by a Small Cause Court. *GOPEE NATH GHOSE v. KEDAR NATH CHUCKERBUTTY* *KEDAR NATH CHUCKERBUTTY v. GOPEE NATH GHOSE* 23 W. R., 428

284.

*Suit for rent*—Act X of 1859, s. 6—A suit to assess rent at an increased rate upon the defendants, and for a decree for rent at such rate in respect of land situated in a town, and upon which either a house or shop stands is not a suit for rent within the meaning of s. 6, Act XI of 1859, and is maintainable in the ordinary Civil Courts, and not in the Small Cause Courts. *JOY KISHORE CHOWDHURY v. MURDER BUKAN* [17 W. R., 178

285.

*Suit for rent of land used for building purposes*—A suit for the rent of land used for building purposes is cognizable in a

## SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2 JURISDICTION—continued

Mofussil Court of Small Causes. *PEARIE BEWAN v. NOKOOR KURHOKAR* 19 W. R., 308

*GOKHUL CHUND CHATTERJEE v. MOSABBO KANDOO* 21 W. R., 5

286.

*Suit on instalment bond for arrears of rent*—A suit upon an instalment bond given for arrears of rent is cognizable in a Small Cause Court. Also a suit by a judgment debtor to recover money paid by him to be applied in satisfaction of a decree under Act X of 1859 but not so applied by the decree holder. *CHURN GHOSAL v. MAHOMED ALLEY. TARINER CHURN ROY v. GOPAL KISTO ROY*

[3 W. R., S. C. C. Ref., 5

287.

*Suit on document given for arrears of rent*—Act XI of 1859, s. 6—A suit to recover arrears of rent on a tabond kuthband, under which defendant had been appointed a tahsildar to collect rents, having been filed before the Munsif, it was returned as being cognizable by the Court of Small Causes. The Judge of the latter Court, seeing that the instalment bond on which the suit was brought was exactly in the form of a kabuliat, and that the defendant was in possession of the land for which the rent was claimed, referred the question of jurisdiction to the High Court, which held that the money which the defendant contracted to pay, being rent, could not be sued for under Act XI of 1859. *PEARIE MOHUN ROY CHOWDHURY v. ASSAD KHAN* 18 W. R., 444

288.

*Suit for rent where there is no contract to pay it*—A suit was brought in the Small Cause Court by a zamindar against a rayat for arrears of rent. The plaintiff alleged that he had tendered pottahs which the defendant was bound to accept, and the defendant alleged that the rent specified was such that he was not bound to accept the pottahs. Held that the suit was not cognizable by a Court of Small Causes, there being no contract between the parties for the payment of rent. *VENKATACHALA REDDY v. NARAYANA REDDY* 4 Mad., 393

289.

*Suit for arrears of phulkar*—A suit for arrears of rent of the description known as phulkar cannot be tried by a Small Cause Court. *GOSWAMI SOOPOOL v. GOSWAMI BUCKUR* 23 W. R., 304

270

*Act XI of 1859, s. 6—Jurisdiction*—*Suit for refund of rent voluntarily paid to a wrong person*—A Mofussil Court of Small Causes has no jurisdiction under s. 6 of Act XI of 1859 to entertain a suit for a refund of money paid as rent in which it is found that the payment was made to a wrong person voluntarily and under no mistake as to that person being entitled to receive it but with the object of defrauding an intermediate tenure-holder. *RAM CHAND DUTT v. MOSAI SANTAL*

[I L R., 11 Cal., 736

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

**271.** ———— *Suit for rent—Suit at full rates after remission for years—Act XLII of 1860, s. 3—“Suit”—Mad. Regs. XXVIII of 1802 and I of 1822, s. 2.*—A zamindari was attached in 1827, and the Collector, without authority from the Board of Revenue or the Government, remitted a portion of the tirvai, and continued such remission until 1842, when the zamindari was restored. The then zamindar and his successors continued the remissions, always, however, entering the faisal rates in the pottahs and setting down the remissions as munasib. In 1861 the plaintiff became lessee of the zamindari, and in 1862, pursuant to notice, he tendered pottahs for Fasli 1272 to the defendant and the raiyats at the faisal rates. *Held*, first, that the plaintiff was not precluded from raising the rents to the amount of the faisal assessment; secondly, that the Act of limitations did not apply; and, thirdly, that the plaintiff might sue in a Court of Small Causes for the rent for Fasli 1272. The word “suit” in the proviso of s. 3 of Act XLII of 1860 referred to regular suits before a Collector under Act X of 1859, and not to the summary proceedings under Regulation XXVIII of 1802 and s. 2 of Regulation V of 1822. *ADIMULAM PILLAI v. KOVIL CHINNA PILLAI*. . . . . 2 Mad., 22

But see *UPPALAPATI GANAKATA GARU v. BALAVI RAMUDU*. . . . . 2 Mad., 475

**272.** ———— *Suit for damages after notice to quit or pay rent.*—A notice was issued on defendant requiring him to quit the land or pay rent, and defendant refused to do either. Plaintiff therefore rightly brought his suit for damages, and not for rent, and the Small Cause Court had jurisdiction to entertain it. But as the Court rejected the suit as being substantially one for rent, its order was set aside, and the suit ordered to be restored to the file of that Court. *BUOONUN MOHUN BOSE v. CHUNDERNATH BANERJEE*. . . . .

[17 W. R., 69

**273.** ———— *Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits.*—The plaintiff, alleging that the defendant, with her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for “damages on account of rent” of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff. *Held* that the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied; it should have been regarded as an action of trespass brought to try a question of title, an action in which the Court of Small Causes had no jurisdiction. The plaintiff’s proper remedy was by an action of ejectment in the ordinary Civil Courts, to which, if he chose, he could add a claim for mesne profits for the period during which the defendant had been in occupation. The decree of the Court of Small Causes was accordingly annulled. *JAINNADAS v. BAI SHIVKOR*. . . . . I. L. R., 5 Bom., 572

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

**274.** ———— *“Damages on account of rent”—Suit for use and occupation—Trespass—Ejectment—Mesne profits.*—The plaintiff obtained a decree declaring him entitled to a certain house. He thereupon gave to the defendant, who was in occupation, notice to pay him rent, and on default of such payment he sued the defendant in the Court of Small Causes to recover “damages on account of rent.” *Held* that the suit was not maintainable in a Court of Small Causes, which could not be used as a medium for ejecting, by indirect means, a person in possession of immovable property. *Held* also that the plaintiff’s suit was only maintainable as a suit for damages on account of trespass, and in such a suit it would be necessary for the plaintiff to prove possession prior to the trespass, or to have obtained a decree in ejectment which would relate back to the date of the trespass. The plaintiff had obtained nothing more than a decree declaring him to be the owner of the house; but this did not necessarily import a right to immediate possession, nor could the plaintiff be allowed to derive from it all the benefits which he might derive from a decree in ejectment. *KALIDAS v. VALLABHDAS*. . . . . I. L. R., 6 Bom., 79

**275.** ———— *Suit for the recovery of damages for the use and occupation of land.*—A suit for the recovery of damages for the use and occupation of land is within the jurisdiction of the Mofussil Small Cause Courts. *MAKHAN LALL DATTA v. GORIBELLAH SARDAR*

[I. L. R., 17 Calc., 541

*KALI KRISHNA TAGORE v. IZZATUNISSA KHATUN*  
[I. L. R., 24 Calc., 557

**276.** ———— *Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 7—Suit for damages for use and occupation of land.*—A suit for damages for use and occupation of land is cognizable by a Court of Small Causes. *VINA PILLAI v. RANGASAMI PILLAI*

[I. L. R., 22 Mad., 149

**277.** ———— *Suit for jodi—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 13.*—A suit for arrears of jodi rent on favourable terms is maintainable as a small cause suit under Provincial Small Cause Courts Act, 1887. *VENKATAGIRI RAJAH v. VENKAT RAO*  
[I. L. R., 21 Mad., 243

**278.** ———— *Provincial Small Cause Courts Act (IX of 1887), s. 15 and sch. II, art. 8—Suits for rent other than house rent—“Suits of the nature cognizable in Courts of Small Causes”—Second appeal—Civil Procedure Code (Act XIV of 1882), s. 586.*—A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto



# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

by the latter on a division between them of the proceeds of an execution-sale as his share of such proceeds, under the order of the Court executing the decrees, is a suit of the nature cognizable in a Court of Small Causes, and consequently, where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit. *MATA PRASAD v. GAURI* . . . I. L. R., 3 All., 59

**287.** ————— *Civil Procedure Code, 1882, s. 295—Suit for refund of proceeds of execution-sale.*—*S* and *L* held mortgage-bonds executed in their favour by the same person. *S*'s bond was dated the 16th June 1882, and was registered, the registration being compulsory, *L*'s bond was of prior date, the 30th December 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883, notwithstanding that *S* claimed the whole on the ground that he was an encumbrancer under a decree passed on a registered instrument, and therefore entitled to priority. *S*, being dissatisfied with this order, brought a suit to recover from *L* the moiety of the sale-proceeds paid to him. *Held* that the suit, being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes. *SHARI RAM v. SHIB LAL* [I. L. R., 7 All., 378

**288.** ————— *Suit for money paid for property sold where judgment-debtors had no interest—Provincial Small Cause Courts Act (IX of 1887), s. 15.*—*Held* that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 536 of the Code of Civil Procedure. *MAKUND RAM v. BODH KISHEN* [I. L. R., 20 All., 80

Neither art. 2 nor art. 35, cl. (j), sch. II of Act IX of 1887, excludes such a suit from the cognizance of the Small Cause Courts. *PRASANNA KUMAR KHAN v. UMA CHARAN HAZRA* . . . 1 C. W. IV., 140

**289.** ————— *Proceeds of immovable property—Jurisdiction—Act XI of 1865, s. 6—Money had and received—Sale of tenure—Co-sharers.*—The plaintiff and the defendant were co-owners of a certain talukh. The zamindar brought

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

a suit for arrears of rent of the talukh against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zamindar's decree, were taken by the defendant, and the plaintiff instituted the present suit to recover an 8-anna share thereof. *Held* that such a suit was not cognizable by a Small Cause Court. *Alata Prasad v. Gauri*, I. L. R., 3 All., 59, dissented from. *RAM COOMAR SEN v. RAM COMUL SEN* . . . I. L. R., 10 Calc., 388

**290.** ————— *Salvage—Suit for salvage—Abandonment of property saved.*—A suit for salvage, even when the saved property has been abandoned by those in charge of it, is not cognizable by a Court of Small Causes. *KISHORE SINGH v. GUNNESSH MOOREJEE* . . . 9 W. R., 252

**291.** ————— *Tax—Suit for amount of trade impost—Suit for rent.*—A Court of Small Causes has no jurisdiction to entertain a suit to recover the amount of a trade impost alleged to be leviable from the defendant in common with all other persons carrying on the trade of weaving within a particular district. Such a suit cannot be considered as a claim for rent. *JAGHIRDAR OF ARNEE v. PERIYANNA MUDELY* . . . 5 Mad., 317

**292.** ————— *Title, Question of—Denial of title of plaintiff by defendant.*—Where the cause of suit, as stated by the plaintiff, appears to be within the cognizance of a Court of Small Causes, the mere denial by the defendant of the plaintiff's right of title is not sufficient to oust the jurisdiction of the Court. If it reasonably appears to the Judge that a *bona fide* question of right, which is not within his jurisdiction to decide, is fairly raised in the suit, his jurisdiction ceases. *ANMALLU ANMAL v. SUBBU VADIYAR* . . . 2 Mad., 184

**293.** ————— *Question incidentally arising.*—If a *bona fide* question of title arises incidentally in a Small Cause suit, the Court should determine it. *ALAGIRISAMI NAICKER v. IN-NASI UDAYAN* . . . I. L. R., 3 Mad., 127

**294.** ————— *Right to cut trees.*—A Court of Small Causes may try incidental questions of title which are indispensable to the decision of the claim before it, e.g., a right to land on which depends a party's right to cut trees. *RADHA CHURN GANGOOLY v. GUDADHUR BAHADOOR* [15 W. R., 166

**295.** ————— *Suit for produce of land.*—If the right of the plaintiff be a question raised in a suit brought in a Court of Small Causes for recovery of value of produce, it is quite open to the Judge of the Court of Small Causes to try it and determine it incidentally to the main question in the suit—the right to the produce claimed. *DARMA AYYAN v. RAJAPA AYYAN* [I. L. R., 2 Mad., 181

**296.** ————— *Suit for damages for loss of produce.*—The jurisdiction of a Small



# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2. JURISDICTION—continued.

as kanom on the land T. . . . The proportionate rent on 2,320 fanams is 365 paras. This quantity of paddy . . . shall be enjoyed by you and your sons and grandsons hereditarily by receiving the same from my sons." After certain clauses restricting the mode of enjoyment and the power of alienation the instrument proceeded, "in the event of the said kanom being paid, that money shall be received by my sons, and shall be invested in some other property, which may be approved of by you and your sons and by my sons, and from that property you may receive income yearly and enjoy the same. In a suit by a grandson of the donee to recover his share of the income, —Held that the suit "related to a trust" within the meaning of the Provincial Small Cause Courts Act, sch. II, art. 18. KRISHNA AYYAN v. VITHIANATHA AYYAN

[I. L. R., 18 Mad., 252

304. ———— *Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 18—Suit by temple manager against his predecessor for damage sustained by temple—Suit relating to a trust.*—A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes. KRISHNAYYAR v. SOUNDARARAJA AYYANGAR

[I. L. R., 21 Mad., 245

305. ———— *Suit against person collecting or receiving subscriptions for building a temple—Trustee—Civil Procedure Code (Act XIV of 1882), s. 30.*—A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them in the capacity of a trustee, and a suit in respect thereof should be filed, under s. 30 of the Civil Procedure Code, in a Subordinate Judge's Court, and not in a Small Cause Court. MAHOMED NATHUBHAI v. HUSEN

[I. L. R., 22 Bom., 729

306. ———— *Wages—Suit for wages against European British subject.*—A suit for wages under Rs 50, alleged to be due from a European British subject to a native, can be tried in a Small Cause Court in the mofussil. RAMJAN BEG v. COOK

[6 B. L. R., Ap., 91: 14 W. R., 428

307. ———— *Wrongful distraint—Suit to recover value of goods distrained for rent under Mad. Act I of 1865, s. 27—Parties—Procedure.*—A suit to recover the value of goods distrained for rent under Madras Act VIII of 1865, and forcibly carried away from the person distraining, may be maintained in a Court of Small Causes under s. 27 of the Act. The suit may be brought either by the landlord or the person authorized to distrain. A petition and summons and order, after hearing the parties and their evidence, appear to be the fitting mode of exercising the jurisdiction. VADAMALAI THIRUVANA TEVAR v. CARUPPEN SERVAI

ZAMINDAR OF SAITPUR v. CARUPPEN SERVAI [4 Mad., 401

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 2 JURISDICTION—concluded.

308. ———— *Provincial Small Cause Courts Act (IX of 1887), art. 35 (j)—Madras Rent Recovery Act (Mad. Act VIII of 1865), s. 15—Civil Procedure Code (Act XIV of 1882), s. 646B—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts.*—Certain moveable property having been distrained under s. 15 of the Rent Recovery Act (Madras), 1865, such distraint was set aside and the property ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif for the value of the property so illegally retained. Held that the suits were not excepted from the jurisdiction of the Small Cause Courts by art. 35 (j) of sch. II of the Provincial Small Cause Courts Act, 1887. CHAKRADHARUDU v. VENKATARAMAYYA

[I. L. R., 22 Mad., 457

## 3. PRACTICE AND PROCEDURE.

### (a) EXECUTION OF DECREE.

309. ———— *Power of execution—Change of jurisdiction.*—A Small Cause Court in which a decree is passed is competent to entertain an application for its execution, even if the debtor's residence and moveable property are situate in a place which has since the decree been excluded from that Court's jurisdiction. In such execution the course to be pursued was that prescribed by ss 235 and 286, Code of Civil Procedure, 1859. KODOO MUNDUL v. SHUSHEE SHIAHUR SIRCAR . . . 16 W. R., 227

See ANONYMOUS

[B. L. R., Sup. Vol., 886: 9 W. R., 175

Contra, MANSUK MOSUNDAS v. SHIVRAM DEVISING . . . I. L. R., 2 Bom., 532

GRISH CHUNDER KUR v. KRISTO CHUNDER GHOSH . . . 18 W. R., 123

ANONYMOUS . . . 3 W. R., S. C. C. Ref., 7

310. ———— *Mode of execution—Interest in moveable property, Power to sell—Act XI of 1865, ss. 6 and 20.*—A Small Cause Court can sell the undivided right, title, and interest of a deceased debtor, to which the defendants succeeded, in the moveable property in satisfaction of a decree obtained against the defendants without infringing the second proviso of s 6 of Act XI of 1865. Until the judgment-creditor has exhausted that mode of proceeding, he is not entitled to proceed against the debtor's immoveable property under s. 20 of the Act. AHOBALASCO CHETTY v. VENKATA KRISHNAMMA

[5 Mad., 275

311. ———— *Execution of decree—Suit against member of undivided family.*—A Court of Small Causes has not power to do more in execution of a decree against an undivided member of a Hindu family than issue process for the attachment



## SMALL CAUSE COURT, MOFUSSIL

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## 3 PRACTICE AND PROCEDURE—continued

and sale of the defendant's undivided right, title, and interest in the family moveable property. It would be for the purchaser at such a sale to obtain a partition. *ITANVIEN v. CRITHAMBARIEN*

[5 Mad., 312]

## 312 — Act XI of 1865,

ss 19 and 20—Rights and interests of judgment-debtor under bond pledging immovable property.—The rights and interests of a judgment debtor under a mortgage bond hypothecating to him immovable property are not saleable by a Court of Small Causes. A sale of such rights by a Court of civil judicature by virtue of a certificate issued under the provisions of s 20 of Act XI of 1865 is the proper mode of execution. *BUDDOO MULL v. MAHARAO*

[6 N W., 129]

## 313 — Power of Court

to attach salary—Civil Procedure Code 1882, ss 223 269.—A Mofussil Court of Small Causes must adopt the machinery of s 223 of the Civil Procedure Code in all cases where execution is sought against persons or property outside its local jurisdiction. Such a Court therefore cannot attach the salary of a public officer where the same is disbursed outside its local jurisdiction on *Hossain Ally v. Achotash Gangooly* 3 C L R 30 followed. *PARBATI CHAKRA v. PANCHANAND* I L R, 6 All., 243

## 314 — Transfer for execution—

Act XI of 1865, s 20—Transfer to, and execution by, Munsiff's Court—Sale of land—Certificate not filed—Title of purchaser.—A decree passed by a Subordinate Judge's Court on the Small Cause side was, after the abolition of the said Court, transferred by the District Court for execution to a District Munsiff's Court. The District Munsiff, on the application of the creditor attached and sold certain land. No application was made by the creditor for a certificate as provided by s 20 of Act XI of 1865, nor was any objection taken to the execution proceedings by the debtor. The creditor, having purchased the land sold it to A, who in attempting to take possession, was resisted by the debtor. In a suit to obtain possession of the land,—Held that A was entitled to recover. *NAGIREDDI v. RAMAKOTA*

[I L R., 7 Mad., 592]

## 315. — Act XI of 1865

s 20—Civil Procedure Code, 1882, s 223—Small Cause decrees of Subordinate Judge—Execution against immovable property—Co-ordinate jurisdiction of Subordinate Judge and District Munsiff.—Execution by District Munsiff.—The Court of a Subordinate Judge and that of a District Munsiff had jurisdiction over certain immovable property. A Small Cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Munsiff for execution against the said property under the provisions of s 20 of Act XI of 1865, the application for execution was rejected by the Munsiff on the ground that this procedure was illegal. Held that s 20 of Act XI of 1865 was not modified by s 223 of the Code of Civil Procedure, and

## SMALL CAUSE COURT, MOFUSSIL

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## 3 PRACTICE AND PROCEDURE—continued.

that the Munsiff's Court was therefore bound to execute the decree. *KANAYARAMA v. RANGA*

[I L R., 8 Mad., 8]

## (b) NEW TRIALS AND REVIEWS

## 316. — Act XI of 1865, s. 21—

*Petition—Limitation Act, 1877, art 173*—S 21 of Act XI of 1865 held to be in force, notwithstanding the right of review given to Small Cause Courts in the mofussil by s 623 of the Code of Civil Procedure, 1882. Where the circumstances of a case admit of a new trial, an application for such new trial is governed by s 21 of Act XI of 1865; but where the circumstances of a case do not admit of a new trial but do admit of a review, then the time within which an application for review should be made is to be governed by art 173, sch. II of Act XV of 1877. *MADON MONOH PODDAR v. PRINCE CHENDRA PURBOT*

[I L R., 10 Calc., 297]

## 317. — Civil Procedure

Code, 1877, ss 623 664—Power to grant new trial of case tried by predecessor.—A Judge of a Mofussil Small Cause Court was held to have jurisdiction to direct a new trial of a case tried by his predecessor, s 21 of Act XI of 1865 not having been repealed by the Civil Procedure Code, 1877. *PER GAETH C.J.*—The Judge, however, in dealing with applications for new trial under s 21, should have regard to the rule laid down in s 624 of the Code of Civil Procedure. *SAUMSEER ALLY v. KURUTT SHAH*

[I L R., 6 Calc., 236—6 C L R., 549]

## 318. — New trial of ex

parte case—Re-opening of case against all the defendants.—It may be competent to the Judge of a Small Cause Court on hearing one of the defendants to set aside an ex parte decree as to all, if justice requires it, e.g. if the objection is one which is common to the case of all; but he is not bound, because the decree is set aside as to one defendant, to interfere with the decision against others who do not object. *DOOKHEE KHAN v. RAJESWAR RAY*

[15 W. R., 371]

## 319 — Fraudulent con-

cession of judgment—New trial.—A Small Cause Court Judge may on the ground of fraud and false personation grant a new trial where judgment has been passed on a confession of judgment. *IN THE MATTER OF HIRU MONER DOSSE* 17 W. R., 48

## 320 — Application for

new trial, Ground for—Computation of time prescribed for application.—An error as to date in the summons to plaintiff's witnesses is sufficient ground for setting aside an order dismissing his suit. The time prescribed by Act XI of 1865, s. 21, for an application for a re-trial is exclusive of the date on which the suit was dismissed. *BHOJO GOVIND DES v. MUDDEN RAM PAL* 18 W. R., 454

## 321. — Third application

for new trial.—A third application for a new trial in-

# SMALL CAUSE COURT, MOFUSSIL

—continued.

## 3. PRACTICE AND PROCEDURE—continued.

a Court of Small Causes is not admissible under s. 21, Act XI of 1865. *DHUNNOO CHOWDHRY v. BUKSHUN* [12 W. R., 266]

**322.** ————— *Non-appearance of defendant—Application to set aside ex-parte decree.*—There is nothing in the first part of s. 21 of Act XI of 1865 showing that an application in accordance with that portion of the section is limited to the first occasion on which a defendant puts in an appearance to a suit. Where therefore a case is adjourned from the date fixed in the summons to any later date, and on such later date a defendant is prevented by sufficient cause from appearing, and in default of such appearance an *ex-parte* decree is given against him, he may apply under the first part of s. 21 for an order to set aside such decree. *IN THE MATTER OF DOYAL MISTREE v. KUPOOR CHUND* [I. L. R., 4 Calc., 318; 3 C. L. R., 482]

**323.** ————— *Procedure—Deposit of amount of decree and costs.*—A defendant desiring a new trial of a case decreed against him in a Small Cause Court must deposit in Court the amount of the decree passed against him and costs, at the time of giving notice of his intention to apply for the new trial. A subsequent deposit, though made within seven days from the date of the decision, will not entitle the party to ask for a new trial. *Semble*—The “next sitting of the Court” mentioned in s. 21, Act XI of 1865, refers to the next sitting after the decision complained of; and the words “within the period of seven days from the date of the decision” apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one Court. *KAILAS CHANDRA SANNEI v. DOWLAT SHEIKH* . 5 B. L. R., Ap., 57; 14 W. R., 42

**324.** ————— *Deposit of amount of decree and costs.*—If an application for a review of judgment made by a defendant in a Small Cause Court be in the nature of an application for a new trial, the amount of the decree, though made payable by instalments, must be deposited in Court, under s. 21 of Act XI of 1865. *NAYROJI PESTANJI v. MANSUKH JAYACHAND* . 5 Bom., A. C., 70

**325.** ————— *Deposit of costs.*—Act XI of 1865, s. 21, does not require a plaintiff applying for a new trial to deposit the costs of the defendants. *MOHIMA CHUNDER ROY v. HERNATH CHUNGO* . . . . . 18 W. R., 446

**326.** ————— *Notice of application.*—Where one of the provisions of s. 21, Act XI of 1865, is not complied with, *e.g.*, where no notice of an intention to apply at the next sitting of the Court for a new trial is given, an application for a new trial cannot be entertained. *IN RE PIRAMBAR SADHU KHAN* . . . . . 6 B. L. R., 390 note

*S. C. PETUMBER SHADDOO KHAN v. DOYA MOYEE DOSSEE* . . . . . 12 W. R., 17

**327.** ————— *Practice—Notice of application—Review—Civil Procedure Code (Act*

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## 3. PRACTICE AND PROCEDURE—continued.

*X of 1877*), s. 623.—The notice clause in s. 21, Act XI of 1865, is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court. Where the application is made within seven days, the notice is unnecessary. If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant is entitled to proceed under s. 623 of the Code of Civil Procedure without resorting to Act XI of 1865. *RATAN KRISHN PODDAR v. RAGHOO NATH SHAHA* [I. L. R., 8 Calc., 287; 10 C. L. R., 275]  
*See ISAN CHUNDER BANERJEE v. LUCHUN GOPE KEMP v. PREMNARAIN SINGH* [I. L. R., 5 Calc., 699; 5 C. L. R., 539]

**328.** ————— *“Next sitting of the Court”—Judge holding two offices.*—Where the same person holds the office of Judge in two Small Cause Courts, and sits for the first half of the month in one Court and for the remaining half in the other, the next sitting of either Court after the close of its half-monthly term would be on the first day on which the Judge sat again in that Court. *MADHUB CHUNDER BISWAS v. OKHOY CHUNDER BISWAS. GORFEE MOHUN BANERJEE v. SREEKANTO BOSE* [13 W. R., 103]

**329.** ————— *Application before execution of decree had been taken out for new trial.*—An application presented to a Small Cause Court on the 25th May to set aside an *ex-parte* decree obtained, on the 14th March, where no process had been executed for enforcing the decree, was held to fall within the first of the two provisions in s. 21, Act XI of 1865. *SHOJONEE DOSSIA v. DHURONEE DHUR GHOSE* . . . . . 16 W. R., 226

**330.** ————— *Notice of application—Next sitting of Court.*—A judgment-debtor in a Small Cause Court on the day (28th July) of her arrest in execution of an *ex-parte* decree deposited the amount claimed and gave notice under s. 21 of Act XI of 1865 that on the next day of the sitting of the Court she would file her grounds for a new trial. The Court next sat on the 1st August and she filed her application on the 2nd. *Held* that the Judge of the Small Cause Court was right in proceeding to hear the application instead of going through the formality of telling her to first give notice and apply again. *VAUGHAN v. LALL CHAND GHOSE* [15 W. R., 281]

**331.** ————— *Ex-parte decree obtained on forged bond.*—Petitioner specially registered a bond, brought it into a Small Cause Court, and, without serving the obligors with any summons, got an *ex-parte* decree against them and shortly after took out execution. The judgment-debtor appeared within thirty days of the decree and applied for stay of execution on the ground that the bond was a forgery. Execution was stayed on security given, a re-hearing was granted in the presence of both parties, the original decree was reversed, and a fresh decree given. *Held* that in this state of the facts the

## SMALL CAUSE COURT, MOFUSSIL

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## 3 PRACTICE AND PROCEDURE—continued

Small Cause Court had jurisdiction to grant a review and fresh decree and that the procedure had down in s. 21 of Act XI of 1865 was followed as far as it was applicable. *IN THE MATTER OF MORTU SAKHO*

[11 W R., 245]

332.

*Second application for new trial*—An applicant who having been made to a Small Cause Court Judge to set aside an *ex-parte* decree, the Judge found from the record that the defendant had been personally served with a summons. He accordingly requested the plaintiff to tell his client to be present three days after to be examined. As neither the applicant nor his pleader was present on that date, the Judge rejected the application without issuing notice to the opposite party. A second application was then made under s. 21, Act XI of 1865. *Held* that the communication to the pleader was an informal proceeding and as applicant had not been summoned in due form, his application should not have been rejected in his absence and the Judge was bound to hear the second application. *GOPAL CHANDER ROY v. ARMAN HAIKHE*

15 W R., 402

333

*Application for new trial*—Deposit of decretal amount or security—*Provincial Small Cause Courts Act (IX of 1887), s. 17*—It is a common precedent to the granting of a new trial that in accordance with the provisions of s. 17 of the Provincial Small Cause Courts Act, 1887, an applicant should at the time of presenting his application for new trial deposit in Court the decretal amount or tender security for payment of the same. *Bommaru v. Arasu, 1 L. R., 13 Mad., 175*, disapproved from. *JOUR ANIR v. BISHEN DAVAL SINGH*

1 L. R., 18 Cal., 83

Reviews of judgment of a Small Cause Court as distinguished from new trials are now governed by s. 623 of the Civil Procedure Code, 1882.

334.

*Provincial Small Cause Courts Act (IX of 1887), s. 17—Deposit of costs—Civil Procedure Code 1882, ss. 623 and 624*—*Power of Judge to review order of predecessor*—On 22nd February 1883 the Subordinate Judge of Timmerly dismissed with costs a Small Cause suit on the ground that the plaintiff had not secured the attendance of his witnesses. On 25th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 621 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates. He entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition. *Held* by the Full Bench following the

## SMALL CAUSE COURT, MOFUSSIL

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## 3 PRACTICE AND PROCEDURE—continued

*cases of Karoo Singh v. Deo Narain Singh 1 L. R., 10 Cal., 80, and Fazal Buzar v. Jemadar Sheikh, 1 L. R., 13 Cal., 231*, that, having regard to the provisions of s. 624 of the Code of Civil Procedure, the Officiating Subordinate Judge had jurisdiction to hear and determine the case on review. *Held* by PARKER and WILKINSON, JJ., that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory. *HANAYANI v. KRAHVI*

1 L. R., 13 Mad., 175

## (c) REFERENCE TO HIGH COURT

References to the High Court are now made under s. 617 of the Civil Procedure Code of 1882 which has been substituted for s. 22 of Act XI of 1865. The substituted section is of wider application than s. 22 and embraces questions arising in execution of decrees as well as questions in a suit, which it was formerly held could not be referred.

*See SUBODH CHANDER PATEL v. JAROO MOTHER*

[5 W R., S. C. C. Ref., 7]

*ANAND CHANDRA MAITIMDAR v. GOBARDHAN KHAN*

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[5 W R., S. C. C. Ref., 19]

*KAMINER SOONDREE CHOWDHRAIN v. MITHEO SCODEN MOOKERJEE*

21 W R., 378

*PANK OF BENGAL v. CHENIE*

[3 B. L. R., 396; 12 W R., 432]

As to what is to be referred—

*See GUJENDRO MORTU SHARA v. EASTERN RAILWAY COMPANY*

18 W R., 145

and how the reference is to be made—

*DISCHAY ADDY v. WELLER*

7 W R., 16

335 ——— Ground for reference—*Application of parties*—A Small Cause Court should not make a reference on a simple point merely on the application of the parties, unless it entertains a doubt upon the question. *HIRSH CHANDER TALAPITTE v. O'BRIEN*

14 W R., 248

336 ——— Questions arising on application for new trial—*Act X of 1867, s. 1—Act XI of 1865, s. 22*—When the judgment of a Small Cause Court is called in question by one of the parties on a point of law, such as that damages have been assessed on a wrong principle, his proper course is to apply for a new trial. The facts not being disputed, the Judge may grant a new trial as to what amount of damages were sustained, and in determining that question, he may alter his opinion as to the principle on which damages ought to be assessed, and upon the new trial assess them on the proper principle. A question of law arising on an application for a new trial was a question which might be referred to the High Court for its opinion as a question within the meaning of s. 1, Act X of 1867, arising at any point in the proceedings previous to the hearing of a suit. The hearing in a new trial is a hearing within

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## 3. PRACTICE AND PROCEDURE—continued.

Act XI of 1865, s. 22. An application for a new trial is a point in the proceedings previous to the hearing. *ISAN CHANDRA SING v. HARAN SIRDAR*

[3 B. L. R., A. C., 135; 11 W. R., 525]

## 337. ————— Act XI of 1865.

—A point arising upon the application for a new trial may be referred to the High Court. *NORO COOMAR CHUCKERBUTTY v. KOYLASH CHUNDER BAROORRE*

. . . 17 W. R., 518

338. ————— Change of Judges pending reference—Second reference by successor of Judge in case already decided.—Where a case was determined by a former Judge of a Small Cause Court, contingent upon the opinion of the High Court upon the question submitted by that Judge, and the parties had an opportunity of appearing and being heard in the High Court before the Judges expressed their opinion,—*Held* that, when that opinion was expressed, the case was at an end, and that it was irregular for a Judge who had succeeded to the Judge who referred the case to interfere in the matter. *UMANUND ROY v. BROWNE*

. . . 7 W. R., 352

## (d) MISCELLANEOUS CASES.

339. ————— Act XI of 1865, s. 45 and s. 20—*Power of clerk of Small Cause Court*.—A clerk of Small Cause Court is not authorized to sign the copy of the judgment and certificate alluded to in s. 20, Act XI of 1865. *ANONYMOUS*

[3 W. R., S. C. C. Ref., 7]

340. ————— s. 51—*Powers of local Legislature—Judges of Small Cause Courts*.—*Held* that in permanently investing, under s. 51 of Act XI of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Ameen (Subordinate Judge), the Local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time, with the powers of a Principal Sudder Ameen, may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted. *Bijee Koor v. Damodur Doss*, 5 N. W., 55, impugned. *CROSTHWAIT v. HAMILTON*

[I. L. R., 1 All., 87]

341. ————— Execution of decrees of Small Cause Courts against immoveable property—*Powers of Judge of Small Cause Court*.—The Judge of a Court of Small Causes, who has been duly invested with the powers of a Subordinate Judge under the provisions of s. 51 of Act XI of 1865, has "general jurisdiction" within the meaning of s. 20 of that Act, and can consequently, under the provisions of that section, enforce a decree under that Act against the immoveable property of the judgment-debtor. *GOPAL v. NANKU*

[I. L. R., 1 All., 624]

342. ————— *Power to invest Small Cause Court Judge with powers of Principal*

## SMALL CAUSE COURT, MOFUSSIL

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## 3. PRACTICE AND PROCEDURE—concluded.

*Sudder Ameen*.—S. 51, Act XI of 1865, did not authorize the Local Government to permanently and unconditionally invest the Judge of a Small Cause Court with the powers of a Principal Sudder Ameen. The section only contemplated an occasional investment of the powers, and one contingent on the state of the business of the Court. *BIJEE KOOR v. DAMODUR DASS*

. . . 5 N. W., 55

343. ————— Power to invest Small Cause Courts with insolvency jurisdiction

—*Civil Procedure Code, 1877, s. 5—Ch. XX, ss. 344*

—366.—The effect of s. 5 of the Code of Civil Procedure (Act X of 1877), coupled with the second schedule to that Act, was to render the whole of Ch. XX (relating to insolvent debtors) of the Code, including s. 360, inapplicable to Courts of Small Causes in the mofussil, notwithstanding the words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. Consequently, the Government Resolution No. 2133 of the 3rd of April 1878, investing the Judge of the Court of Small Causes, Ahmedabad, with powers, under the said chapter, to adjudicate in insolvency matters, was *ultra vires* and invalid. *LALLU GANESH v. RANCHHOD KARANDAS*

. . . I. L. R., 2 Bom., 641

By the Civil Procedure Code Amending Act XII of 1879, s. 360 is made applicable to Small Cause Courts, so that such a resolution would now apparently be valid.

## 344. ————— Presentation of plaint—

*Former order returning plaint—Provincial Small Cause Courts Act (IX of 1887), ss. 23 and 27*.—Where a plaint in a suit for damages was presented to a Judge of a Small Cause Court, and it was found that it had formerly been presented to his predecessor, who was of opinion that the Court had no jurisdiction to try the suit and returned the plaint to the plaintiff under s. 23 of Act IX of 1887,—*Held* that, the order returning the plaint being final under s. 27 of the Act, the Judge could not admit and register the plaint until that order had been set aside. *IN RE HAUSAMBHAI ABDULABHAI*

[I. L. R., 20 Bom., 233]

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## Madras.

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7 B. L. R., Ap., 61

## 1 JURISDICTION

### (a) GENERAL CASES.

1. ——— Extension of jurisdiction by Act XV of 1882—Act IX of 1850, s 53—Abandonment of excess—Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs 1000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non suit under s. 53 Act IX of 1850. Held, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded, by their having abandoned the excess in the former suit, from recovering the full amount sued for SIMON & GORA CHAND DOSS [I L. R., 8 Calc., 473

2. ——— Adding sum to legal claim for purpose of giving jurisdiction—Act IX of 1850, s 25—Act XXVI of 1864, s 2—A plaintiff cannot give jurisdiction to the Small Cause Court by adding to his claim sums which he could not, under any circumstances, be entitled to recover SIKHAR CHAND & SONS v. SORINGMULL, 1 Hyde, 272, distinguished. BOKOMALLY NAWA & CAMPBELL [10 B. L. R., 193: 19 W. R., 20

3. ——— Abandonment of excess—Claims not within pecuniary limits of jurisdiction—The Court has no jurisdiction to hear a case unless there be an abandonment of any excess above its pecuniary jurisdiction GORACHAND CHUNDER BOSE & CHANDROO CHUNDER GHOSH [Bourke, O C., 3. Cor., 83

4. ——— Leave to sue—Presidency Towns Small Cause Courts Act (XV of 1852), s 18—Discretion Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction—A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs 23 for goods sold in Calcutta and

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

forwarded by the E. I. Ry. Co., for delivery at Lucknow. The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living at a long distance from Calcutta, and that the suit was one for a small amount. *Held* that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s. 18, and that the case was one in which the leave applied for should have been granted. *IN THE MATTER OF COLLETT v. ARMSTRONG*. I. L. R., 14 Cal., 526

5. — Non-resident foreigner carrying on business by his munim in Bombay—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 18*—Where a foreigner who did not reside in Bombay carried on business there by his munim,—*Held* that, under s. 18 (1) of the Small Cause Courts Act (XV of 1882), the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court. *Per SARGENT, C.J.*—*Primâ facie* the word "defendants" in cl. (b) of s. 18 has the same meaning in each of the three cases in which that clause gives jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits. Although it is true that a non-British subject who does not personally carry on business within the territorial limits of the Court does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business, and his property resulting from it, and may be fully regarded as submitting to the Courts of the country. *GIRDHAR DAVODAR v. KASSIGAR HIRAGAR*. I. L. R., 17 Bom., 662

6. — Splitting claim—*Omission to abandon excess*—*Act IX of 1850, s. 34*—*Held* under s. 34 of Act IX of 1850 that an abandonment of excess not stated in the summons is a splitting of the claim, and the Court has no jurisdiction to amend its record where there is no abandonment so stated. *GORACHUND CHUNDER BOSE v. CHANROO CHUNDER GHOSE*. Bourke, O. C., 3: Cor., 93

7. — Splitting cause of action—*Act IX of 1850, s. 34*—The defendant, as broker for the plaintiffs, guaranteed all transactions entered into by the plaintiffs with native firms through the defendant. Some of these native firms, in respect of such transactions, became indebted to the plaintiffs, and the defendant wrote to the plaintiffs requesting them to sue such defaulting firms. The

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

plaintiffs accordingly sued six of such firms, and sent a letter to the defendant claiming from him payment of the taxed costs incurred in all the suits, amounting to Rs. 7,553-10-6. The defendant having failed to pay, the plaintiffs sued him in the Small Cause Court, to recover payment of the taxed costs incurred in one of the suits, amounting to Rs. 433. *Held* that the plaintiffs, in doing so, were splitting their cause of action within the meaning of s. 34 of the Small Cause Courts Act (IX of 1850). *BLACKWELL & Co. v. SUMAR AHMED*. 6 Bom., O. C., 88

*See CHOCKALINGA PILLAI v. VIRUTHALAM*  
[4 Mad., 334]

8. — *Act IX of 1850, s. 34—Tradesman's account*.—A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns. *CASSUM JOOIA v. THUCKER LILADHUR KISSOWJI*. I. L. R., 2 Bom., 570

9. — Valuation of suit—*Suit for damages under Rs. 1,000, on contract of more than Rs. 1,000*.—In an action for damages on account of defendant's refusal to take delivery of goods of the value of Rs. 6,999-6-8, sold to him by plaintiff, which goods were afterwards re-sold at a loss of Rs. 344-5-9,—*Held* that the Court of Small Causes had jurisdiction, notwithstanding that the original contract was for more than Rs. 1,000. *KUPPU CHETTI v. CHIDAMBARA MUDALI*. . . . 3 Mad., 170

10. — *Act IX of 1850, s. 27—Liquidated damages—Earnest-money*.—Where a contract for the sale and delivery of 2,000 barns of stone contained a provision that in case of breach by the purchaser a sum as liquidated damages was to be paid by him at the rate of Rs. 1 per barn, and the purchaser paid Rs. 1,000 earnest-money, but made default in accepting the stone,—*Held* that, though in default of acceptance the earnest-money, Rs. 1,000, was forfeited, the vendor could not retain the earnest-money and sue for the whole amount of the liquidated damages; but that his proper course was to sue for the difference only, which suit could properly be brought in the Small Cause Court, being Rs. 1,000 only. *MEHERVANJI MANCHARJI v. PUJJA VELJI*. . . . 5 Bom., O. C., 147

11. — *Set-off—Deduction of amount of proceeds of goods not accepted*.—The plaintiffs consigned goods to the defendant, and drew a bill for Rs. 2,711-9-6 against them on the defendant in favour of the Chartered Mercantile Bank. The bill was accepted by the defendant, and, when presented for payment, was dishonoured. The bill was paid for honour by the attorney of the plaintiffs. The goods arrived, and (the defendant having refused to pay the bill) were sold by the plaintiffs, after notice to the defendant, at his risk, and realized Rs. 1,655-15-4. The plaintiff refused to hold a survey on the goods unless the defendant paid the amount of the acceptance. The plaintiffs

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 1 JURISDICTION—continued.

sued the defendant in the Small Cause Court for the amount of his acceptance, giving him credit for the proceeds of the goods and abandoning the excess. *Held* that the plaintiff's were not entitled to do so, as the claim on the bill was not brought within the jurisdiction of that Court by payment or admitted set-off. **SHORTT & ARDRE HARRIS**

[8 Bom., O. C., 53]

## 12. ———— Part payment—

*Set-off—but for balance of account*—The plaintiff advanced Rs15,000 against the defendant's grain consigned to Hong-kong, to be there sold on his account by the plaintiff's agents. The plaintiff subsequently gave credit to the defendant for Rs14,115-3-3, alleged to have been received by them as the proceeds of the sale, and sued him for the balance in the Bombay Small Cause Court, abandoning the excess so as to bring the claim within the Court's extended jurisdiction of Rs1000. The defendant disputed the correctness of the account sales forwarded by the agents at Hong Kong, and contended that the Court had no jurisdiction to try the case. The Judge, subject to the opinion of the High Court upon the facts as stated, struck the case out of the list for want of jurisdiction. *Held* that as both the plaintiff and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiff to the defendant, the receipt by the plaintiff of the amount, for which they gave credit in their particulars of demand was in the nature of a part payment, and that the suit was therefore on a balance of account, and within the jurisdiction of the Court of Small Causes. **EWART, LATHAM & Co v. MUHAMMAD SIDDIK**

4 Bom., O. C., 133

## (2) ARMY ACT

13. ———— Stat. 44 & 45 Vict., c. 58, ss 148, 151—*Act XV of 1882 s. 19—Leave to sue*—The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 41 & 45 Vict. c. 58 s. 151. **WALLIS & TAYLOR**

[L. L. R., 13 Cal., 37]

14. ———— *Presidency Towns Small Cause Courts Act (XV of 1882)—Army Act, 1881 (44 & 45 Vict., c. 58), s. 151—Army (Amendment) Act, 1888 (51 Vict., c. 4), s. 7—Leave to sue*—The jurisdiction given to Presidency Small Cause Courts by Act XV of 1882, s. 18, is not affected by 51 Vict., c. 4, s. 7. **WATTS & Co v. BLACKETT**

L. L. R., 18 Cal., 144

15. ———— *Presidency Towns Small Cause Courts Act (XV of 1882), cl. 2, s. 1, 19—Army Act, 44 & 45 Vict., c. 58, sub-s. 1, s. 151—51 Vict., c. 4, s. 7*—The words of s. 7 of 51 Vict., c. 4, amending sub-s. 1 of s. 151 of 44 & 45 Vict., c. 58 are meant to restrict the words "within the jurisdiction, etc." (found in sub-s. 1 of s. 151) to persons resident within it, so as to meet and exclude the case of persons casually

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

within the jurisdiction and not actually resident within it, and are limited to that purpose, and do not therefore affect the powers conferred by s. 19 of Act XV of 1882. **WALLIS & Co v. BAILEY**

[L. L. R., 18 Cal., 373]

## (c) DAMAGES FOR BREACH OF CONTRACT

16. ———— *Contract for shipment and delivery of goods—Divisible contracts—Construction of contract—Separate suits*—Where a contract provided for delivery of goods in two monthly shipments and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith, and it appeared that the total amount of the damages sustained by reason of the two breaches alleged, if added together, exceeded Rs2,000 whereas, if taken separately, they were less than that amount, *Held* that on the true construction of the contract the plaintiff was entitled to bring two separate suits for the damages sustained in respect of each shipment, and that therefore the Presidency Small Cause Court had jurisdiction. **VOLKART v. ABRAHAM SANKER**

[L. L. R., 18 Mad., 304]

## (d) DECREE, SUIT ON.

17. ———— *Suit on decree of Small Cause Court—Presidency Small Cause Courts Act, XV of 1882, ss 1 & 54*—A judgment creditor in the Court of Small Causes had not before the 1st July 1882 the right to sue in that Court on his judgment. **MIRWAZI NOWROZI v. ASHBAI**

[L. L. R., 8 Bom., 1]

## (e) IMMOVABLE PROPERTY

18. ———— *Question of title—Act IX of 1930, s. 91 (Act XI of 1892, s. 41)—Summons to show cause on what title occupier holds, refused leave of owner*—Upon a summons issued under section 91 of Act IX of 1930 by the Judge of the Small Cause Court to the occupier of a house to show by what title he claims to hold or occupy the same or part thereof, *Held* that the jurisdiction of the Small Cause Court was not ousted by the occupier appearing and showing as cause that which did not amount to an allegation of title in the occupier. *Held* also that the words in that section, "without leave of the owner," comprised a case where the original possession was with leave of the owner but was afterwards withdrawn by his vendee, the subsequent owner. **DADASHAI HIRANJEE v. ARVINDRAI**

10 Bom., 888

19. ———— *Act IX of 1930, ss 91-93—Difficult or doubtful question of title—Proof of the existence of a difficult or doubtful question as to the right to possession, bond fide raised by the person in possession, was held to be sufficient cause shown to justify a Presidency Small Cause Court in refusing a warrant of ejectment under*

## SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

s. 93 of Act IX of 1850. MUHAMMED ESUF SAHIB v. GEORGE . . . I. L. R., 4 Mad., 385

Merely assertion of a title to possession is not sufficient. MUHAMMED ESUF SAHIB v. GEORGE

[I. L. R., 4 Mad., 385

ANONYMOUS . . . I. L. R., 4 Mad., 389 note

20.

*Title to immoveable property—Act IX of 1850, ss. 25, 91—Act XXVI of 1864, s. 2—Practice—Leave to amend summons and plaint.*—In a suit brought under s. 91 of Act IX of 1850, the Bombay Court of Small Causes had no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit *Aliter*—if the suit were brought under s. 25 of Act IX of 1850, as extended by s. 2 of Act XXVI of 1864, and the value of the property in dispute did not exceed Rs 1000. In a case involving a question of adverse title, the plaintiff should be allowed to amend the summons issued under s. 91 of Act IX of 1850, so as to render it conformable with a claim under s. 25 of Act XXVI of 1864 if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff. NOWLA OOMA v. BATA DHURMAJI

[I. L. R., 2 Bom., 91

21.

*Act IX of 1850, s. 91—Equitable defence—Suit for ejectment.*—The plaintiff in 1879 took out a summons under s. 91 of the Presidency Towns Small Causes Courts Act, IX of 1850, calling on his nephew the defendant to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one N, to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to N and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment, dated April 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant, and agreed to pay rent for the same at Rs 25 a month. His defence was that the mortgage, the sale, and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution; that no money had passed between the parties; that the defendant had never been out of possession, and that the plaintiff now required the Court to assist him in turning his own wrong to his own advantage. At the hearing in the Court of Small Causes the defendant proposed to prove the above facts, and submitted that, under the circumstances, a *bona fide* question of title was raised which ousted the jurisdiction conferred on the Court by s. 91. The Court, however, refused to receive the evidence, and held that it had jurisdiction. On reference to the High Court,—Held that the defendant was entitled to set

## SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

up the defence which he had, and that it ousted the jurisdiction of the Court of Small Causes to proceed further with the action—inasmuch as such defence raised a question of adverse title, which, in suits under s. 91 of Act IX, 1850, that Court had not jurisdiction to decide. LUCKMIDAS KHIMJI v. MULJI CANJI . . . I. L. R., 5 Bom., 295

22.

*Act XI of 1882, s. 41—Landlord and tenant—Admission of tenancy—Suit in ejectment.*—The plaintiff, alleging that the defendant was his tenant at a monthly rental of Rs 2 and had refused to deliver up possession to the plaintiff, took out a summons against the defendant under s. 41 of the Small Cause Courts Act, XV of 1882. The defendant admitted the tenancy, but contended that he held under an unexpired lease for four years. The Judge of the Court of Small Causes was of opinion that a question of title was involved, and he dismissed the case on the ground that he had no jurisdiction to hear it. The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction. Held that the case was within the jurisdiction of the Small Cause Court. DAVIDAS HARJIVANDAS v. TRYABALLY ABDULLAH

[I. L. R., 10 Bom., 30

23.

*Presidency Towns Small Cause Courts Act (XI of 1882), ss. 22 and 41—Landlord and tenant—Suit to eject tenant—Tender and payment into Court—Transfer of Property Act (IV of 1882), s. 114—Costs.*—The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest, and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Courts. Held that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under Ch. VII, s. 41, of the Presidency Small Cause Courts Act, the plaintiff must pay the defendants' costs as between attorney and client under s. 22 of that Act. Held on appeal (1) that there, having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under s. 114 of the Transfer of Property Act; (2) that the suit not being cognizable by the Small Cause Court, s. 22 of Act XV of 1882 did not apply, an application under Ch. VII of that Act not being a suit under s. 22 thereof. KRISHNASAMI CHETTI v. NATAL EMIGRATION BOARD . . . I. L. R., 17 Mad., 216

24.

*Trespass to immoveable property—Act XI of 1882, ss. 18, 19, 38, 45.*—The plaintiff brought a suit in the Calcutta Court of Small Causes to recover damages for trespass to certain immoveable property of which he proved he was in possession; the defendant contended that such a suit was one for the determination of a right to, or interest in, immoveable property, and was therefore not maintainable in the Small Cause Court. Held the Court had jurisdiction to



# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 1 JURISDICTION—continued

enters a such a suit. *PEARLY MORTON GHOSHAL*  
v *HARRAY CHANDER GANGOOLY*  
[I. L. R., 11 Calc., 261]

## (f) INSOLVENCY

25 ——— *Madras Small Cause Court*  
— *Civil Procedure Code (Act XIV of 1852), ss 6-3*  
— *Presidency Small Cause Courts Act (XV of 1852) ss 2, 23* — The Madras Court of Small Causes has no jurisdiction in insolvency. The second paragraph of s. 8 of the Code of Civil Procedure 1852 which authorized the Local Government by notification published in the official Gazette to extend to the Presidency Small Cause Court certain portions of the said Code is repealed by the Presidency Small Cause Courts Act s. 2 of Act XV of 1852 and consequently the notification of the Governor in Council of Fort St. George dated 5th February 1852, conferring on the Madras Court of Small Causes jurisdiction in insolvency being repugnant to s. 8 of the Code of Civil Procedure 1852 as amended, if otherwise valid, ceased to have effect when Act XV of 1852 came into force. *LYNCH WALLER*  
[I. L. R., 6 Mad., 430]

## (g) LEGACY, SUIT FOR

26 ——— *Presidency*  
*Towns Small Cause Courts Act (XV of 1852)*  
*s. 19* — *Suit for legacy* — *Equitable jurisdiction* — A suit to recover a legacy brought in the Small Cause Court in which there is no allegation that the executors were in possession of sufficient assets to pay the legacy or that they had ever assented to the payment of the legacy is one for the administration of an estate and for an account, such a suit the Small Cause Court has no jurisdiction to try. *OKROY COOMAR BOYSENER* v *KOTLAH CHANDER GHOSAL*  
[I. L. R., 17 Calc., 367]

## (h) MAINTENANCE, SUIT FOR

27 ——— *Presidency Small Cause Courts Act (XV of 1852), s. 18* — *Presidency Small Cause Courts* constituted under Act XV of 1852 are not debared from entertaining suits for maintenance and based on contract or declaratory decree. *POKALA* v *MURUGAPPA*  
[I. L. R., 10 Mad., 114]

## (i) MOVEABLE PROPERTY

28 ——— *Titled huts* — *Act IX of 1850*  
*ss 89-90* — *Goods and chattels* — Titled huts were not "goods and chattels" within the meaning of s. 89 Act IX of 1850 and therefore could not be taken in execution under that section. Where titled huts had been seized under a decree of the Small Cause Court and a third party interpleaded under s. 89 of Act IX of 1850 and claimed the huts — *Held* that the Court, having no power to seize the huts, was right in dismissing the claim. *KALYANRAO SINGH* v *MOOLAS CHAND*  
10 B. L. R., 448. 20 W. R., 8

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 1 JURISDICTION—continued

29 ——— *Fixtures* — *Act IX of 1850*  
*s. 85* — *Seizure of goods and chattels in execution of decree* — *Engine in flour-mill* — *Landlord and tenant* — In a suit for damages for the removal of oil and flour mills and a steam-engine and to set aside in execution of a decree of the Calcutta Small Cause Court — *Held* that such things were fixtures, and not goods and chattels, within the meaning of s. 85 of Act IX of 1850 and therefore could not be seized in execution. The question whether fixtures are removable by a tenant as against his landlord has nothing to do with the question whether they are seizable in execution as goods and chattels. *MILLER* v *BRINDA*  
[I. L. R., 4 Calc., 948. 4 C. L. R., 460]

30 ——— *Presidency Towns Small Cause Courts Act (XV of 1852), s. 28* — *Presidency Small Cause Court Rules of Practice 43, 60-61* — *Titled huts* — "For the purpose of execution," *Meaning of* — *Question of title* — *Estoppel* — In execution of a decree of the Calcutta Small Cause Court against A, the judgment creditor attached certain titled huts which had been mortgaged by A to the plaintiff. Plaintiff thereupon filed his claim on the mortgage, in the Small Cause Court, but his claim was disallowed, that Court being of opinion that the mortgage was a collusive transaction and not genuine. The plaintiff then brought this suit on his mortgage making the judgment creditor as well as A defendants, and praying as against the judgment creditor that they be restrained from proceeding to a sale or other disposition of the mortgaged premises. A preliminary objection was taken that such a suit would not lie, and the suit was dismissed on that objection by the original Court. *Held* that the words of s. 28 (Act XV of 1852) "for the purpose of execution" must mean for all purposes of execution, inclusive of the purpose of determining objections made to a attachment. Titled huts for all the purposes of execution are therefore moveable property under that section. The Small Cause Court has full power and authority to determine the question of title under a mortgage over-attached property, and that question is therefore *res judicata*. *DEBO NATH BATABYAL* v *NEPPER CHANDER MUNDY*  
[I. L. R., 26 Calc., 776  
3 C. W. N., 590]

*Held* on appeal by the plaintiff reversing the above decision that titled huts are immovable property. That the words "for the purpose of the execution of the decree" in s. 28 of the Presidency Small Cause Courts Act (XV of 1852) only mean that, as between the judgment-debtor and the judgment-creditor property of this particular class (i.e., titled huts) shall, for the purposes of execution, be deemed to be moveable. That section does not contemplate that Small Cause Courts should deal, in execution proceedings, with questions of title or determine any right or interest in titled huts, at any rate as between the attaching creditor and the mortgagee of the judgment debtor. *Jesmit Solomon Bhamji* v *Malomed Khan*  
I. L. R., 13 Calc., 296 distinguished. That the Small

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

Cause Court had no jurisdiction to go into the question of the validity of the plaintiff's mortgage, and neither the appellant nor the respondents, either or both, could by consent or otherwise give it jurisdiction. That the plaintiff was not estopped from now saying that the Small Cause Court had no jurisdiction to deal with the matter. *DENO NATH BATABYAL v. ADHOR CHUNDER SETT* . . . 4 C. W. N., 470

(j) REGISTRATION ACT, 1866, ss. 52, 53.

31. ——— Petition and decree under Registration Act.—Small Cause Courts in the Presidency Towns had no jurisdiction to entertain petitions and make decrees under the provisions of ss. 52 and 53, Act XX of 1866. *IN THE MATTER OF NIL KAMAL BANERJEE v. MADHUSUDAN CHOWDHRY*

[6 B. L. R., 177

S. C. NIL COMUL BANERJEE v. MUDCOSOODUN CHOWDHRY . . . 14 W. R., 478

## (k) REVENUE.

32. ——— Matter concerning revenue —Trespass by Collector.—Action of Collector in preserving waste land.—Act IX of 1850, s. 25.—The Collector of Bombay, *bona fide* believing that certain land upon which a quarry had been opened by the plaintiff was Government waste land, by his servants forcibly stopped the quarrying operations of the plaintiff "for the purpose, the Collector stated in his evidence, of preserving the land for Government, as land from which revenue might in future be collected." In an action for trespass brought against him by the plaintiff, it was held that the act of the Collector was not "a matter concerning revenue" within the meaning of s. 25 of Act IX of 1850, and that the jurisdiction of the Small Cause Court was therefore not excluded. *NARAYAN KRISHNA LAUD v. NORMAN* . 5 Bom., O. C., 1

## (l) SET-OFF.

33. ——— Claims arising out of the same transaction.—Presidency Small Cause Court.—Jurisdiction.—Equitable right of set-off.—Civil Procedure Code (Act XIX of 1882), ss. 111, 126.—Presidency Small Cause Courts Act (XV of 1882), ss. 18, *expl.* 1, 24.—In a suit in the Calcutta Small Cause Court to recover Rs. 1,197 5 6, the price of goods sold and delivered, the defendants claimed to set off a sum of Rs. 2,738-4, being the loss which they alleged they had sustained by reason of the plaintiff's breach of contract, and claimed judgment for the sum of Rs. 1,540-14-6 after giving the plaintiff credit for the sum claimed by him. *Held* that the defendants' claim could be set off if it were one which the Small Cause Court had jurisdiction to try; the claim being to obtain credit for or receive the entire sum of Rs. 2,738-4, the Small Cause Court was without jurisdiction, and no set-off could therefore be allowed. *An*

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 1. JURISDICTION—continued.

equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction, although the claim sought to be set off is not within the provisions of s. 111 of the Code of Civil Procedure. *Quare*—Whether a decree could be passed in favour of the defendant for any balance which might be found due to him. *PROJENDRA NATH DAS v. BUDGE-BUDGE JUTE MILL Co.* . . . I. L. R., 20 Calc., 527

34. ——— "Admitted set-off"—Presidency Towns Small Cause Courts Act (XV of 1882), s. 18, *expl.*—Civil Procedure Code (Act XIX of 1882), s. 111.—The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148, but they deducted from this sum of Rs. 2,148, by way of set off, a sum of Rs. 600, which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to Rs. 1,548. The defendant admitted that the Rs. 600 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set off against the plaintiffs' claim. *Held* by MACPHERSON and TREVELYAN, JJ. (PETHERAM, C.J., dissenting), that the sum of Rs. 600 could not, under *expl.* 1 of s. 18 of Act XV of 1882, be set off, and that the suit must be dismissed as being beyond the jurisdiction of the Court. *RAMDEO v. POKHIRAM* . . . I. L. R., 21 Calc., 419

## (m) TITLE, QUESTION OF.

35. ——— Questions of title incidentally raised.—Act XV of 1882, s. 19, *cl. (g)*—Suit for rent—"Suits for determination of any right or interest in immovable property."—When a suit is brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction, because a question of title to immovable property is incidentally raised. It is the nature of the suit as brought by the plaintiff, and not the nature of the defence, that determines whether or not the Court of Small Causes has jurisdiction. *Cl. (g)* of s. 19 of the Presidency Small Cause Courts Act (XV of 1882) refers to suits brought expressly for the purpose of obtaining a decree determining a right or interest in immovable property, and cannot include a suit brought for moveable property, or money, in which a question of title may be raised by the defendant. The plaintiffs sued in the Presidency Court of Small Causes to recover fazendari rent from the holder of fazendari land. The defendant pleaded that no rent had been paid for the land since 1846, that the claim was time-barred, and that the plaintiffs had no title to the land in question. The Judges of the Court of Small Causes dismissed the suit, on the ground that the defence raised a *bona fide* question of title to immovable property which ousted their jurisdiction. *Held*, reversing the lower Court's decision, that the suit was cognizable by the Court of Small Causes. *BAPUJI RAGHUNATH v. KUTABJI EDULJI UMREGAR* . . . I. L. R., 15 Bom., 400

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 1 JURISDICTION—continued

### (a) TROVER.

36. ——— Action for detinue and trover *Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Presidency Small Cause Courts Act (XV of 1882).* *1.* — The plaintiff as executor of D sued the defendant in the Small Cause Court of Bombay to recover two Government promissory notes of the nominal value of Rs 2000, standing in the name of D. The defendant, who had been D's servant, alleged that the notes had been given to him by D as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D to the defendant. It was then contended on behalf of the plaintiff that assuming there was evidence of a gift such gift was incomplete inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that, so far as the jurisdiction of that Court was concerned the defendant had a right to retain the notes. *Held* by the High Court that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value. *JUDGMENT BY JUDGE COLAH - PRINCE OF COWASJI BECHA*

[L. L. R., 12 Bom., 573]

## 2. PRACTICE AND PROCEDURE.

### (a) GENERAL CASES

The practice and procedure of the Presidency Small Cause Courts is so different now from what it was under the former Acts IX of 1850 and XXVI of 1864 that most of the cases decided under those Acts have become useless as precedents. The procedure is now governed by Act XV of 1882 by which a great portion of the Civil Procedure Code has been extended to these Courts.

37. ——— Dismissal of suit for want of jurisdiction—*Costs—Form of decree—Where a plea to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form it should be stated that the suit abates or is dismissed "for want of jurisdiction."* In such a case the Court has power to award costs to the defendant. *FRECK v. HARRIS*

[L. L. R., 6 Calc., 418 - 7 C. L. R., 237]

38. ——— Power to restore case struck off for default in appearance—*Act IX of 1850, s. 42—A Court of Small Causes, constituted under Act IX of 1850, could, during the same day and at the same sitting of the Court, ex parte restore*

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 2. PRACTICE AND PROCEDURE—continued.

a case once struck out under s. 42, though the order for striking off may have been duly recorded. In such a case it would be open to the defendant to apply to set aside such *ex parte* order, and the sufficiency of the grounds of the application would be a question for the discretion of the Judge. *2113 CHUNDER HELLICK v. KISSEN DEAL OPADHYA*

[L. L. R., 1 Calc., 478]

### (b) LEAVE TO SUE.

39. ——— Practice as to granting leave to sue person out of jurisdiction—*Power of High Court to make rules as to Small Cause Court—Stat. 21 & 25 Vict., c. 191, s. 15—Civil Procedure Code (1882), s. 632—Presidency Towns Small Cause Courts Act (XV of 1882), s. 6, 14, cl. (a) and (c), 33—In 1835 the High Court made a rule under the Presidency Small Cause Courts Act s. 33 whereby it was declared that the granting leave to sue a defendant out of the jurisdiction under s. 13, cl. (a) and (c), of that Act was a non-judicial or quasi-judicial act within the meaning of that section, and might be done by the Registrar of the Court of Small Causes, Madras. *Held* that the rule was *ultra vires* and void. *RAJAM CHETTI v. DESHAYIA**

[L. L. R., 18 Mad., 238]

### (c) NEW TRIAL.

40. ——— Application for new trial—*Fresh evidence—Affidavits.*—A party who applies for a rule for a new trial and obtains it on particular materials, ought not to be allowed to go into fresh evidence with a view to strengthen his case when the rule comes on for hearing. If on hearing both parties the Court thinks further inquiry necessary, it can, of course, make such inquiry in such manner as seems most fit to it. When new trials are moved for on allegation of facts, it would be very convenient that a practice should be introduced of requiring the facts to be stated by affidavit, and in like manner the answer to be supported by affidavit. *MOONMOOCHY KONDLOO v. MADHUBHAM BEWOLLE* 15 W. R., 181

41. ——— *Presidency Towns Small Cause Courts Act (XV of 1882) (amended by 1 of 1885), Ch. 11, ss. 69 and 70—Jurisdiction—Where the plaintiff requested the Chief Judge of the Presidency Small Cause Court to deliver his judgment contingent upon the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882), but subsequently abandoned the exercise of such right before the question to be referred was formulated or a reference made, *Held* that the plaintiff was not thereby deprived of his remedies under Ch. VI of the Act, and could still make an application for a new trial. *Held* also that the meaning of s. 70 is that, in failing to give security, the party shall be deemed to have submitted to the judgment as final and conclusive within the meaning of s. 37 of Act I of 1893; that is to say, the judgment becomes final and conclusive, and as*

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 2. PRACTICE AND PROCEDURE—continued.

provided by Ch. VI of Act XV of 1882. *Held*, therefore, that the Small Cause Court had jurisdiction to entertain the application by the plaintiff for a new trial. *PROTAP CHUNDER SEN v. TUNSOOK DASS* . . . I. L. R., 23 Cal., 967

42. — Ground for new trial—*Want of jurisdiction*.—A new trial may be granted on the ground of want of jurisdiction in the Court, though such ground was not formally raised or recorded at the original hearing. *CHUNDRE CHURN DUTT v. EMDURSEE COWASSEE RIJNER*

[I. L. R., 8 Cal., 678; 11 C. L. R., 225]

43. — Question of evidence—*Power to reverse decree*.—Where the question is one of evidence, the judgment of the original Court can be reversed, and new trial directed only when such judgment is manifestly against the weight of evidence. *Sadasook Gambir Chand v. Kannayya*, I. L. R., 19 Mad., 96; followed. *SASSOON v. HURRY DAS BHUKT*

[I. L. R., 24 Cal., 455  
1 C. W. N., 44]

44. — *Presidency Towns Small Cause Courts Act (I of 1895)*, s. 37 and 38—*Powers of Bench sitting on application for new trial*.—*Question of evidence*.—The fourth Judge of the Presidency Small Cause Court, in a suit tried by him, delivered judgment for the plaintiff. The defendant applied under s. 38 of the Presidency Small Cause Courts Act (I of 1895) for a new trial, and the Judges (the first and fourth) on such application set aside the judgment, and dismissed the plaintiff's suit with costs, and on the plaintiff's application the Full Bench of the Small Cause Court refused to interfere. *Held* by the High Court that the Judges exercised the powers of an Appellate Court in setting aside the original decree, and exceeded the jurisdiction vested in them by s. 38 of the Act, such jurisdiction being a revisional jurisdiction only. *Held* also that, where the question is one of evidence, the judgment of the original Court could be reversed, and a new trial directed only when such judgment is manifestly against the weight of evidence. *Sadasook Gambir Chand v. Kannayya*, I. L. R., 19 Mad., 96, followed. *SASSOON v. HURRY DAS BHUKT* . . . I. L. R., 24 Cal., 455  
[1 C. W. N., 44]

45. — Difference of opinion between Judges as to allowing new trial.—In a case of difference of opinion between two Judges upon the point as to whether there should be a new trial, no rule can be granted. *JARDINE, SKINNER & Co. v. MONKEY* . . . 14 W. R., 312

46. — Application to set aside *ex-parte* decree—*Presidency Small Cause Courts Act (XV of 1882)*, s. 37—*Ex-parte* decree.—S. 37 of the Presidency Small Cause Courts Act (XV of 1882) does not apply to an *ex-parte* decree. An application to set aside an *ex-parte* decree passed by a Presidency Court of Small Causes falls within the

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 2. PRACTICE AND PROCEDURE—continued.

terms of s. 103 of the Code of Civil Procedure. *ROSHANLAL v. LACHMI NARAYAN*

[I. L. R., 17 Bom., 507]

47. — Power to reverse decree—*Presidency Towns Small Cause Courts Act (XV of 1882)*, s. 37—*Powers of Full Bench of Presidency Small Cause Court—Reversal of decree on question of fact*.—One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff. The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, s. 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree. *Held* by COLLINS, C.J., and SHPPHARD, J. (BEST, J., dissenting), that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction conferred by Act XV of 1882, s. 37, as the case was one on which different minds might not unreasonably have come to different conclusions. *SADASOOK GAMBIR CHAND v. KANNAYYA* . . . I. L. R., 19 Mad., 96

48. — Powers of Full Bench—*Presidency Towns Small Cause Courts Act (XV of 1882)*, s. 37—*Presidency Towns Small Cause Courts Amendment Act (I of 1895)*, s. 13—*Appeal*.—Act I of 1895, s. 13, does not empower the Full Bench of the Presidency Court of Small Causes to entertain appeals of questions of fact against the decree of one of the Judges of the Court. *SRINIVASA CHARLU v. BALAJI RAU* . . . I. L. R., 21 Mad., 232

49. — Second new trial.—It is competent to the Judges of the Calcutta Small Cause Court to grant a second new trial of the same case. *PURSON CHUND GOLACHA v. KAJOORAM*

[10 B. L. R., 355; 19 W. R., 203]

50. — Second application for new trial—*Presidency Towns Small Cause Courts Act (XV of 1882)*, s. 37—*Act IX of 1850*, s. 53.—The Judges of the Calcutta Small Cause Court have power to entertain in the same suit more than one application for a new trial. There is nothing in s. 37 of Act XV of 1882 prohibiting such a practice. It is in accordance with the practice of Courts in England to allow such applications. *Purson Chund Golacha v. Kajooram*, 10 B. L. R., 355; 19 W. R., 203, followed. *SURRUT COOMARI PASSESSE v. RADHA MOHUN ROY* . . . I. L. R., 22 Cal., 784

## (d) REFERENCE TO HIGH COURT.

51. — Question of law.—Only questions of law in suits can be referred. *MOHUN SING v. KARLEM GOISSA BEGUM* . . . 8 Mad., 57

The point of law referred should be expressly stated. *JARDINE, SKINNER & Co. v. MONKEY*

[14 W. R., 312]

52. — Question of fact—*Act XXVI of 1864*, s. 7—*Act IX of 1850*, s. 55.—The question whether or not cotton fabrics bordered

# SMALL CAUSE COURT, PRESIDENCY TOWNS—*cont. and*

## 2. PRACTICE AND PROCEDURE—*continued*

with silk, or having a portion of silk otherwise used in their manufacture are "silks in a manufactured or unmanufactured state wrought up or not wrought up with other materials," within the meaning of a 10 Act XVIII of 1864, was a question of fact to be decided on the evidence and not a question of law to be referred for the opinion of the High Court under Act IX of 1850 s. 5, and Act XXVI of 1864, s. 7. **LAKSHMIDAS HIRACHAND & G I P RAILWAY COMPANY** 4 Bom., O. C., 129

53 Order rejecting application for new trial—*Judges contingent on opinion of High Court*—The decision of a Small Cause Court rejecting an application for a new trial, but making such rejection contingent upon the opinion of the High Court, was not such a judgment as could be referred under s. 7 Act XXVI of 1864. **HALL & JOHNSON** 12 B. L. R., 34

See also **MA KIVTOH & GILL**

[12 B. L. R., 37 20 W. R., 358]

54—Reference to High Court—*Question for—New trial Application for—Difference of opinion between Judges—Contingent judgment*—An order rejecting an application for a new trial, subject to the decision of the High Court on certain point or points referred, is not a contingent judgment "within the meaning of a 69 of Act XV of 1852, nor can points of difference between the Judges at that stage form matter for reference. **KRISHNASWAMI & PRASAD DAS** I. L. R., 4 Cal., 298

Under the Acts of 1850 and 1864 the Judge in referring a point was bound to make his judgment contingent on the opinion of the High Court.

See **DOSABHAI KAVAJI & KHERABJI HORMASJI** [7 Bom., O. C., 180]

But now under the Act of 1882, s. 69 he can either give judgment contingent on the opinion of the High Court or reserve his judgment.

55—*Stating case on application for a new trial—Presidency Towns Small Cause Courts Act (XV of 1852), ss. 37, 39, and 69*—When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law and the majority, without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act. **SIRHANMAL & MENTRAMI MEDALI** [I. L. R., 20 Mad., 358]

56—*Presidency Towns Small Cause Courts Act (XV of 1852), ss. 37, 69—Application to Full Bench for new trial*—The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on the hearing of an application for a new trial made under Act XV of 1852, s. 37, such hearing not being the "hearing of a suit" within the

# SMALL CAUSE COURT, PRESIDENCY TOWNS—*continued*

## 2. PRACTICE AND PROCEDURE—*continued*

meaning of a 69 of that Act. **OAKHOTT & BRITISH INDIA STEAM NAVIGATION COMPANY**

[I. L. R., 15 Mad., 179]

57—*Presidency Small Cause Courts Act (XV of 1852), s. 69—Case stated for opinion of High Court—Mode of stating case—Question of law or usage*—In a suit brought in the Small Cause Court by the plaintiffs against the defendant for damages for breach of contract to deliver goods, the only dispute was as to the principle on which damages were to be assessed. The defendant paid into Court the sum of R779-10-0 At the close of the hearing, and before judgment was delivered, the plaintiffs' attorney informed the Chief Judge that he would require a case to be stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1852), unless the decree were in his favour. The Judge thereupon desired him to state the exact question of law he would wish to be referred, but he declared himself unable to do so until after judgment was delivered. He said he could not then say anything more than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. The Chief Judge thereupon stated the facts to the High Court, and referred the following general question for its opinion: "Whether, on the facts above set forth, the plaintiffs are entitled to recover from the defendant any and if so what, sum greater than R779-10-0 paid into Court by the defendant?" On the reference coming before the High Court, a preliminary objection was taken as to whether the reference was in proper form no question of law or usage having the force of law having been formulated for the opinion of the Court. *Held* (FARRIS, J. dissenting) that the reference should be sent back to be amended by stating the precise question arising in the case. **KALLI LEONHARD & GOUDLHAI MITCHARD** [I. L. R., 15 Bom., 378]

58—*Presidency Towns Small Cause Courts Act (XV of 1852), s. 69—Duty of the Judge in stating a case for opinion of the High Court—Question of law—Condition precedent to referring case*—Under s. 69 of the Presidency Small Cause Courts Act (XV of 1852), the existence of such a question of law or usage or construction as therein mentioned is a condition precedent to a reference to the High Court, and if no such question arises, the Small Cause Court has no authority to refer and the High Court no jurisdiction to deal with the reference. The duty of drawing up the case, where a reference is made, is imposed on the Court, and it is responsible for the form of the case. **ISHWARDAS TRISHOVANDAS & HALDAS BHADIDAS** I. L. R., 20 Bom., 779

59—*Presidency Towns Small Cause Courts Act (XV of 1852), s. 69—Requirement for reference, Time for making*—A party requiring a Judge of the Small Causes Court to make a reference to the High Court under

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 2. PRACTICE AND PROCEDURE—continued.

s. 61 of the Small Cause Courts Act (XV of 1882) must do so before the Judge has delivered his judgment. *BANK OF BENGAL v. VIABHOY GANGJI* [I. L. R., 16 Bom., 618]

60. ———— *Judgment contingent upon opinion of the High Court—Presidency Small Cause Courts Act (XV of 1882), s. 69—Civil Procedure Code (1882), ss. 373, 617, 618, and 619—Withdrawal of suit, Power to allow.*—The Small Cause Court passed a decree for the plaintiff, but contingent upon the opinion of the High Court. On the reference the High Court decided that, upon the plaint before the Court, the plaintiffs could not recover. *Held* that the Small Cause Court, on the receipt of the copy of the judgment of the High Court, was bound to enter judgment for the defendants. *YULE & Co. v. MAHOMED HOSAIN* [I. L. R., 24 Calc., 129]

61. ———— *Defect in reference—No question of law referred—Presidency Small Cause Courts Act (XV of 1882), s. 69.*—A reference can only be made under s. 69 of Act XV of 1882 for the opinion of the High Court upon some question of law or usage having the force of law, or upon the construction of a document if any such question arises in a suit or proceeding in which the amount or value of the subject-matter is over Rs500, and either party requires such reference. A Small Cause Court making a reference under s. 69 should state the question of law, or usage having the force of law, or the construction of a document upon which the opinion of the High Court is sought. *Quare*—Whether s. 617 of the Code of Civil Procedure is to be read as incorporated with s. 69 of the Presidency Small Cause Courts Act. *BENODE LALL ROY v. RIVER STEAM NAVIGATION COMPANY*. 1 C. W. N., 143

62. ———— *Deposit of security for costs—Act XXVI of 1864, s. 8.*—A case should not be referred to High Court by a Judge of the Small Cause Court until security has been deposited in accordance with s. 8, Act XXVI of 1864, by the party against whom the judgment has been given. If such party do not deposit the security "forthwith," he must be taken to submit to the judgment of the Small Cause Court. Where, however, a case was sent up without security for costs being deposited, and before the case was heard the plaintiffs tendered a sum as security, which the Judge refused to accept as being too late, the High Court, on the sum being deposited, and it appearing that the defendant would not be prejudiced by such a course, allowed the case to be heard. *FORNARO v. RAMNARAIN SOODEB* [14 B. L. R., 180: 23 W. R., 136]

63. ———— *Act XXVI of 1864, s. 8—Omission to deposit costs—Non-appearance.*—Where a case had been referred from the Small Cause Court, for the opinion of the High Court, at the request of the plaintiff, and they neither deposited any security for the cost of the reference, nor appeared in the High Court.—*Held*, the defendants, who appeared, were entitled to judgment and

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued.

## 2. PRACTICE AND PROCEDURE—continued.

to an order that the plaintiffs should pay the costs of reference and other expenses connected therewith. *DISSENT v. JUSTICES OF THE PEACE FOR THE TOWN OF CALCUTTA* [5 B. L. R., Ap., 24: 20 W. R., 349 note]

In a similar case, however, the reference was held not to be properly before the Court, and an application for costs by the defendant was refused. *RAJKUMAR PARAMANICK v. STEWART*. 5 B. L. R., Ap., 23

These cases were under the old procedure. Under Act XV of 1882, if security is not deposited, the party against whom the contingent judgment has been given is to be taken to have submitted to it.

64. ———— *Case referred at request of party—Non-appearance of such party before High Court—Costs.*—When a case is referred by the Small Cause Court, for the opinion of the High Court, at the request of one of the parties, and such party does not appear in the High Court, the decision must be given against him, whether security has been given for the costs of the reference and the amount of the judgment or not, and he must pay the cost of the reference. *WILLIAMSON v. ARAB ISMAIL KHAN* [11 B. L. R., 415: 20 W. R., 349]

65. ———— *Costs of reference to High Court—Costs—Practice—Presidency Towns Small Cause Courts Act (XV of 1882), s. 69—Civil Procedure Code (Act XIV of 1852), ss. 220, 617, 620.*—Under s. 620 of the Civil Procedure Code, the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the cost of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit. *NICOL v. MATHOORA DASS DUMANI* [I. L. R., 15 Calc., 507]

## (e) RE-HEARING.

66. ———— *Re-hearing, Application for—Practice—Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 71—Compliance with requirements of Act subsequently to application for re-hearing—Rule of High Court, No. 208—Limitation Act, 1877, s. 5.*—An application to the High Court for a re hearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882) must be in writing. A decree was passed against the petitioner by the Court of Small Causes on the 9th December 1887. On the 16th December Counsel on his behalf was instructed to apply to the High Court under s. 38 of Act XV of 1882 for re hearing of the suit. The Court was then engaged in re-hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, their Lordships, before rising, allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on, it appeared (1) that the petition had

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 2 PRACTICE AND PROCEDURE—continued.

not been signed and declared until the 17th December 1887, i.e. the day after the application had been made in Court. 2) that the affidavit in support of the application as required by s. 38 had not been filed until two days after the application in Court and 3) that the court fees which by s. 71 of Act XV of 1882 should be paid prior to the application, had not been paid until the 20th December 1887, i.e. four days after the application. Held that the application for a re-hearing must be rejected. The application although nominally made on the 16th December was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made. **IN RE JAINIS-ONDAS PRESHOTAMDAS**

[I. L. R., 12 Bom., 408]

## 87 ——— Presidency

*Small Cause Courts Act s. 38—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice—* On an application for a re-hearing by the High Court under s. 38 of Act XV of 1882 of a suit already heard and decided by a Judge of the Small Cause Court—Held by the High Court that, the evidence being of a very conflicting character and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused. S. 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order and such opinion should be a distinct opinion and not merely what is termed an inclination of opinion. **HASSANBHAY VITHAM v. BRITISH INDIA STEAM NAVIGATION COMPANY**

I. L. R., 12 Bom., 579

## 88. ——— Presidency

*Towns Small Cause Courts Act (XV of 1882), s. 38 71—Stamp—Petition insufficiently stamped—Deficiency of stamp, Power to make good after period of limitation allowed for presentation of application.*—On the 7th April being the last day on which such application could be made under the provisions of s. 39 of the Presidency Small Cause Courts Act, an application was made to the High Court under that section for the re-hearing of a suit which had been dismissed by the Small Cause Court. The application was made by petition at the rising of the Court, and not being a regular motion day the hearing of the matter was postponed till the 9th April. On that day on the application being brought on, it appeared that the petition only bore a 7 rupee stamp instead of one of the much larger value required by s. 71 of the Act. It was contended on behalf of the petitioner that the deficiency could then be made up,

# SMALL CAUSE COURT, PRESIDENCY TOWNS—continued

## 2 PRACTICE AND PROCEDURE—continued

and that he was entitled to have the application heard. Held that this could not be done. The eight days allowed by s. 38 expired on the 7th April and had the application been then considered, it could not have been received, but must have been rejected, as s. 71 requires the proper fee to be paid before the application can be received. Although the consideration of the application was deferred to the 9th April, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received. **NORENDRANATH BOSE v. ADESAK CHUNDEN ROY** I. L. R., 18 Cal., 445

## 89 ——— Marriage or

*failure of justice—Withdrawal before judgment of request to refer case for the opinion of the High Court.*—In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 60 of Act XV of 1882. The Judge was willing to do so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a re-hearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of law as applicable to the facts. Held that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to re-hearing. **VASANT TRICUMJI & CO. v. SOUTHERN MARATHA RAILWAY COMPANY** I. L. R., 17 Bom., 14

## 70 ——— Presidency

*Small Cause Courts Act (XV of 1882), s. 38—Dismissal for default—Remedy of plaintiff—Civil Procedure Code (1882), ss. 100, 102, 103—Appearance and non appearance of parties—Appearance by counsel or pleader to obtain adjournment—* S. 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under s. 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under s. 38, he must do so within eight days. If he professes to apply for an order setting aside the dismissal under s. 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, s. 11, art. 163). A suit and cross-suit between the same parties were on the board of a Judge of the Presidency Small Cause Court for hearing on the 23rd April 1888. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The motion of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and

## SMALL CAUSE COURT, PRESIDENCY TOWNS—concluded.

### 2. PRACTICE AND PROCEDURE—concluded.

B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a rehearing of both suits. The Court, regarding the decrees as *ex-parte* decrees, granted a rule for a new trial, which was made absolute. On appeal to the Full Court, the matter was referred to the High Court. *Held* that under the circumstances the suits were to be considered as having been disposed of under ss 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that, whether or not they, or either of them, fell within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under s. 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit. *SOONDERLAL v. GOORPRASAD*

[I. L. R., 23 Bom., 414]

## SMALL CAUSE COURT, RANGOON.

1. ——— Establishment of—*Act XXI of 1863—Act XI of 1865—Local Government.*—Act XXI of 1863, after establishing Recorder's Courts in British Burma, and fixing the limits of their jurisdiction, enacted by s. 10 that, "save as in this Act provided, no Court other than the Recorder's Court shall have or exercise any civil jurisdiction whatever within the limits for the time being fixed as aforesaid." Act XI of 1865, after declaring that the words "Local Government" should denote "the person authorized to administer the Executive Government in such part," enacted by s. 3 that the Local Government may, with the previous sanction of the Governor General in Council, constitute Courts of Small Causes under that Act at any place within the territories under such Government. By s. 3 the Judge of such Small Cause Court was to be appointed by the Local Government. Act XI of 1865 did not repeal s. 10 of Act XXI of 1863. By notification dated 1st September 1869 the Governor General appointed a Judge of the Small Cause Court at Rangoon, extended the provisions of Act III of 1864 to British Burma, and invested the Chief Commissioner of British Burma with the powers conferred on a Local Government by that Act. By notification of 2nd October 1869 the Governor General in Council sanctioned the establishment of a Court of Small Causes in Rangoon under s. 3, Act XI of 1865, extended the jurisdiction of the said Court to an amount not exceeding Rs. 1,000, and notified that the territorial jurisdiction would be co-extensive with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon. *Held* that the Small Cause Court at Rangoon so established was properly constituted. There is nothing to show that the words "Local Government," as used in Act XI of 1865, were intended to include a Chief Commissioner. *KO SHOAY DOON v. SHOAY GAN*

[8 B. L. R., 198; 14 W. R., 391]

2. ——— Jurisdiction of—*Foreign ship—Suit by sailor for wages—Mofussil Small Cause*

## SMALL CAUSE COURT, RANGOON—concluded.

*Court Act (XI of 1865), s. 8 (expl. a).*—Civil Courts have, as a general rule, jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction. A captain of a ship, who was at the time loading or unloading his vessel within the local limits of the Small Cause Court of Rangoon, was sued by one of his sailors (who had contracted to serve on a voyage from Bremerhaven to East India) for wages in the Small Cause Court of Rangoon. *Held* that the sailor's cause of action arose within the local limits of the Small Cause Court where the defendant was residing when the suit was brought, and that therefore the Small Cause Court had jurisdiction to hear the suit. *OLNER v. LAYEZZO*

[I. L. R., 10 Calc., 878]

## SMUGGLING.

See *STOLEN PROPERTY—OFFENCES RELATING TO*. . . 18 W. R., Cr., 63  
[19 W. R., Cr., 37]

## SNAKE-CHARMERS.

Death caused by—

See *MURDER.*

[3 B. L. R., A. Cr., 25; 12 W. R., Cr., 7  
I. L. R., 5 Calc., 351; 4 C. L. R., 580]

## SOLDIER.

See *CANTONMENTS ACT (III OF 1880), s. 14*. . . I. L. R., 3 All., 214

Residence of—

See *JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.*

[I. L. R., 1 All., 51]

See *SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN.*

[5 W. R., S. C. C. Ref., 21  
6 Mad., 83]

Army Act, 1881, s. 144—*Sub-Conductor, Ordnance Department—Service of summons—Civil Procedure Code, s. 468.*—A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover Rs. 183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, and his reason for such action. *Held* that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881. *ABRAHAM v. HOLMES*

[I. L. R., 11 Mad., 475]



**SOLICITOR**

See CASES UNDER ATTORNEY

See CASES UNDER ATTORNEY AND CLIENT.

See PRIVILEGED COMMUNICATION

Duty of—Attorney and client—It is the duty of a solicitor who has once undertaken a cause to carry it to a conclusion. 14 B. & L. R., 4 B. & L. R., P. C., 29

This was an observation made in some remarks addressed to the Judicial Committee to a solicitor who, having obtained a final order in an appeal, had abstained from carrying that order to its proper termination. It was intimated subsequently that it was not intended to have any judicial authority, being only a personal admonition addressed to the solicitor and having reference to the peculiar circumstances of his case. 4 B. & L. R., P. C., 51

Lien of, for costs

See COSTS—COSTS OUT OF ESTATE

[I. L. R., 10 Bom., 248]

**SOLITARY CONFINEMENT**

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[3 B. &amp; L. R., A. Cr., 49]

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[3 B. &amp; L. R., R. N., 4]

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3 B. &amp; L. R., A. C., 81

**SONTAL PERGUNNAHS.**

See SETTLEMENT OFFICER.

[6 C. L. R., 555]

See TRANSFER OF CRIMINAL CASE—GENERAL CASES

I. L. R., 18 Calc., 247

Appeals in cases from—

See APPEAL—REGULATIONS—REGAL REGULATION III OF 1872

[6 C. L. R., 555]

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17 W. R., 11

[I. L. R., 12 Calc., 536]

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL

[I. L. R., 3 Calc., 298]

I. L. R., 10 Calc., 781

Trial of suit for land in—

See JURISDICTION—SUITS FOR LAND—PROPERTY IN DIFFERENT DISTRICTS

[I. L. R., 4 Calc., 222]

See SUBORDINATE JUDGE, JURISDICTION OF

5 C. L. R., 128

**SONTAL PERGUNNAHS JUSTICE REGULATION (V OF 1863)**

s. 21.

See SONTAL PERGUNNAHS SETTLEMENT REGULATION, s. 6.

[I. L. R., 26 Calc., 239]

**SONTAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872).**

s. 3, 4—Act XXXVII of 1855, s. 2—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1857)—Suit exceeding ₹1,000 in value—Officer invested with power of a Civil Court—Court—The effect of a 2 of Act XXXVII of 1855 and a 2 of Regulation III of 1872 is to make the general and regulations, including the provisions of the Code of Civil Procedure, applicable in the Sontal Pergunnahs to suits exceeding ₹1,000 in value without any qualifications, provided that such suits are tried in the Courts established under the Civil Courts Act (XII of 1857). An officer in the Sontal Pergunnahs invested by Local Government with the powers of a Civil Court under a 4 of Regulation III of 1872 is a Court established under Act VII of 1857 with the meaning of a 3 of the Regulation. DURGAM MAHWAR & RAJESHOR DIO

[I. L. R., 18 Calc., 133]

1. s. 5—Jurisdiction of Civil Court—Settlement proceedings—During the time of the settlement in the Sontal Pergunnahs, certain proceedings were instituted, with the permission of the settlement officer, by the plaintiff to get possession of certain land, and came before the Subordinate Judge, by whom they were treated as a regular suit. The decision was not pronounced until the settlement had been completed. Held that a 5 of Regulation III of 1872 did not apply, and that, under the circumstances, the proceedings must be taken to have been regularly commenced, and that they might be completed as proceedings in the ordinary Civil Court. Held, further, that the proceedings were not necessarily irregular by reason of the fact that issues had not been framed under a 5 of the Regulation. SOJANOW, DASI & LAKSHMI SINGH. 11 C. L. R., 30

2. Appeal from settlement proceedings—Notification of the Lieutenant Governor of the 7th May 1872—Act XXXVII of 1855 s. 2—The officers appointed under a 2 of Act XXXVII of 1855, and not the settlement officers as such, are the persons empowered to try such suits as are referred to by Regulation III of 1872 a 5, and to certify issues to the Civil Courts under that section. The notification of the Lieutenant Governor, dated the 7th May 1872, being still in force, the settlement officers have no power to deal with such cases. Where a settlement officer referred certain issues to a Deputy Commissioner as a Civil Court under Regulation III of 1872, a 5, to be dealt with by him, and he gave a decision thereon and certified the same to the settlement officer, and it appeared that the Deputy Commissioner had previously been invested with the powers of a settlement officer, and the proceedings were subsequently returned to him for the settlement record to be amended

**SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872)**  
—continued.

in conformity with his findings, 'he being thoroughly conversant with all the facts of the case, and he accordingly passed an order and amended the record defining the areas to which the plaintiffs were entitled. On appeal against that order,—*Held* that, so far as he was acting as a Civil Court, the Deputy Commissioner had no jurisdiction to try the issues sent him or deal with the case, but that, inasmuch as he was vested with the powers of a settlement officer, and was fully competent as such to deal with the case himself, seeing that the parties could not in any way be prejudiced by the irregularity committed, the High Court would not interfere to set aside the order. *Held* also that, treating the action of the Deputy Commissioner as that of a settlement officer, the High Court had no jurisdiction to hear the appeal. **TARINI PERSHAD MISRA v. MAHAMUD CHOWDHRY**  
[I. L. R., 7 Cal., 378]

**S. C. TARINI PROSAD MISSEER v. HERRISH CHUNDER CHOWDHRY** . . . . . **8 C. L. R., 548**

s. 6 as amended by s. 24, Sonthal Pergunnahs Justice Regulation (V of 1893)—*Illegal Contract—Compound interest—“Unlawful” consideration. Meaning of.*—There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Pergunnahs to pry compound interest upon the amount borrowed is “unlawful” within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. Referring to the Sonthal Regulations, s. 6 of Regulation III of 1872 and s. 24 of Regulation V of 1893, it was held, in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest. **SHAMA CHARAN MISSEER v. CHUNI LAL MARWARI** . . . . . **I. L. R., 26 Cal., 238**

1. —ss. 11, 25—*Suit regarding matter decided by Settlement Court—Settlement officer, Finding of—Jurisdiction of Civil Court—Right of suit—Suit to set aside settlement and for possession.*—Where a suit was brought to establish, by avoiding the instrument under which he held, that the defendant was not a tenant of the lands in dispute, and to oust him from possession, and he had been recorded in the record-of-rights made by the settlement officer as a tenant of such lands,—*Held* that the suit was one regarding a matter decided by the Settlement Court “within the meaning of s. 11 of the Sonthal Pergunnahs Settlement Regulation (III of 1872),” and was therefore not maintainable. The introductory words of cl. 4 of s. 25 of the Regulation, which impose a personal limitation on the jurisdiction of the Civil Courts, apply to suits of all the three classes to which the clause relates; so that the bar to the jurisdiction can take effect on a suit in the third of the three classes only when it is both a “suit to contest the finding or record of the settlement officer,” and

**SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872)**  
—continued.

involves also the determination of “the rights of zamindars or other proprietors as between themselves.” **RAM CHURN SING v. DHATURI SING**  
[I. L. R., 18 Cal., 146]

2. —“Proprietor,” *Meaning of—Suit for establishment of lakhiraj title and amendment of record-of-rights—Jurisdiction of Civil Court—Onus of proof.*—In proceedings for settlement of rent and record of rights under the Sonthal Pergunnahs Settlement Regulation (III of 1872), certain lands claimed by the plaintiffs as lakhiraj were ordered to be recorded as mal and assessed with rent, the Commissioner of the Division stating that the plaintiffs might, if they chose, bring a suit in the Civil Court. The defendant (zamindar) obtained an *ex-parte* decree for rent on the basis of the jumma-bandi prepared in the said proceedings. In a suit brought to establish the plaintiffs' lakhiraj title and for an order directing the record-of-rights and jumma-bandi to be amended,—*Held* that a lakhirajdar is a “proprietor” within the meaning of s. 25 of the Regulation, and ss. 11 and 25 did not bar the jurisdiction of the Civil Court in this case. **Ram Charan Singh v. Dhaturi Singh, I. L. R., 18 Cal., 146**, distinguished. *Held* also that in the present case the onus was on the plaintiffs to prove their alleged lakhiraj title. **RAMRANJAN CHUCKERBUTTY v. NANDA LAL LAIK** . . . . . **I. L. R., 22 Cal., 473**

1. —ss. 24, 25—*Suit to set aside order of settlement officer—Non-publication of record-of-rights.*—Where, in December 1884, a suit was brought to set aside an order of the settlement officer under Regulation III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendant's title, and it was found that no record-of-rights had been published in accordance with s. 24 of the Regulation,—*Held* the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record-of-rights. **RAM NARAIN SINGH v. RAM RUNJUN CHUCKERBUTTY** . . . . . **I. L. R., 13 Cal., 245**

2. —*Suit to set aside order of settlement officer—Non-publication of record-of-rights—Onus of proof.*—In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Regulation III of 1872 and to recover khas possession of a mouzah, alleging that the defendant held the lands as chakran and that the services for which he held them had ceased, the defendant pleaded that the tenure was dur-mokurari, that the lands had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. The plaintiff sought to set aside the settlement on the ground of the non-publication of the record-of-rights and the fraud of the defendant, and both the lower Courts found that the record-of-rights had not been published by its being posted conspicuously in the village as required by s. 24. On second appeal it was contended on

# Sonthal Pergunnahs Settlement Regulation (III of 1872)

—concluded

behalf of the defendant that such publication was not essential but that it was open to the settlement officer to publish the record in such manner as might be convenient. *Held* that putting the record conspicuously in the village is an essential part of the publication, and that the suit was not barred by limitation. It was further contended that the onus of proving the tenure to be dur mokutari, which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree. *Held* that the onus of proving the validity and propriety of the settlement proceedings upon which he relied had been properly thrown on the defendant. **NADIA CHAND SINGH v. CHANDER SIKHAR SADR** L. L. R., 15 Cal., 785

## SOVEREIGN PRINCE.

Suit against—

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE PRINCES

See RES JUDICATA—COMPETENT COURT—GENERAL CASES

[L. L. R., 15 Mad., 484]

## SPECIAL OR SECOND APPEAL.

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[9 W. R., 471

11 W. R., 511

6 B. L. R., 333, 334 note

## 1. ORDERS SUBJECT OR NOT TO APPEAL.

1. ——— Law applicable to special appeals—*Civil Procedure Code, 1877, ss. 588, 591*—Second appeals to the High Court must either come within Ch. XLII or ss. 588 and 591 of Act X of 1877. *HIRDRAMUN JHA v. JINGHOOR JHA*

[I. L. R., 5 Calc., 711

2. ——— Order improperly adding plaintiffs to suit—*Civil Procedure Code, 1882, s. 591*.—An appeal lies, under s. 591 of the Civil Procedure Code, from an order improperly adding a person as a plaintiff in a suit. *GOOGLEE SAHOO v. PREMEE SAHOO*

I. L. R., 7 Calc., 148

3. ——— Order for attachment for contempt—*Civil Procedure Code, 1882, s. 591*.—An order for attachment for contempt is not an order in the exercise of the High Court's civil jurisdiction, and therefore does not come within the provisions of s. 591 of the Civil Procedure Code. *NATTAHOO v. NAROTAMDAS CANDAS*

I. L. R., 7 Bom., 5

4. ——— Decision of Political Agent in a regular appeal—*Political Agent of Southern Maratha Country*.—A special appeal lies from the decision of the Political Agent of the Southern Maratha Country passed in regular appeal. *NILOWA v. FAKIRAPPA*

6 Bom., A. C., 75

5. ——— Decision of the District Court on appeal from the Talukhdari Settlement Officer. —A decision of the District Court on appeal from the Talukhdari Settlement Officer is subject to second appeal to the High Court. *JAY-SANG DEYABHAI v. GOYABHAI KIKABHAI*

[I. L. R., 16 Bom., 408

6. ——— Order for penalty under Stamp Act—*Civil Procedure Code, 1877, s. 588—Act VIII of 1859, s. 365*.—A decision of a Judge directing a penalty to be enforced under the Stamp Act is not "an order as to a fine" within the meaning of s. 365 of Act VIII of 1859 (with which s. 588 of Act X of 1877 corresponds). S. 365 was not intended to apply to penalties under the Stamp Act, but only to fines which may be levied under the Code itself. *SOMAKA CHOWDRAI v. BHOBUNJOY SHAHA*

[I. L. R., 5 Calc., 311

7. ——— Order as to compensation for land—*Land Acquisition Act (X of 1870), ss. 15, 39*—Dispute as to right to compensation.—Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred. *ATUL BAI v. ARNO-POORNA BAI*

[I. L. R., 9 Calc., 338; 12 C. L. R., 409

## SPECIAL OR SECOND APPEAL

—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

8. ——— Order directing plaint to be returned for presentation in proper Court—*Civil Procedure Code, 1892, s. 57*.—A Munsif dismissed a suit, on the ground that, if it had been properly valued, it would not have come within his jurisdiction. The District Judge affirmed the Munsif's judgment, and directed the plaint to be returned for presentation to the proper Court under s. 57 of the Civil Procedure Code. This was not done. Held that a second appeal would lie. *JOYNATH ROY v. LALL BAHADOOR SINGH*

[I. L. R., 8 Calc., 126; 10 C. L. R., 146

9. ——— Order as to execution of decree under Rs. 5,000, but with interest, etc., exceeding Rs. 5,000—*Second Class Subordinate Judge—Subject-matter of suit under Rs. 5,000 and within jurisdiction*.—The plaintiffs obtained a decree in the Court of a Second Class Subordinate Judge for a sum less than Rs. 5,000, which with accumulations of interest subsequently exceeded Rs. 5,000. The plaintiffs applied in execution to recover the total amount. The application was rejected by the Subordinate Judge on the ground that the Court had no jurisdiction under s. 24 of Act XIV of 1869. On appeal, the District Judge made an order confirming the decision of the Subordinate Judge. The plaintiffs filed a second appeal in the High Court. Held that no second appeal lay to the High Court from such an order. The subject-matter of the suit was within the jurisdiction of the Subordinate Judge, and his jurisdiction continued, whatever might be the result of the suit, in all such matters in the suit as were within his cognizance, amongst which were matters in execution in the suit. The mere circumstance that the amount actually due by process of accumulation exceeded Rs. 5,000 could not oust him from the jurisdiction he hitherto had over the suit. *SHAMRAY PANDORI v. NLOJI RAMAJI*

[I. L. R., 10 Bom., 200

10. ——— Regular appeal heard ex-parte.—A special appeal lies from a regular appeal heard ex-parte. *TARA CHAND GHOSE v. ANAND CHANDRA CHOWDHRY*

[2 B. L. R., A. C., 110; 10 W. R., 450

*RAMSHET BIN PACHASHET v. BALKRISHNA BIN ABABHAT*

6 Bom., A. C., 161

*PABAN CHUNDER GHOSE v. CHUKKUN LALL ROY*

[20 W. R., 402

11. ——— Appeal from ex-parte decree—*Appeal improperly admitted*.—Where a decree is passed ex-parte in an original suit, the defendant has no right to a special appeal, even though his appeal has been entertained by the Civil Court. *CHIDAMBARA PILLAI v. KAMAN*

[1 Mad., 189

12. ——— Decree ex-parte.—A second appeal lies from an ex-parte decree of a lower Appellate Court. *MARUTI v. VITHU*

[I. L. R., 16 Bom., 117

## SPECIAL OR SECOND APPEAL

—continued

## 1 ORDERS SUBJECT OR NOT TO APPEAL

—continued.

13 — Order refusing to set aside *ex parte* decree—*Civil Procedure Code (Act X of 1877) s. 554* 622—After a decree had been made *ex parte* the defendant applied to have it set aside. The subordinate Judge refused the application but his order was reversed by the District Judge. *Held* that the order of the District Judge was final and *r.s.* 558, and that no second appeal would lie nor would the Court interfere under s. 622 of the Code. **AJAYKAR CHANDER MOOKERJEE v. MARTIN** . I. L. R., 8 Cal., 832

14 — Order of remand—*Order under s. 554, Civil Procedure Code, 1859*—A special appeal did not lie from an order of remand under s. 551, Civil Procedure Code. **COLLECTOR OF AGRA v. BULAKTA** . 3 Agra, 368

[Agra, F. B., Ed. 1874, 161]

15 — Order on inquiry in case of obstruction in execution of decrees—*Miscellaneous appeal—Civil Procedure Code 1859 s. 229*—Where an inquiry had been held under s. 229, Code of Civil Procedure and a regular appeal lay to the High Court and *r.s.* 231 a miscellaneous appeal could not be entertained. **GOOROO DOSS ROY v. PURCHAND BOSS** . 9 W. R., 337

16 — Order refusing to admit appeal presented after time—A special appeal will not lie against an order of the Judge refusing to admit a regular appeal presented after the expiration of the time provided for preferring appeals. **PHOOLNARAY v. BISHNUPERSHAD** . 3 Agra, 301

17. — *Case decided ex parte*.—A special appeal does not lie from the order of a Judge declaring that sufficient cause has not been shown to his satisfaction for presenting after time an appeal from an *ex parte* judgment of a Deputy Collector. **BODHOOWATH BISHN v. MONTU LAL MITTAR** . 7 W. R., 236

*Contra*, **SUDHODDHEY v. HUBONATH DAH** . [3 W. R., 87]

18 — Order dismissing appeal as presented out of time—*Civil Procedure Code, 1859 s. 554—Limitation Act 1877, s. 4*—An order dismissing (a) an appeal as being presented out of time and (b) the Limitation Act, 1877, is a "decree" (c) "final" within the meaning of s. 554 of the Code of Civil Procedure, 1859. A second appeal (d) *IMMOVABLE* from such order. **GRISIA DAS v. MAINTEN** . I. L. R., 12 Cal., 30

(e) *MOVABLE* refusal to restore appeal (f) *MOVABLE* appeal lies from the order (g) *MOVABLE* application to restore an (h) *MOVABLE* withdrawn (i) *MOVABLE* (j) *MOVABLE* (k) *MOVABLE* (l) *MOVABLE* (m) *MOVABLE* (n) *MOVABLE* (o) *MOVABLE* (p) *MOVABLE* (q) *MOVABLE* (r) *MOVABLE* (s) *MOVABLE* (t) *MOVABLE* (u) *MOVABLE* (v) *MOVABLE* (w) *MOVABLE* (x) *MOVABLE* (y) *MOVABLE* (z) *MOVABLE*

## SPECIAL OR SECOND APPEAL

—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

and 6 of Act XXIII of 1861 dismissing an appeal for non service of notice in consequence of failure to deposit the cost of issuing the same. **DISHODDHO CHATTERJEE v. BERNAR LAL MOOKERJEE**

[3 W. R., Mis., 23]

**INDU CHANDER BAROO v. GOFFER ALI KHAN** . [7 W. R., 338]

21. — Order re-admitting appeal dismissed for want of prosecution—*Civil Procedure Code, 1859, s. 347*—A special appeal lay from an order under s. 347 of Act VIII of 1859 re-admitting an appeal dismissed for want of prosecution. **DISHODDHO CHATTERJEE v. BERNAR LAL MOOKERJEE** . 3 W. R., Mis., 23

22. — Order rejecting application for re-admission of appeal dismissed for default of prosecution—*Proof of illegality of order—Civil Procedure Code, 1859, s. 347*.—A special appeal will lie from an order of a Judge rejecting an application for the re-admission of an appeal dismissed for default of prosecution, provided the order be shown to be illegal. **HALCO v. ARWAB** . [7 W. R., 81]

23. — Order rejecting application for re-admission of appeal dismissed for want of prosecution—*Civil Procedure Code, 1859, s. 347*—A special appeal lay from an order rejecting an application, under the provisions of s. 347 of Act VIII of 1859, for the re-admission of an appeal dismissed for default of prosecution, if it appears that the Court below has not exercised the discretion which it possessed under the section. The lower Appellate Court, without inquiry and without recording any reasons summarily refused an application under s. 347. The order of refusal was set aside in special appeal and the application remanded for proper consideration and disposal. **LALL SINGH v. ZAFER** . 6 N. W., 223

24. — Order dismissing appeal for non appearance of appellant—*Civil Procedure Code, 1859, s. 346*—A special appeal lay to the High Court from an order passed under s. 346 of the Civil Procedure Code, dismissing the appellant's regular appeal for non appearance of the appellant in person or by pleader. **DEEAPPA SETHI v. RAMANANDHA BHATT**, 3 Mad., 109 commented on **CHIVAPPA CHETTI v. NADARAJA PILLAI** . 6 Mad., 1

**DEVAPPA SETHI v. RAMANANDHA BHATT** . [3 Mad., 109]

25 — Order dismissing appeal for default—*Civil Procedure Code, 1859, s. 554*—No appeal will lie under s. 554 of the Code of Civil Procedure in a case where an appeal has been dismissed for default, inasmuch as an appeal cannot be brought within any of the grounds therein mentioned. **AKBAR ALI v. JAFFER ALI** . I. L. R., 23 Cal., 827

26. — Order refusing to admit appeal dismissed for default—*Application for re-admission*.—No special appeal lay to the High

# SPECIAL OR SECOND APPEAL

—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

Court from the order of a Judge refusing to re-admit an appeal dismissed for default by a Principal Sudder Ameen. The application for re-admission should be made to the Principal Sudder Ameen. *KISTO PERMADETT v. COWIE*. . . W. R., 1864, 315

27. — Order refusing to re-admit appeal—*Dismissal of appeal for default—Pleader asking for time to go on with a case—Civil Procedure Code, 1882, ss. 556, 558.*—The provisions of ss. 556 and 558 of the Civil Procedure Code do not apply, when the pleader for the appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed. A second appeal does not therefore lie in such a case from an order of the first Appellate Court refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure. *WATSON & Co. v. AMBICA DASI*. . . I. L. R., 27 Cal., 529  
[4 C. W. N., 237]

28. — Order refusing to confirm a sale—*Subsisting decree—Code of Civil Procedure (Act XII of 1882), ss. 558, 316, 244.*—A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by s. 558 of the Code of Civil Procedure, and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code. *Prosunno Kumar Sanyal v. Kalidas Sanyal, I. L. R., 19 Cal., 563*  
L. R., 19 I A, 166, referred to. *DOYAMOYI DASI v. SARAT CHUNDER MOJUMDAR*  
[I. L. R., 25 Cal., 175  
1 C. W. N., 656]

29. — Order affirming or reversing order confirming sale—*Civil Procedure Code, 1859, s. 257.*—No special appeal lay from the decision affirming or reversing an order under s. 257, Act VIII of 1859, confirming a sale. *JACKSON, J.* dissent. *KOOLDEEP NARAIN SING v. LUCKHUN SING*  
[B. L. R., Sup. Vol., 917: 9 W. R., 218  
ABDOOL KURELM v. OGHUN LAL  
[8 W. R., 119]

30. — Order confirming sale complained of for irregularity—*Civil Procedure Code, 1859, s. 257*—A defendant complained, under s. 257 of the Civil Procedure Code, of irregularity in conducting the sale of his lands taken in execution of a decree against him. The sale was confirmed by the Court of first instance, and the order was affirmed on appeal by the Civil Judge. *Held* that a special appeal to the High Court did not lie. *VARADHA REDDI v. VENKATA SUBBA REDDI* 5 Mad., 213

31. — Order of Appellate Court confirming a sale—*Civil Procedure Code, 1882,*

# SPECIAL OR SECOND APPEAL

—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

s. 312.—An order of an Appellate Court under s. 312 confirming a sale cannot be the subject of a second appeal. *NANA KUMAR ROY v. GOLAM CHUNDER DEY*  
[I. L. R., 18 Cal., 422]

32. — Order setting aside sale—*Order on regular appeal.*—The High Court has no power to entertain a special appeal from an order passed in regular appeal by a Judge setting aside a sale in execution, and reversing the order of a Munsif confirming such a sale. *RUGHONATH SINGH v. TOODEY SINGH*. . . 5 N. W., 19

33. — *Civil Procedure Code (1882), ss. 312 and 622—Superintendence of High Court.*—No second appeal lies against an order under s. 312 of the Code setting aside a sale. *Nana Kumar Roy v. Golam Chunder Dey, I. L. R., 18 Cal., 422*, followed, and the Court refused under the circumstances to interfere under s. 622. *AUBHOYA DASSI v. PUDMO LOCHUN MONDOL*  
[I. L. R., 22 Cal., 802]

*LACHMIPAT v. MANDIL KOER*  
[3 C. W. N., 333]

34. — *Order setting aside sale under s. 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code (1882), ss. 244 and 588.*—No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under s. 294 of the Civil Procedure Code, notwithstanding that s. 244 bars a separate suit in such a case; that s. 244, whilst it precludes a right of suit, does not enlarge the right of appeal which is limited strictly by s. 588. *BHAGBUT LALL v. NARAY ROY*  
[I. L. R., 21 Cal., 789]

35. — Order overruling objections to confirmation of sale—*Civil Procedure Code, 1859, s. 257.*—A judgment-debtor having preferred various objections to the Court of the Subordinate Judge which was executing the decree against him, his objections were rejected, and the Court proceeded to sell the property attached in execution. The judgment debtor then preferred an appeal to the Judge against the order which threw out his objections, but without expressly objecting to the confirmation of the sale. *Held* that the Judge was entitled to deal with the case as an appeal against the sale which had taken place before the appeal was preferred, and no further appeal therefore lay to the High Court. *SONAMONEE DOSSIA v. MOTEE SINGH*  
[4 W. R., 385]

36. — Order passed in appeal reversing lower Court's order setting aside a sale in execution of decree—*Civil Procedure Code, 1882, s. 588.*—Under the provisions of s. 588 of the Code of Civil Procedure, no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set

## SPECIAL OR SECOND APPEAL

—cont. and

## 1 ORDERS SUBJECT OR NOT TO APPEAL

—continued

aside on the ground of material irregularity *Gopi Kozir v. G. Lal* I L R, 21 Cal., 789

37 — Order made on application to set aside sale in execution where the auction purchaser is a benamidar for judgment-debtor—*Civil Procedure Code (1882) ss 244 and 311—Bengal Tenancy Act s 173*—Where the auction purchaser is a benamidar for the judgment-debtor in an application to set aside a sale under s 173 of the Bengal Tenancy Act and 311 of the Code of Civil Procedure a second appeal lies to the High Court from the order made on the application as the application is one under s 244 of the Code *CHAND MOHAR DASTA v. SANTO MOHAR DASTA* I L R 24 Cal., 707 [C W N 534]

38. — Order made under s 311 of Civil Procedure Code (1882) on application to set aside sale. No second appeal lies from an order made under s 311 of the Civil Procedure Code *NARAYAN v. BASULESHAN* [I L R, 23 Bom., 531]

39 — Order refusing to set aside a sale *appeal from an order remanding a case* Code of Civil Procedure (1882) s 588 cl 16 and 29 and s 562—Though orders under s 562 of the Code of Civil Procedure are appealable under cl 29 of s 588 yet the provisions of the latter section are subject to its last paragraph which says that orders passed under this section shall be final and therefore no second appeal lies from an order passed under s 588, cl 16 notwithstanding that it is an order passed by the lower Appellate Court remanding the case under s 562 inasmuch as the order was made in a case which was itself an appeal from an order allowed by s 588 of the Code *MATHURA NATH GHOSH v. NOBIN CHANDRA KENDU BISWAS* [I L R, 24 Cal., 774 [C W N, 674]

40 — Order refusing to set aside sale in execution of decrees—*Civil Procedure Code (1882) ss 2 and 588*—A judgment-debtor whose property had been sold in execution of a decree and purchased by the decree-holder applied that the sale be set aside on the ground that the person at whose instance execution had proceeded had been improperly brought on to the record. The application was rejected by the Court of first instance and an appeal by the applicant was dismissed. Held no second appeal lay to the High Court. *DAI AGAM PILLAI v. PASUPASAMI AYYAN* [I L R, 19 Mad., 20]

- (a) MORTGAGE—*Civil Procedure Code (1882) ss 311 and 588—Decree—Fraud in execution of the decree*  
 (g) PROFITS OF SUIT—*Auction purchaser a*  
 (r) RESY—*Application was made by the judgment-debtor and the auction*  
 (a) SPECIFIC PERSONAL party to have a sale set

## SPECIAL OR SECOND APPEAL

—continued

## 1 ORDERS SUBJECT OR NOT TO APPEAL

—cont. and

aside on the ground of irregularity in publication or conducting the sale as also on the ground of fraud. The Court of first instance rejected the application, and refused to set aside the sale. On appeal to the Subordinate Judge he reversed the decision of the first Court. On a second appeal to the High Court by the auction purchaser an objection was taken that no second appeal lay at his instance. Held that inasmuch as the application was under s 244 of the Civil Procedure Code, a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s 244 of the Code *HIRAJAL GHOSH v. CHUNDRA HATTO GHOSH* [I L R, 28 Cal., 639]

See *ENORA MOHAN PAL v. NITDA LAL DEY* [I L R, 28 Cal., 324]

and *MOTILAL CHAKRABARTY v. BISSICK CHANDRA BHAISAGI* I L R, 28 Cal., 328 note

42. — *Civil Procedure Code ss 2 and 244 311—Application to set aside sale on ground of fraud*—Where a judgment-debtor applied to have an execution sale set aside and alleges circumstances which if found in his favour would amount to fraud on the part of the decree-holder or auction-purchaser the case comes under s 244 of the Civil Procedure Code and a second appeal lies therein. *NEMAI CHAND KAVIRI v. DEVI NATH KANTI* [C W N, 691]

43 — Order of remand made under s 562 of Civil Procedure Code—*Order made in an appeal under s 588 from an order for a set-aside*—*meant under s 485*—Held that no appeal would lie from an order of remand made under s 562 of the Code of Civil Procedure when such order was itself made in an appeal under s 588 from an order under s 485 of the Code *MATHURA NATH GHOSH v. NOBIN CHANDRA KENDU BISWAS* I L R, 24 Cal., 774 followed *JHANDYA LAL v. SARMA LAL* [I L R, 21 All., 291]

44 — Order passed by Appellate Court on appeal from order granting a review of judgment—*Civil Procedure Code (1882) ss 64 629 632*—No second appeal lies against an order passed under s 639 of the Civil Procedure Code. An application was made by a plaintiff for review of a judgment dismissing his suit as against all the defendants, which application was granted. Against that order the defendants appealed, and the lower Appellate Court confirmed the lower Court's order granting the review as against one of the defendants, but set it aside as against the other defendants. Held that no second appeal lay against such order. *THAN SINGH v. CHUNDU SINGH* [I L R, 11 Cal., 296]

See *AUKHOY CHURN MOHANT v. SHAMANT LOCHAN MOHANT* I L R, 18 Cal., 788 and cases there cited.

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—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

45. — Order on application to review—*Civil Procedure Code, 1882, s. 629—Appeal from decree as amended—Practice.*—A second appeal lies against an order of a lower Appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882) where the appeal to the lower Appellate Court has been, not from the order allowing a review, but from the original decretal order itself as amended by the original Court on the application for review. *Than Singh v. Chundun Singh, I. L. R., 11 Cal., 296*, distinguished. *Semble*—The words of s. 629, “an order of the Court for rejecting the application shall be final,” *prima facie* apply to the Court which has passed the original decree, but in spirit they would seem properly to apply also to an order of an Appellate Court. *BALA NATHA v. BHIVA NATHA*. I. L. R., 13 Bom., 496

46. — Order on appeal affirming order granting application for review of judgment—*Civil Procedure Code, ss. 584, 629*—No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment. *GOPAL DAS v. ALAR KHAN*. I. L. R., 11 All., 383

47. — Order setting aside order granting review—*Civil Procedure Code, 1882, ss. 591, 623, and 629.*—No second appeal to the High Court lies from an order setting aside an order granting a review of judgment. *KANTI CHUNDER MUKERJEE v. SALIGRAM*. I. L. R., 24 Cal., 319

*IMAN BUX v. MAHOMED GORE*

[I. L. R., 24 Cal., 319 note

48. — Order imposing fine for avoiding of summons to attend as witness—*Civil Procedure Code, 1859, s. 365—Witness absconding—Right of appeal.*—By the words of s. 365 of Act VIII of 1859, the Legislature must have intended to give the person aggrieved by any order of a Civil Court imposing a fine on him as a punishment for keeping out of the way in order to avoid service of summons to attend as a witness the right of appeal to the High Court, whether the order was strictly referable to s. 160 of that Act or not. *IN RE GAJADHAR PRASAD NARAYAN SINGH*

[I. B. L. R., A. C., 187

*S. C. GUJADHUR PERSHAD NARAIN SINGH v. JUGDEO NARAIN*. 10 W. R., 238

49. — Order of a District Court under s. 26 of the Succession Certificate Act (VII of 1889)—*Succession Certificate Act, s. 19—Jurisdiction of High Court and District Court.*—S. 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case. *SABBA RAO v. PALANIANDI PILLAI*. I. L. R., 17 Mad., 167

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—continued.

## 1. ORDERS SUBJECT OR NOT TO APPEAL

—continued.

50. — Order on application for revival of suit—*Act LIII of 1860, s. 2—Civil Procedure Code, 1859, s. 378.*—The Zillah Judge reversed a decree in the plaintiff's favour on the ground that the suit was barred by the period of limitation prescribed by s. 30 of Act X of 1859; subsequently to this decree Act LIII of 1860 came into operation, which by ss. 1 and 30 provided that suits for causes of actions which had accrued before the 1st of August 1859 might be instituted within two years from that day; and by s. 2 that suits or appeals dismissed on the ground that they had not been commenced within the period prescribed by the Act of 1859 might be revived. The Zillah Judge rejected an application under the Act of 1860 to revive the suit. *Held* that this was not an application for a “review of judgment” within s. 378 of Act VIII of 1859, so to which the order of the Court was final; but being for the revival of a suit under the provisions of the latter law, his order was the subject of an appeal. *BUNGSHEDHUR MUNDUL v. PUDDOLOCHUN ROY*

[*Marsh.*, 38: W. R., F. B., 11  
1 Ind. Jur., O. S., 5: 1 Hay, 80

51. — Decree in rent suit under R100—*Bengal Rent Act (VIII of 1869), s. 102—Bengal Tenancy Act (VIII of 1885), s. 5—Effect of repeal.*—In a suit between landlord and tenant a decree was passed by the lower Appellate Court on the 28th of July 1885. Under the provisions of the Act then in force—namely, Bengal Act VIII of 1869, s. 102—a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885. *Held* that no appeal lay. *HURROSUNDARI DASI v. BROJOHARI DAS MANJI*. I. L. R., 13 Cal., 86

52. — Order in suit entertained without jurisdiction—*Subsequent Act passed giving jurisdiction—Appeal brought after passing of such Act.*—A suit had been dismissed by a lower Appellate Court on the ground that the Court of first instance had no jurisdiction to entertain such suit. An Act was subsequently passed declaring that all suits which had been similarly entertained without jurisdiction should be deemed to have been duly preferred. The plaintiff, after the passing of the Act, filed a special appeal, in which he urged that the decision of the Court of first instance was no longer illegal, and that the suit should be heard by the lower Appellate Court on its merits. *Held* (*per TURNER, J.*) that, as at the time the lower Appellate Court gave the decision from which the special appeal was presented the Act had not been passed, it must be held that its judgment was correct, and that a new law, passed since the decision, could not make that decision wrong, which was, and still is, with reference to the law then in force, right, and that



## SPECIAL OR SECOND APPEAL

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the appeal should be dismissed. *Held* (per SPARKES J.) that a special appeal would lie, the decision being contrary to a law in force at the time that the special appeal was instituted, which law the Court was bound to enforce. **BILDOO & LUCHMEY**

[5 N W., 108

53 ——— Order in execution of a decree — Under Act VIII of 1879 there was no special appeal from orders passed in execution of a decree. **ANONYMOUS** 1 Ind. Jur., O S., 50

**ANONYMOUS** 1 Ind. Jur., O S., 58

But there is now since the passing of Act XXIII of 1861

*See* **MAHOMED HOSSEIN & AZIZ ALLY**

[B. L. R., Sup. Vol., Ap., 1 Marsh., 298  
W R., F B., 83 2 Hay, 293

**BAGURAI & NIZAMUDDIN** 6 Bom., A. C., 205

**VARADANATH MUDALI & MANOHAR ANMAL**  
**VENKATA BALAKRISHNA CHETTI & M. ARAGUNALNA**  
**VALATH KRISHNA GOPALAN** 4 Mad., 32

54. ——— *Act XVIII of 1891 as 11 and 41 — Act VIII of 1879 as 237 263 and 872* A special appeal will lie from an order passed on appeal in relation to the execution of a decree. **MAHOMED HOSSEIN & AZIZ ALLY**

[B. L. R., Sup. Vol., Ap., 1 Marsh., 298  
W R., F B., 83 2 Hay 293

55. ——— Decree is suit on bond registered under s 53 Act XX of 1866. — No second appeal lay to the High Court against an order passed on an application for execution of a decree made in a suit under s 53 of Act XX of 1866. *Quære* Whether an appeal lay at all against such an order passed in proceedings taken in execution of such a decree. **SHRI BULLOY BHATTACHARJEE & BABURAM CHATTOPADHYA**

[I. L. R. 11 Calc., 189

56 ——— *Civil Procedure Code 1877 s. 241 — Reg. strat on Act 1866 s. 53.* — An application was made to a District Munsif on the 16th July 1879 to issue execution on a decree dated 6th November 1869 obtained on a bond registered under s. 53 of the Registration Act of 1868. He made an order refusing execution, the decree being, one passed, not in a regular suit, but in a summary suit, and governed by the period of limitation prescribed by art. 166, sch. II Act IX of 1871. On appeal the Subordinate Judge reversed the order of the Munsif holding that art. 167, sch. II of Act IX of 1871, applied. On application to the High Court — *Held* that as s. 53 of Act X of 1877 provided that orders passed in appeal from orders under s. 241 should be final no second appeal lay. **SURETA PRASADA RAO & VAISYA SANKARAN RAO** I. L. R., 1 Mad., 401

57 ——— Appeal from portion of decree disallowing objection. — *Civil Procedure*

## SPECIAL OR SECOND APPEAL

—continued.

## 1 ORDERS SUBJECT OR NOT TO APPEAL

—continued.

*Code 1892 ss. 541 551* — A preliminary objection taken by a respondent that no second appeal lies from so much of the decree of a Subordinate Judge as disallowed objections filed by the appellant under s. 561 of the Code of Civil Procedure was held to be without weight. **GANAPATI & SITHARANI**

[I. L. R., 10 Mad., 292

58 ——— Decision as to title to land — Appeal to High Court from decision of District Court on appeal. — *Madras Forest Act s. 10* — An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act 1882, on appeal from the decision of a Forest Settlement Officer. **KAMARAJ & SETHUPATHY OF STATE FOR INDIA** I. L. R., 11 Mad., 309

59 ——— Arbitration — *Civil Procedure Code ss. 521 522 and 592 — Execution of award — Appellate decree in accordance with award.* — By reason of s. 522 of the Civil Procedure Code where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in s. 571, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 592, and cannot be made the subject of second appeal. **PURENATH DEY & VOI & CHANDER DUTT 12 W. R., 93 and Raghoobai Dyal & L. S. vs Koor 12 C. L. R., 504** disallowed from. **VARADANATH & SADAPAL SEKHAR** I. L. R., 10 All. 8

60 ——— Order reviewing and setting aside order rejecting objection to execution of decree. — *Civil Procedure Code s. 629* — When a Munsif sets aside or renounces an order rejecting an objection to the execution of a certain decree and the District Court on appeal refuses to interfere, *Held* that no second appeal lay to the High Court. **PAPATTA & CHELINATH**

[I. L. R., 13 Mad., 195

61 ——— Order of Special Judge as to settlement of rents. — *Superintendence of High Court — Bengal Tenancy Act (VIII of 1855) ss. 104 cl. 2 105 106 108 — Rule 33 of the Rules made under the Act — Jurisdiction — Error of fact.* — *Civil Procedure Code (Act XIX of 1877) ss. 109 622* — The High Court has no jurisdiction to set aside a second appeal from or to interfere under s. 622 of the Code of Civil Procedure with an order of a Special Judge in regard to settlement of rents. **SHENWARAT KOER & DHARAT HOY**

[I. L. R., 18 Calc., 508

62 ——— Decision of Settlement Officer — Settlement of rent under Bengal Tenancy Act (VIII of 1855) s. 104. — No second appeal lies to the High Court from a decision of a Revenue officer settling rents under s. 104 of the

## SPECIAL OR SECOND APPEAL —continued.

### 1. ORDERS SUBJECT OR NOT TO APPEAL —continued.

Bengal Tenancy Act. *ACHHA MIAN CHOWDHRY v. DURGACHURN LAL* I. L. R., 25 Calc., 248 [2 C. W. N., 137]

63. ————— *Rent-suit—Bengal Act VIII of 1869, s. 102—Bengal Tenancy Act (VIII of 1885), s. 153—General Clauses Act (I of 1868), s. 6.*—The word “proceedings” in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety, that is, down to the final decree. A second appeal, therefore, to the High Court, on a question of the amount due as rent, will not lie when the suit was instituted previously to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. *Hurrosundari Devi v. Bhujohari Das Manji*, I. L. R., 13 Calc., 86, approved. *SATGHURI v. MUJIDAN* [I. L. R., 15 Calc., 107]

64. ————— *Appeal from order of District Judge—Bengal Tenancy Act (VIII of 1885), s. 153—Appeal in rent-suits.*—In certain rent-suits, the amount claimed being under Rs 100, the question was raised as to whether the plaintiff was entitled to the whole 16 annas of the rent or only to a 10 annas share thereof. Upon this point the first Court gave the plaintiff decrees for the full amount claimed, holding that the question was *res judicata*. Upon appeal the District Judge held that the question was not *res judicata*, and remanded the suits for trial on the merits. The plaintiff preferred a second appeal to the High Court. *Held* that, having regard to the provisions of s. 153 of the Bengal Tenancy Act, no appeal lay, as the question was not one relating to title to land or to some interest in land as between parties having conflicting claims thereto, nor was it “a question of the amount of rent annually payable by a tenant;” these words in the section meaning the total amount of rent annually payable in respect of a holding, and not the amount of rent which may be payable to any particular co-sharer in the property. *PRASANNA KUMAR BANERJEE v. SRINATH DAS* [I. L. R., 15 Calc., 231]

65. ————— *Appeal in cases under Rs 100—Bengal Tenancy Act (VIII of 1885), s. 153—Cesses, Suit for—Bengal Act IX of 1860, s. 47.*—A suit to recover cesses for an amount not exceeding Rs 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals. *MOHESH CHUNDER CHUTTOPADHYA v. UMATABA DEBY* . . . . . I. L. R., 16 Calc., 638

66. ————— *Order of Special Judge on appeal from settlement officer—Bengal Tenancy Act, Ch. X, ss. 104, cl. 2, 106, 107, and 108, cl. 2—Dispute as to entries in record-of-rights—Question as to status of raiyats—Civil Procedure Code, s. 622.*—Under Ch. X of the Bengal Tenancy Act, there is to be (1) a framing of the record-of-rights; (2) a draft publication for a period of one month, during which time objections

## SPECIAL OR SECOND APPEAL. —continued.

### 1. ORDERS SUBJECT OR NOT TO APPEAL —continued.

may be preferred; and (3) a final publication, previous to which publication “disputes” as to the correctness of the entries in the record-of-rights, other than entries of rents settled, are to be heard and decided. Under s. 107, the decisions of the settlement officer in all proceedings under the chapter are to have the force of decrees, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the settlement officer; but it is only in cases under s. 106 decided by the Special Judge on appeal from the settlement officer that a second appeal lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled. Where a decision of the settlement officer in a case under s. 104, cl. 2, of the Act dealt with the question of the status of the raiyats, and was passed before the record had been framed; and after the record had been framed, there was no dispute as to the correctness of any entry, except the entries of the rent settled,—*Held* that the order of the Special Judge on appeal from such decision of the settlement officer was not one passed in a case under s. 106, and therefore no second appeal lay from it to the High Court. *Sherbarat Koer v. Nirpat Roy*, I. L. R., 16 Calc., 596; *Lala Kirat Narain v. Palakdhari Pandey*, I. L. R., 17 Calc., 326, referred to. *Held* also that the case was not one which required the interference of the High Court under s. 622 of the Civil Procedure Code. *GORI NATH MASANT v. ADOITA NAIR*

[I. L. R., 21 Calc., 776]

67. ————— *Special Judge, Order of—Bengal Tenancy Act (VIII of 1885), ss. 106 and 108—Boundary dispute—Bengal Survey Act (Beng. Act V of 1875), Part I, s. 40—Settlement officer acting as survey officer.*—A second appeal only lies to the High Court under s. 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under s. 106 of the Act. No second appeal therefore lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a settlement officer acting as a survey officer under Part V of the Bengal Survey Act (Bengal Act V of 1875). *ISHAD ALI CHOWDHRY v. KANTA PERSHAD HAZAREE* . . . . . I. L. R., 21 Calc., 935

68. ————— *Bengal Tenancy Act (VIII of 1885), Ch. X, ss. 106 and 108—Record-of-rights, Dispute prior to the preparation of—Standard of measurement, Question of.*—In a proceeding under Ch. X of the Bengal Tenancy Act, a dispute arose between the parties, before the preparation of the record-of-rights, on the question of the local standard of measurement. The settlement officer decided the case in favour of the plaintiffs, and, on appeal to the Special Judge, the decision was upheld. *Held* that the order of the settlement officer was not one under s. 106 of the Bengal Tenancy Act, and under cl. 3 of s. 108 no second appeal lay to the High Court. *Gopinath*

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## 1 ORDERS SUBJECT OR NOT TO APPEAL

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*Masani v Adin Nath*, I L R., 21 Cal., 776, referred to *ANAND LAL PARIK v. SHIB CHANDER MUKERJEE*, I L R., 23 Cal., 477

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*Special Judge, Decision of—Revenue officer Decision of—Bengal Tenancy Act (VIII of 1885), ss. 105, 106 and 109 (3)—Record of rights, Dispute prior to completion of—Dispute about proposed entry or omission in the record—The respondent in the course of proceedings for the record of rights in the village of which he was the landlord applied for the settlement of fair rents. The appellant claimed to be a raiyat holding at a fixed rent. The respondent denied the validity of the claim. This dispute gave rise to a case between them which was decided by the revenue officer against the appellant who then appealed to the Special Judge with the result that the decision on that question was confirmed. At the time of the revenue officer's decision no record of rights had been completed under a 105 (1) of the Bengal Tenancy Act. On appeal to the High Court, the respondent took the preliminary objection that no appeal lay under s. 109 (3) as the case was not one under s. 106. Held that the decision of the revenue officer was a decision in a proceeding under s. 106 of the Bengal Tenancy Act, and that a second appeal lay from the decision of the Special Judge to the High Court. *Gopi Nath Masani v. Adin Nath*, I L R., 21 Cal., 776 and *Anand Lal Parik v. Shib Chander Mukerjee*, I L R., 23 Cal., 477, so far as they decide that a second appeal would not lie in such a case, overruled. *DEBENDRA KANTI GHOSH v. NOBIN KISSORI CHOWDHURI*, I L R., 24 Cal., 482*

I C W. N., 234

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*Bengal Tenancy Act (VIII of 1885), ss. 104, 106, 109—Special Judge under the Bengal Tenancy Act—Question of standard of measurement, area of lands, and liability to pay rent—Decision of the Special Judge—Under the terms of a 109 of the Bengal Tenancy Act VIII of 1885 a second appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession. *MATHEW MOHUN LALIT v. UMA SUNDARI DEBI**

I L R., 23 Cal., 34

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*Bengal Tenancy Act (VIII of 1885), ss. 105, 106, 109—Order of Special Judge as to standard of measurement of lands—An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under a 106 of the Bengal Tenancy Act, and therefore no second appeal lies from such an order to the High Court. *Mather Mohan Lalit v. Uma Sundari Debi*, I L R., 23 Cal., 34, and *Debu Kanti v. Nobin Kissori Chowdhuri*, I L R., 24*

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## 1 ORDERS SUBJECT OR NOT TO APPEAL

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*Calo.* 462 distinguished *NAROHARY JAIN v. HARI CHARAN PRASAD*, I L R., 23 Cal., 558

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*Bengal Tenancy Act (VIII of 1885), s. 153—Execution of rent decree valued at less than Rs 100—Civil Procedure Code (Act XIX of 1902), s. 617—Where the civil suit is a suit for rent valued at less than Rs 100 and the decree or order made in it does not divide a question relating to title to land or some interest in land as between parties having conflicting claims thereto or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant, no second appeal will lie in respect of an order made in execution proceedings relating thereto. *SATYAM CHARAN MITTER v. DEBENDRA NATH MUKERJEE**

I L R., 27 Cal., 434  
4 C. W. N., 229

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*Bengal Tenancy Act (VIII of 1885), s. 153—Determination of annual rent payable—Rate of rent—Where the High Appellate Court, in deciding the question as to the amount of rent annually payable found that the plaintiff had failed to prove the rate of rent claimed by him and therefore gave him a decree at the rate admitted by the defendant—Held that this was not a determination of the annual rent payable, and therefore no second appeal lay. *DEBENDRA NATH MITTER v. DEBENDRA NATH MUKERJEE*, I C W. N., 711*

74

*Suit for rent—Interest on rent—Bengal Tenancy Act (VIII of 1885), ss. 3, cl. (5), and 153—Interest on rent is not rent within the meaning of s. 3, cl. (5) of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is one relating to rate of interest and the value of the subject-matter of the suit is less than Rs 100. *KOTLA CHANDRA DEB v. TARAK NATH MANDAL**

I L R., 25 Cal., 571 note

75

*Bengal Tenancy Act (VIII of 1885), s. 153—Rent payable by the tenant not in issue in the appeal—Under s. 153 of the Bengal Tenancy Act, a second appeal lies in a rent suit whenever the decree of the Appellate Court has decided a question of the amount of rent annually payable by a tenant; it is not necessary that the amount of rent payable by the tenant should be a matter in issue in the second appeal. *RAJ CHAND GHOSH v. KUMUD MOHAN DUTTA CHAUDHURI**

I C. W. N., 667

In the same case on review, —Held the question relating to instalments, though it affects the question of interest on the rent, is not a question of the amount of rent annually payable within the meaning of s. 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the value of the suit is less than Rs 100, even if there is a question as to the instalment of rent. *Kotla Chandra Deb v. Tarak Nath Mandal*, I L R., 25

## SPECIAL OR SECOND APPEAL —continued.

### 1. ORDERS SUBJECT OR NOT TO APPEAL —continued.

*Calc.*, 571 (note), referred to. **RAI CHARAN GHOSE**  
**v. KUMUD MOHAN DUTTA CHOWDHRY**

[I. L. R., 25 Calc., 571  
2 C. W. N., 297]

76. ——— Appeal from District Judge  
—Proceeding to be adopted when a District Court  
erroneously returns an appeal petition for presenta-  
tion in High Court—*Civil Procedure Code*, ss. 57,  
588, 589, 622.—Certain members of a Moplah family  
sued the others in a Subordinate Court to recover  
their distributive share under Mahomedan law. The  
property to be divided was more than Rs. 5,000 in  
value, but the share claimed by the plaintiffs was  
less. The Subordinate Judge passed a decree,  
against which an appeal was preferred to the  
District Court, but the District Judge returned the  
appeal for presentation to the High Court. The  
appellants preferred a second appeal to the High  
Court against the decision of the District Judge,  
and also presented a petition praying for the revi-  
sion of his proceedings under the *Civil Procedure*  
*Code*, s. 622. Held that neither a second appeal  
(which did not lie in such a case) nor a petition  
under the *Civil Procedure Code*, s. 622, was the  
appropriate proceeding to be adopted by the ap-  
pellants, but an appeal as from an order made under  
the *Civil Procedure Code*, ss. 57, 582, which would  
lie under ss. 588, cl (c), and 589. The error of  
the appellants being one of form merely, the Court  
amended the second appeal as an appeal from an  
order of the District Court, and directed the District  
Judge to receive and dispose of the appeal from the  
Subordinate Judge. **KUNHIKUTTI v. ACHOTTI**  
[I. L. R., 14 Mad., 462]

77. ——— Suits under Chota Nagpore  
Landlord and Tenant Procedure Act (Beng.  
Act I of 1879), ss. 37, 137—*Arrears of rent and*  
*ejectment*, Suit for.—In suits instituted under  
Bengal Act I of 1879 for arrears of rent and eject-  
ment on account of the non-payment of arrears of  
rent, a second appeal lies to the High Court, this  
class of cases not being within the provision of s. 137  
of the same Act. **RAMJAN KHAN v. RAMAN**  
**CHAMAR** . . . . . I. L. R., 10 Calc., 89

78. ——— Suit for arrears of rent—  
*Chota Nagpore Landlord and Tenant Procedure*  
*Act* (Beng. Act I of 1879), ss. 37, 38, 47, 49-56,  
62-67, 76, 93, 135, 137, 144—*Civil Procedure Code*  
(Act XIV of 1882), ss. 3, 4, 534.—No second appeal  
lies in a suit for arrears of rent brought under the pro-  
visions of the Chota Nagpore Landlord and Tenant  
*Procedure Act* (Bengal Act I of 1879). The cases of  
**Ramjan Khan v. Raman Chamar**, I. L. R., 10 Calc.,  
89; 11 C. L. R., 480, and **Priag Nath Sah Deo v.**  
**Muri Munda**, I. L. R., 24 Calc., 249, so far as they  
held that a second appeal did lie in cases of this  
nature arising under Bengal Act I of 1879, were  
wrongly decided. **KHEDU MAHTO v. BUDHUK**  
**MAHTO** . . . . . I. L. R., 27 Calc., 508  
[4 C. W. N., 383]

## SPECIAL OR SECOND APPEAL —continued.

### 1. ORDERS SUBJECT OR NOT TO APPEAL —concluded.

*Contra*, **PRIAG NATH SAHA DEO v. MURA MUNDA**  
[I. L. R., 24 Calc., 249]

### 2. RIGHT OF APPEAL.

79. ——— Appeal by one defendant  
against another.—A special appeal cannot be en-  
tertained by one defendant against another. **RAMES-**  
**SUR GHOSE v. AZEEM JOARDAR** . 17 W. R., 378

80. ——— Right of parties not appeal-  
ing from first Court's decision—*Ground of*  
*appeal*.—Parties who did not appeal from the deci-  
sion of the first Court cannot bring a special appeal  
against the decision of the lower Appellate Court on  
the ground that the decision of the first Court pre-  
judiced their rights. **POYKANT RAM SAHOO v.**  
**POORNO CHUNDER DASS**

[W. R., 1864, Act X, 97]

81. ——— Right of defendant not  
appearing as respondent on appeal.—A de-  
fendant who obtains a judgment in his favour in the  
Court of first instance, and who, on appeal by the  
plaintiff, does not appear at the hearing of the ap-  
peal or present a petition for a re-hearing, may, under  
Act X of 1877, present a second appeal against the  
decree of the lower Appellate Court. *EX-PARTE*  
**MODALATHA** . . . . . I. L. R., 2 Mad., 75

82. ——— Party dissatisfied with find-  
ings in judgment—*Civil Procedure Code* (Act X  
of 1877), ss. 540 and 584.—An appellant who has  
obtained a decree setting aside the decision of the  
Court of first instance is not entitled to a further  
appeal to the High Court, on the ground that he is  
dissatisfied with some of the findings recorded in the  
judgment of the lower Appellate Court, an appeal  
from an appellate decree under s. 584 being strictly  
restricted to matters contained in the decree alone.  
**KOYLASH CHUNDER KOOSARI v. RAM LALL NAG**  
[I. L. R., 6 Calc., 206]

### 3. ADMISSION OR SUMMARY REJECTION OF APPEAL.

83. ——— Summary rejection of memo-  
randum—*Civil Procedure Code*, ss. 54, 543, 551,  
582, 584—*Reasons for rejection*.—*Per EDGE, C.J.*  
—A Judge to whom a memorandum of appeal from  
an appellate decree is presented for admission is en-  
titled to consider whether any of the grounds men-  
tioned in s. 584 of the Code of Civil Procedure in fact  
exist and apply to the case before him, and, if they do  
not, to reject the memorandum of appeal summarily.  
S. 551 of the Code of Civil Procedure applies to  
appeals which have been admitted. *Per AIKMAN, J.*  
—When a memorandum of appeal is summarily re-  
jected, whether under s. 543 or under s. 54 read with  
s. 582 of the Code of Civil Procedure, the reasons for  
such rejection should be recorded: *sed quare* whether,  
unless it appears from the memorandum of appeal  
taken by itself that a second appeal does not lie, a

## SPECIAL OR SECOND APPEAL

—continued

## 3. ADMISSION OR SUMMARY REJECTION OF APPEAL—concluded

second appeal can be summarily rejected, and should not rather be dealt with under s. 51 of the Code *Deest*—That a ground of appeal to the effect that the lower Appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 54 of the Code of Civil Procedure. *RUP KHASAD v. RAJNATH*

[I. L. R., 15 All., 367]

84. — Confirmation of decree in effect—*Civil Procedure Code* (1852), s. 551—The decision of the Full Bench in *Inturrogangur v. Seshayyengar* 1 L. R., 18 Mad., 213, where it was held that the jurisdiction of a Court of first instance to amend a decree under s. 206 of the Civil Procedure Code is ousted by the confirmation of that decree on appeal applies equally to second appeals dismissed under s. 51 of the Code and to second appeals tried after notice to the respondent. *MUSI SAMI NAIDU v. MUTHUSAMI PEDI*

[I. L. R., 23 Mad., 293]

## 4. SMALL CAUSE COURT SUIT.

## (a) GENERAL CASES.

85. — Frame of suit—*Civil Procedure Code*, s. 556—For the purpose of determining whether a second appeal lies or is prohibited by s. 186 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance. *KIAM-UD-DIN v. RAJJO*

[I. L. R., 11 All., 13]

86. — Cases in which appeal is taken away—*Act XXIII of 1861* s. 27—*Civil Procedure Code*, 1859 s. 557—S. 27, Act XXIII of 1861, took away special appeal in all three cases that were expressly included to them, thus overriding s. 337, Act VIII of 1859. The provision applied in execution of decree as well as in suits themselves, and to suits and proceedings in execution commenced before 1861, or even before 1859. *RAM JAIJI CHATTERJEE v. RAJJI MCHER DOSTER*

[8 W. R., 321]

*MORABUTKOOSISSA BEGUM v. OJIER JENADAR*

[8 W. R., 107]

*SOORJO COOMAR SYKMA LOY v. KRISHNO COOMAR CROWHAT*

[13 B. L. R., 224; 14 W. R., F. B., 30]

87. — Order in execution of decree—*Suit brought before Act XXIII of 1860*—No special appeal lay from a regular appeal from an order made in execution of a decree passed in a suit of a nature cognizable by a Small Cause Court, though the suit was instituted before the passing of Act XXIII of 1860. *GURA CHAND MISHRA v. BOY KASTO NARAIN SINGH*

[13 B. L. R., F. B., 281; 20 W. R., 431]

## SPECIAL OR SECOND APPEAL

—continued

## 4. SMALL CAUSE COURT SUITS—continued

*BRICKER SINGH v. NAGESHAR NATH*

[I. L. R., 2 All., 112]

88. — *Act XXIII of 1861*, s. 27—*Execution proceedings arising out of decision in regular appeal*—S. 27, Act XXIII of 1861, barred a special appeal in execution proceedings arising out of decisions passed on regular appeal in suits of a nature cognizable by Courts of Small Causes. *ANUND CHUNDER LOY v. SIBBI GURJI MISHRA*

[8 W. R., 113]

*DEBKE PRASHAD SINGH v. DELAWAR ALI*

[12 W. R., 69]

89. — *Civil Procedure Code* s. 595—*Orders in execution of decrees in Small Cause suits*—No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 100. *ATHALA v. SCHRANNA*

[I. L. R., 13 Mad., 118]

90. — *Order in execution of decrees in suit cognizable by Small Cause Court*—Where the original suit is a suit of the nature cognizable in Courts of Small Causes and the subject-matter of the suit does not exceed Rs. 100 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto. *Harakh v. Ram Sarup*, 1 L. R., 12 All., 579, approved. *See Bulloo Bhat's charge v. Beharum Chaitopadhyay*, 1 L. R., 11 Cal., 169, and *Arthala v. Sathanna*, 1 L. R., 12 Mad., 116, referred to. *DIN DAYAL v. PATRA KHAN*

[I. L. R., 19 All., 431]

91. — *Suit of the nature cognizable in Courts of Small Causes—Transfer of decrees—Civil Procedure Code* ss. 223, 228, 595—Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 100 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. *Nasser Hussain v. Keesa Mal*, 1 L. R., 13 All., 551, approved. *HARAKH v. RAM SARUP*

[I. L. R., 13 All., 579]

92. — *Suit of the nature cognizable in Court of Small Causes—Civil Procedure Code*, ss. 650, 623—*Superior's sentence of High Court*—For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 22-14-0, the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above Rs. 100 and the Munsif's order having been upheld in appeal by

# SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

the District Judge, revision of both orders was applied for in the High Court. *Held* that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge.

NAZAR HUSAIN v. KESRI MAL

[I. L. R., 12 All., 581]

93. ———— *Suit of nature cognizable in Courts of Small Causes—Execution of decree—Transfer of decree for execution—Civil Procedure Code (Act XIV of 1882), ss 223, 224, 225, 556*—A suit not exceeding Rs 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif under ss. 223 and 224 of the Civil Procedure Code: the Munsif passed an order in execution, and the order was confirmed in appeal. *Held* that the words "suit of the nature cognizable in Courts of Small Causes" in s. 586 of the Code is equally applicable, whether the suit be brought in a Court of Small Causes or in any other Court, that s. 586 controls s. 228 in a case of this kind, and no second appeal would lie from the Munsif's order. *Harakh v. Ram Sarup, I. L. R., 12 All., 579*, cited and approved. LALA KANDHA PERSHAD v. LALA LAL BEHARI LAL

[I. L. R., 25 Cal., 872]

See SHYAMA CHARAN MITTER v. DEBENDRA NATH MUKERJEE . . . I. L. R., 27 Cal., 484  
[4 C. W. N., 269]

94. ———— *Case wrongly decided to be not cognizable by Civil Court—Act XXIII of 1861, s. 27*.—S. 27, Act XXIII of 1861, which barred a special appeal in suits below Rs 500, as being of a nature cognizable by a Small Cause Court, did not apply to a case in which the lower Appellate Court had wrongly decided that the case was not cognizable by any Civil Court. GURKEPOOLAN v. SYEPOOLAN . . . 7 W. R., 41

95. ———— *Suit instituted in ordinary Civil Court, though cognizable by Small Cause Court—Civil Procedure Code, 1877, s. 586—Questions incidentally arising*.—S. 586 of the Code (if Civil Procedure precludes a second appeal in a suit for damages under Rs 100, although the suit has been instituted in the District Munsif's Court and not in a Court of Small Causes, and although a question of title has been raised by the defendant and decided. *Per* MUTTUSAMI AYYAR, J.—The question what is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Civil Procedure Code has reference to the mode of adjudication, and not to the forum, and the fact that the suit is instituted in the District Munsif's Court, and not in a Court of summary jurisdiction makes no difference for the purposes of that section. If the matter adjudicated on in a suit is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction only for the purpose and object of that suit. MANAPPA MUDALI v. MCCARTHY

[I. L. R., 3 Mad., 182]

# SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

96. ———— *Civil Procedure Code, 1882, s. 586*.—Where a suit, though one cognizable by a Small Cause Court, was instituted and dealt with in the ordinary Civil Courts, it was contended that a second appeal would lie. *Held* that no second appeal would lie. A small cause is such wherever it is instituted, and the nature of the cause not being variable in any way according to the Court in which it is brought, the circumstance that it has been instituted in an ordinary Civil Court and dealt with there would not for that reason admit of a second appeal which in such a case is expressly excluded by s. 586 of the Code of Civil Procedure (Act XIV of 1882). KALIAN DATAL v. KALIAN NAWAR

[I. L. R., 9 Bom., 259]

97. ———— *Suit transferred to regular side—Civil Procedure Code, s. 595—Provincial Small Cause Courts Act (IX of 1887), s. 23*.—A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of the Civil Procedure Code, s. 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under the Provincial Small Cause Courts Act, s. 23, on the ground that the suit involved questions of title. A second appeal therefore does not lie in such a case. MUTTUKABUPPAN v. SELLAN

[I. L. R., 15 Mad., 98]

98. ———— *Question of jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646B—Civil Procedure Code Amendment Act (VII of 1888), s. 60*.—Notwithstanding s. 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under s. 616B of the Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *Held*, on a second appeal to the High Court, that s. 646B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction, it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void. SURESH CHUNDER MAITRA v. KRISTO RANGINI DAS

[I. L. R., 21 Cal., 249]

## (b) ACCOUNT.

99. ———— *Suit for balance of account—Act XXIII of 1861, s. 27—Suit in Civil Court in local jurisdiction of Small Cause Court*.—Where a suit for a balance due on account of rents collected from the plaintiff's zamindaris by the defendant's

## SPECIAL OR SECOND APPEAL

—continued—

## 4. SMALL CAUSE COURT SUIT—continued

Further action as agent of the plaintiffs for an amount under P.O. was not certainly by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lay to the High Court, a 27 of Act XXIII of 1911 only applicable to a suit which is properly brought in a Civil Court because there is no Small Cause Court having jurisdiction to try it. *DIREKTAH NARAYAN SINGH v. MURARI MOHTY GHOSH*. [I. L. R. 1 Cal., 123. 24 W. R., 478]

100.—Suit against agent for account.—Suit for account of an agent for default of account. Plaintiff a talukdar sued his late husband's agent for the delivery up of certain account papers and documents for an account of his agency and in default of account. P.O. as damages. He did this because it was of a nature coming by a Small Cause Court, and that consequently no special appeal would lie. *HARSH NARAYAN ROY CHOWDHURY v. JOY DEBORA DAS*. [2 C. L. R., 17]

( ) AWARD.

101.—Decision on award.—Award of a sum of money and costs.—When the plaintiff's suit for an award is as to its nature and value cognate to a Court of Small Causes, no special appeal lay to the High Court against the decree of an ordinary Civil Court in respect of such award. *BAIT v. NARAYAN DAS*.

[4 B. L. R., Ap., 62-13 W. R., 253]

102.—Suit on award.—Award dealing with matters not within cognizance of Small Cause Court.—Act XXIII of 1911, s. 27.—G and E referred to arbitrators to decide between them regarding the partition of their paternal estate. The award found that a sum of Rs. 25 was due by G to E, and contained other provisions which could not be dealt with by a suit in a Small Cause Court. Held that a suit to recover the money due under the award could not be brought in the Small Cause Court, and that s. 27, Act XXIII of 1911, therefore did not bar a special appeal. *GARGI KAKAI v. RAN SAKAI*.

[1 M. W., 157]

(2) CONTRACT

103.—Suit to recover collections from co-sharer.—Agreement to pay share to co-sharers.—A suit by a co-sharer to recover from the defendant collections which are in his charge and which he is under agreement to pay to the other co-sharers is a suit for debt under a contract, and, if the sum Rs. 100, is cognizable by a Small Cause Court. *ARI AKHAR v. GOWDARI RAY*. [10 W. R., 79]

104.—Suit against agent for money.—Money received for plaintiff.—Act XXIII of 1911, s. 27.—Is a suit to recover the balance, unaccounted for of the plaintiff's money in the hands of the defendant, who had been employed as a law agent on a salary to conduct and look after the plaintiff's law suits and to receive and disburse moneys collected

## SPECIAL OR SECOND APPEAL

—continued—

## 4. SMALL CAUSE COURT SUIT—continued

with such suits, it was held that the case was not brought under the term "claim for money due under a contract" in Act XI of 1908, s. 6, and that therefore under Act XXIII of 1911, s. 27, a special appeal would not lie. *JAGMOHAN KUMAR ROY v. PRABHU NATH SAKI*. [20 W. R., 4]

105.—Suit on implied contract.—Suit against co-sharers for share of rent.—Civil Procedure Code, 1877, s. 548.—A was the proprietor of 9 annas of a mouzah, B and his family of 1 anna, and C and others of the remainder 6 annas. B and his family having occupied and enjoyed, to the exclusion of their co-sharers, 5 1/2 annas of the mouzah, failed to pay any rent in respect of such occupation. A instituted a suit against them (making C and the other holders of the 6 annas share defendants to the suit) to recover the sum of Rs. 12-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the 5 1/2 annas to which the Gannas share-holders were entitled as also the share which B and his family were entitled to retain as proprietors of 1 anna share. He did that the facts showed an implied contract on the part of B and his family to pay to their co-sharers whatever, upon taking an account, should appear to be due to them, and that, inasmuch as the total amount sought to be recovered in the suit did not exceed Rs. 100, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 136 of the Code of Civil Procedure. *ABRAHAM SINGH v. JAGMOHAN ROY*. [I. L. R. 6 Cal., 284; 7 C. L. R., 94]

106.—Contract Act (IX of 1902), s. 69-70.—Small Cause Court Act (XII of 1903), s. 6.—Part real—Implied contract.—The plaintiff a purchaser in execution of a patta right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the patta right, a sum of money which she had been compelled to pay to the defendant for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge was reversed. On appeal to the High Court.—Held that, assuming the suit to be independently of any express promise, it was one cognizable by a Court of Small Causes, and no appeal would therefore lie. *Rambux Chittagoo v. Madhoojee Paul Chowdhry*. [E. L. R. Sup. Vol. 65: 1 M. W., 377, distinguished Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1908. *Sath Prasad v. Baiy Nath* I. L. R., 3 All. 66, approved. *KRISHNA KAKAI CHOWDHURY v. GOPI MOHTY GHOSH HAKKI*. [I. L. R., 15 Cal., 653]

107.—Nofassul Small Cause Courts Act, s. 6.—Civil Procedure Code, s. 546.—Suit against sons of Hindu father as a head executed by father, not cognizable by Small Cause Court.—Hindu law.—Liability of son for debt

## SPECIAL OR SECOND APPEAL

—continued

## 4. SMALL CAUSE COURT SUITS—continued.

*of living father.*—In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held* by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s 586 of the Code of Civil Procedure. *Held* further by the Divisional Bench that the decree against the sons was bad. **NARASINGHA v. SUBBA**

[I. L. R., 12 Mad., 139]

108.

Civil Procedure

*Code, s 586—Provincial Small Cause Courts Act, sch. II, art. 11—Suit relating to contract—Contract Act, s. 69—Suit for contribution—Joint property.*—Lands of which part belongs to the plaintiffs and part to the defendant were comprised in a pottah which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear, and was collected from the plaintiffs, who now sued to recover ₹200, being the amount so paid, together with interest. *Held* the suit was of a nature cognizable by a Court of Small Causes, and therefore no second appeal lay. **Krishna Karim Chowdhry v. Gopi Mohun Ghose Hazra, I. L. R. 15 Cal., 652, followed.** **SRINIVASA v. SIVAKOLUNDU**

[I. L. R., 12 Mad., 349]

## (e) CONTRIBUTION.

109. — Suit for contribution for revenue paid to save estate.—A claim for money below ₹500 paid as revenue by one partner in an estate on account of another, in order to save the whole estate from sale, arises under an implied contract between them, and therefore is cognizable by a Small Cause Court. No special appeal lay in such a case under s 27, Act XXIII of 1861. **RAM MONEY DOSSIA v. PEAREE MOHUN MOZOOMDAR**

[6 W. R., 325]

## (f) CUSTOMARY PAYMENT.

110. — Suit by zamindar against patnidar for dākh expenses—*Act XXIII of 1861, s. 27.*—A case in which a zamindar sues a patnidar for dākh expenses, according to his patni jumma, is of a nature cognizable by a Court of Small Causes, and as such, by s. 27, Act XXIII of 1861, no special appeal will lie. **DHERAJ MAHTAB CHUND BAHADOOR v. RADHA BINODE CHOWDHRY**

[8 W. R., 517]

**ERSKINE v. TRILOCHUN CHATTERJEE**

[9 W. R., 518]

## (g) DAMAGES.

111. — Suit for damages—*Damages to moveable or immovable property.*—No special appeal lies in a suit for damages below ₹500, whether the damages are on account of moveable or immovable property. **BREENUCK LALL MAHTOON v. RUNG LALL MAHTOON**

. 11 W. R., 369

## SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

112. — Suit where claim for damages exceeds ₹500, but decree is given for less than ₹500—*Act XXIII of 1861, s. 27.*—Where the damages claimed in a suit exceeded ₹500, and the Court gave the plaintiff less than ₹500 damages, *Held* that the right of appeal was not taken away by Act XXIII of 1861, s. 27. **NELLMONEE SINGH DEO v. GORDON, TUART & CO**

[1 Ind Jur, N S, 3, 6:6 W. R., 152]

113. — Suit for damages for illegal arrest—*Proceedings in execution of decree against surety.*—A decree-holder having taken out execution, the judgment-debtor paid a sum of money in satisfaction of the decree, and got a surety to execute a security-bond on his behalf. The decree-holder thereupon took out proceedings under s 204, Act VIII of 1859, had the surety arrested, and realized from him the amount due under the decree. The surety then brought an action to recover damages for illegal arrest, the sum claimed not exceeding ₹500. *Held* that the suit was cognizable by a Small Cause Court, and that under s. 27, Act XXIII of 1861, no appeal would lie. **TOOLSEE RAM v. NEND KISHORE LALL**

. 12 W. R., 471

114. — Suit for damages for assault—*Absence of pecuniary injury.*—No suit for damages occasioned by personal injury will lie in the Small Cause Courts, unless actual pecuniary loss has resulted from such injury to the plaintiff. When there is no such pecuniary loss, the suit for damages will lie in the ordinary Civil Courts, and a special appeal will lie to the High Court, although the damages claimed are below ₹500. **ALI BUKSH v. SAMIRUDDIN**

[4 B. L. R., A. C., 31; 12 W. R., 477]

**RAJ CHUNDER CHUCKERBUTTY v. PUNOHANUN SURMAH CHOWDHRY**

. 4 W. R., 7

115. — Suit for damages for personal injury—*Actual pecuniary damage.*—The plaintiff, in a suit for damages laid at ₹200, claimed ₹50 on account of medical expenses caused by an assault committed on him by the defendants, ₹50 as the costs of a criminal prosecution which he had brought against them, and ₹10 for injury to his reputation and feelings. *Held* that, inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s 6, proviso (3), of the Mofussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. **Gunga Narain Moytro v. Gadadhir Chowdhry, 13 W. R., 434, referred to** **JIWA RAM SINGH v. BHOLA**

[I. L. R., 10 All., 49]

116. — Suit for money paid by unsuccessful claimant to attached property—*Civil Procedure Code, 1851, s 246*—A suit for money paid by an unsuccessful claimant, under s 246, Act VIII of 1859, in order to save from sale



## SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued

his share of an estate which had been attached in execution and decree is in reality a suit for damages, and (the value being below Rs500) is in the nature of a Small Cause Court suit in which no special appeal will lie. **POORSHUTT CHATTERJEE v. GOVIND SCONDER PANDY** 18 W R, 283

117.—Suit to recover money attached—Removal of attachment on wrongful objection to attachment of property.—C, a decree-holder, alleging that K, a landholder of a village, had objected to the attachment in his hands of money due as profits to the judgment-debtor a co-sharer, on the ground that he had paid such money to the judgment-debtor before the attachment, by reason whereof the attachment had been removed, and that such objection was dishonest and wrongful, inasmuch as such money was still in K's hands sued K for the amount of such money and the costs of the attachment proceedings. Held that the suit was one for damages and, the amount claimed not exceeding Rs500 one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie. **KALIAN SINGH v. CHANDU LAL** I L R, 6 All, 10

118.—Suit for money lent to redeem mortgage—Suit for damages as on breach of contract—Act XXIII of 1861 s. 27.—Defendant borrowed a sum of money below Rs500 from the plaintiff, with a view to redeem a mortgage on condition that, after redemption, he would sell the property to the plaintiff. He did not, however redeem the property. Held that plaintiff's suit to recover his dues was one for damages as upon a breach of contract in which, under s. 27, Act XXIII of 1861, no special appeal would lie. **KHULLEE MAHOMED v. FURKAN ALI** 12 W R, 269

119.—Suit for damages for breach of contract controlling terms of decree.—No special appeal lies in a suit for damages for breach of a private arrangement by which the parties agree to control the terms of a decree, when the suit is within the jurisdiction of the Small Cause Court. **CHUDY PERSAD DOSS v. KASIRATH DOSS** [W R, 1884, 348]

120.—Suit for damages to crops by inundation.—Omission to ratify bond—Act XLIII of 1860 s. 3.—Under s. 3, Act XLIII of 1860, a suit for damages of any kind below Rs500, a suit for damages for rot cutting through a bond whereby plaintiff's crops were destroyed in consequence of accumulation of water was cognizable by a Small Cause Court, and consequently, under s. 2, Act XLIII of 1861, no special appeal lay in such a case. **GOVERNATH PAUL v. GOWD** [8 W R, 7]

121.—Suit for damages for inadequate sale of decree—Act XXIII of 1861 s. 27.—No special appeal lay under s. 27, Act XXIII of 1861, for damages for inadequate sale of a decree. **KRISHNAMOY THAKOOR v. BHANUMAT DOSS** [5 W R, 215]

## SPECIAL OR SECOND APPEAL

—continued

## 4. SMALL CAUSE COURT SUITS—continued.

122.—Suit for defamation of character—Absence of pecuniary injury.—Suits for defamation of character, where there has not been any actual pecuniary loss, were not under cl. 3, s. 6, Act XI of 1863, cognizable by the Small Cause Courts, and therefore in such a suit a special appeal would lie under Act XXIII of 1861, s. 27. **LHAIKAD CHANDRA CHACKERBUTTY v. MATHUR CHANDRA CHACKERBUTTY** [4 B L R, Ap, 59; 13 W R, 118]

123.—Absence of pecuniary damage.—Quære.—Before a suit can be a case of defamation of character, it is necessary to presume that actual pecuniary damage has resulted. **DUTTA DOSS KOONDOL v. ANILASH KANISH DOSSIA** 12 W R, 372

124.—Suit for malicious prosecution.—Absence of pecuniary damage.—The defendant had a charge of assault against the plaintiff before the Magistrate, and the charge was heard and dismissed. The plaintiff then brought a suit for damages occasioned to his reputation by the false and malicious charge, laying the damages at Rs150; but no actual pecuniary loss in consequence of the charge was alleged. Held that it was not a suit cognizable by the Small Cause Court, and therefore a special appeal would lie. **PRATKRISHNA HANDEKAR v. NADIR CHAND CHATTERJEE** [4 B L R, A. C, 35 note; 10 W R, 115]

125.—Injury to reputation.—The defendant charged the plaintiff with plotting to murder him and the case came before the Magistrate and was dismissed. The plaintiff then sued in the Munsif's Court for damages on account of the injury "to his reputation and pain of body and mind" caused by the malicious prosecution, and laid the damages at Rs100. A special appeal to the High Court was dismissed on the ground that it was a suit cognizable by a Small Cause Court. **NADIR CHAND ROY v. BAIKANT NATH MISSE** [4 B L R, A. C, 33 note]

126.—Suit for damages for loss of reputation and business.—A suit for damages not exceeding Rs500 on account partly for injury to reputation and partly for loss in business and professional position was held to come within the provisions of s. 6, Act XI of 1863, and was not open to special appeal. **BRUJO SCONDER PHALOOKER v. ESHAN CHUNDER ROY** 15 W R, 179

127.—Suit for money paid as rent to save estate from sale—Enforced payment where rent had been already paid—Act XXIII of 1861, s. 27.—Act XI of 1863, s. 6.—Act XI of 1863, s. 23, cl. 2.—The plaintiff the holder of a patta taluk, by an arrangement with the defendants, his kinsmen, paid the Government revenue and the road-tax for the year 1864 and then tenanted the balance of the rent for that year to the defendants, but they refused to accept it; and he therefore deposited it in the Munsif's Court in accordance with s. 46

## SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

of Bengal Act VIII of 1869. One of the defendants then took proceedings under Bengal Regulation VIII of 1819 to recover his share of the rent, and, notwithstanding the protest of the plaintiff that the rent had been already paid, obtained an order for the sale of the tenure, and to prevent the sale the plaintiff had to pay the sum claimed for rent. In a suit brought to recover that amount with interest,—*Held* it was a suit cognizable by a Court of Small Causes under s. 6 of Act XI of 1861, and therefore a special appeal was barred by s. 27, Act XXIII of 1861. It was not a suit for “damages on account of illegal exaction of rent” within the meaning of cl. 2, s. 23 of Act X of 1859. KRISHNA KISHORE SHAHA v. BIRESHWAR MOZOOMDAR

[L. L. R., 4 Cal., 595; 3 C. L. R., 177]

128. — Suit for payments made on account of rent—*Refusal to allow for such payments in rent account*.—A suit to recover certain cash and the value of certain grain which the defendants had persuaded the plaintiff to pay them, engaging that the lambardar would allow the same in his account (as part payment of rent), but which the lambardar refused to do, is practically a suit for damages, and, the amount in question being cognizable by a Small Cause Court, no special appeal can be entertained. YACOOB ALI v. KOOR SINGH

[2 N. W., 111]

129. — Suit to recover a share of *malikana*—*Act XXIII of 1861, s. 27*.—A suit to recover a share of *malikana*, which the defendant had realized from the Collector, is a suit for recovery of a sum of money which has been taken away by the defendants to the damage of the plaintiff, and is therefore cognizable by the Small Cause Court; and under s. 27, Act XXIII of 1861, no special appeal lies from a judgment passed in appeal in such a suit. LAKSHMANA DEBIA v. MAHOMMED HAFEZULLA

[3 B. L. R., Ap., 98]

S. C. RASMONEE DEBIA v. MAHOMMED HAFEZULLAH

[12 W. R., 29]

130. — Suit for profits of land—*Provincial Small Cause Courts Act (IX of 1897), sch. II, cl. 31 Civil Procedure Code, s. 586*.—The plaintiff sued on the Small Cause side of a Subordinate Court before the Provincial Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit Rs 0, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree, which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under the Civil Procedure

## SPECIAL OR SECOND APPEAL

—continued.

## 4 SMALL CAUSE COURT SUITS—continued.

Code, s. 586. *Held* that the objection should prevail, since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1897. ANNAMALAI v. SUBRAMANYAN . . . I. L. R., 15 Mad., 298

## (A) DEBTS.

131. — Suit for division of debt due to estate of deceased—*Held* that a suit for division of debts due to the deceased's estate (the sum being ascertained) was cognizable by a Small Cause Court, and no special appeal lay to the High Court. OODETTA v. GOPAL . . . 2 Agra, 234

## (i) DECLARATORY DECREE.

132. — Suit to have property made over to plaintiff on an adjusted account.—Where, on an adjusted account between two parties, one claims from the other some money and some grain which are shown to be due to him and asks in effect that they may be made over to him, the suit is not a suit for declaratory decree, and a special appeal does not lie in such a suit to the High Court under s. 27, Act XXIII of 1861. BULDERO SINGH v. RAM SURUN LALL . . . 25 W. R., 234

## (j) DECREE.

133. — Decree for land under a compromise in a suit cognizable by a Small Cause Court—*Act XXIII of 1861, s. 27*.—In a suit for recovery of a sum of money below Rs 500, the parties entered into a compromise, whereby the defendant made over a certain piece of land in lieu of the money claimed, and a decree was passed accordingly. In execution of the decree, disputes arose between the parties. Upon special appeal by the judgment-debtor to the High Court—*Held* that under s. 27, Act XXIII of 1861, no special appeal lay to the High Court. TALAN BIBI v. TENU BIBI [6 B. L. R., Ap., 82; 15 W. R., 65]

## (k) IMMOVABLE PROPERTY.

134. — Suit for kattubadi and karnam's emoluments—*Civil Procedure Code (1882), s. 586—Provincial Small Cause Courts Act (IX of 1897), sch. I, art. 13*.—Where plaintiff sued for arrears of kattubadi and karnam's emoluments, the value of the suit being less than Rs 500,—*Held* that kattubadi and karnam's emoluments are neither a charge on, nor interest in, immovable property, and that no second appeal lay. MULLAPUDI BALAKRISHNAIA v. VENKATANARASIMHA APPA RAO [L. L. R., 19 Mad., 329]

See VENKATARAMA DOSS v. MAHARAJAH OF VIZIANAGRAM . . . I. L. R., 19 Mad., 103

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## SPECIAL OR SECOND APPEAL

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—continued

## 4 SMALL CAUSE COURT SUITS—continued

## 4. SMALL CAUSE COURT SUITS—continued.

## (i) MAINTENANCE.

135 Suit by widow for main-  
tenance—*Act XVIII of 1861, s. 27*.—A Hindu  
widow who had been supported by her father-in-law  
after his death sued his eldest son for maintenance  
and obtained a decree for Rs 150 notwithstanding the  
defendant's objection that, being one of three brothers  
who inherited their father's estate, he was not solely  
liable for the maintenance claimed. *Held* that, as  
this was a Small Cause Court suit, an appeal did not  
lie. **RAMCHANDRA DIXSHIT v. SAVITRIBAI**

[4 Bom., A. C., 73

JUDAL KUM RANCHHOD MELJI v. HIRA MELJI

[4 Bom., A. C., 75

## (m) MEANS PROFITS

136 Suit for means profits—  
*Act XVIII of 1861, s. 27*—Suit under Rs 500.—A  
suit for the recovery of means profits (not amounting  
to Rs 500) is cognizable by a Court of Small Causes.  
A special appeal therefore does not lie in such a suit.  
**KAKASHI SAKHARAM v. GOVIND GANESH**

[8 Bom., A. C., 96

137.—*Act XI of 1863, s. 6*—*Act XVIII of 1861, s. 27*.—In a suit brought  
in the Sudler Amcen's Court for Rs 113 for means  
profits, it was objected on special appeal that under  
s. 27, Act XVIII of 1861 no special appeal would lie  
the suit being cognizable by the Small Cause Court.  
*Held*, it being merely a suit for means profits  
and no question of right arising in it, it was a  
suit for damages within s. 6, Act XI of 1863, and  
therefore cognizable by the Small Cause Court. **RAM  
PYARI DEBI v. DIXAKATH MOOKESHERJEE**

[2 B. L. R., S. N., 13-10 W. R., 375

138.—*Provincial Small Cause Courts Act (IX of 1887) s. 11*  
*art 31*.—Where the plaintiff, after obtaining a  
decree in a suit for possession of certain land of  
which he had been dispossessed by the defendants,  
brought a suit in the Munsif's Court for means profits  
for the period during which he had been kept out of  
possession and the suit, though partly decreed by the  
Munsif was dismissed by the District Judge.—*Held*  
that such a suit was not cognizable by a Small Cause  
Court, and therefore a second appeal in the suit  
would lie to the High Court. **SHIRAM SAMANTA v.  
KALIDAS DEY**

I. L. R., 18 Calc., 318

139.—*Suit for means profits where the value of the subject-matter in dispute is less than Rs 500—Provincial Small Cause Courts Act (IX of 1887), s. 11, art 31*.—*Held* by the Full Bench (GHOSH and BANERJEE, JJ., dissenting) that no second appeal lies in a suit for means profits where the value of the subject-matter in dispute is less than Rs 500. **SIRAM SAMANTA v. KALIDAS DEY, I. L. R., 19 Calc., 316, overruled.**  
**KUNJO BERAJI SINGH v. MADHUB CHANDRA GHOSH**  
[I. L. R., 23 Calc., 884

140.—*Provincial Small Cause Courts Act (IX of 1887), s. 11, art 31*—*Suit for means profits under Rs 500—Civil Procedure Code (Act XIV of 1902), s. 548*.—A suit for means profits is cognizable in Courts of Small Cause where the value of the subject-matter in dispute is less than Rs 500 and art. 31 of s. 11 of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of s. 548 of the Civil Procedure Code, and no second appeal lies from a decision in it. **SENAPATI ATYAR v. MARAKATHAMMAL**

[I. L. R., 23 Mad., 196

LINGGATTA ATYAVARU v. MALLIKARJUNA ATYAVARU  
I. L. R., 23 Mad., 196 note

## (n) MONEY.

141.—*Suit for money had and received for the plaintiff's use*.—C, a mortgagee, the mortgage having been foreclosed, and D, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with D to surrender the mortgaged property to him, if he deposited the mortgage money in Court by a specified day. D borrowed the money for this purpose by means of a conditional sale of the property to J, and deposited it in Court. The deposit was made after the specified day, and consequently C took possession of the property. The money deposited by D remained in deposit, and, while there, C caused it to be attached in execution of a money decree he held against D, and it was paid to him. D thereupon sued C in the Munsif's Court to recover such money, which amounted to Rs 350. *Held* that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes. **LACHMAN PRASAD v. CHAMMI LAL**  
I. L. R., 4 All., 6

COLLECTOR OF CANNORE v. KEDARI

[I. L. R., 4 All., 19

142.—*Suit to recover purchase-money—Act XXIII of 1861, s. 27*.—*Held* that the suit to recover Rs 200 paid in respect of the purchase of land which was not completed was a suit of the description cognizable by the Small Cause Court, and a special appeal would not lie. **ANOOB CHYND v. HARARTE LALL**  
1 Agra, 275

143.—*Suit for money paid as excess of rent*.—In a suit for recovery of a sum of money less than Rs 500, as money paid in excess of rent due.—*Held* that, the suit being cognizable by the Court of Small Causes under s. 6, Act XI of 1863, no special appeal lay to the High Court. **SRI SAHAYA SUXUL v. BHICHAJAN JUBARAJ**

[2 B. L. R., A. C., 173

S. C. SHIB SWAMY SOOROOOL v. BHEE CHUNDER JOORBAJ  
I. L. R., 11 W. R., 30

## SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

144. ——— Suit for money illegally levied on land—*Act X of 1876, s. 15—Civil Procedure Code, 1876, s. 586.*—The plaintiff sued to recover from the defendant R71 3-3, alleging that the defendant had illegally levied the money on the plaintiff's land on account of enhanced summary settlement and local fund cess. The defendant, being a minor, was represented by the Collector as his administrator. The Assistant Judge who tried the suit awarded the plaintiff's claim. The District Judge, on appeal, reduced the amount of the plaintiff's claim to R35-4-9, but upheld the decree of the first Court in other respects. The defendant thereupon filed a second appeal in the High Court. *Held* that under the Civil Procedure Code (Act X of 1877), s. 586, no second appeal lay, as the suit was one cognizable by a Small Cause Court. *Act X of 1876, s. 15*, removes suits to which the Collector is a party from the jurisdiction of the Small Cause Court; but the nature of the suit remains unaltered. *MUSA MIYA SAHEB v. GULAM HUSEIN*

[I. L. R., 7 Bom., 100

145. ——— Suit by lessee for refund of revenue—*Contract to refund excess.*—In a suit by a lessee upon a contract for a refund of excess revenue remitted by Government, a special appeal is not admissible if the amount claimed be under R500. *WHITE v. TRIPORA SUNKUR MOOKERJEE*

[W. R., 1864, 297

146. ——— Suit to recover money paid in excess of share of profits of land.—A suit to recover from the defendant R235, paid to him in excess of his share of the profits of certain lands, is cognizable in the Small Cause Court, and consequently no special appeal will lie in such a case under s. 27, Act XXIII of 1861. *JOGNARAIN MANJEE v. NUDDOOSOODUN GORATT*

2 W. R., 134

147. ——— Suit for recovery of money stolen from Court—*Suit against Government.*—A sum of money was stolen from the Judge's Court of Tippera while A was the Nazir. A paid the amount to Government, and died leaving B his heir. B sued Government for recovery of the amount paid by A on the ground that, as there was no negligence of A and as the amount was under the custody of the guards of Government at the time of the theft, A was not responsible for the loss thereof. *Held* the suit was cognizable by a Small Cause Court, and therefore, under s. 27, Act XXIII of 1861, no special appeal lay to the High Court. *COLLECTOR OF TIPPERA v. MAFIZUNNISSA BIBEE*

[4 B. L. R., Ap., 46

## (c) MORTGAGE.

148. ——— Suit to recover debt charged on immoveable property—*Act XXIII of 1861, s. 27.*—A suit brought to enforce a debt or demand not exceeding R500 which is secured upon, and must in law be primarily satisfied out of immoveable property, is not a suit of a nature cognizable in Courts

## SPECIAL OR SECOND APPEAL

—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

of Small Causes under s. 27 of Act XXIII of 1861, so as to exclude a right to special appeal. This is so, though the plaintiff on the face of it seeks recovery in the alternative, either from the mortgagor personally, or from the mortgaged property. *ATMAKAM BALLAL KAGJI v. SADASHIV HARI MAHAJANI*

2 Bom., 1

149. ——— Suit for enforcement of hypothecation against moveable property—*Act XI of 1865, s. 6.*—A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 556 of the Civil Procedure Code. *Surajpal Singh v. Jairamgir, I. L. R., 7 All., 855*, followed. *Ram Gopal Shah v. Ram Gopal Shah, 9 W. R., 136*, and *Apparu Pillai v. Subaya Mupuen, 2 Mad., 47*, referred to *KALKA PRASAD v. CHANDAN SINGH*

I. L. R., 10 All., 20

## (p) MOVEABLE PROPERTY.

150. ——— Suit for price of personal property sold—*Suit by co-sharer.*—A suit lies in a Small Cause Court by a co-sharer to recover the price of a share of personal property alienated by another co-sharer. *RADHANATH SHAHA v. KAMENDEE SOONDEREE DOSSEE*

2 W. R., 37

151. ——— Suit for materials of hut, or their value—*Act XXIII of 1861, s. 27.*—A suit for the materials of a hut, in which the plaintiff sought for a decree to break up and remove them, or to obtain their value (R29), was held to be a case cognizable by a Small Cause Court under Act XI of 1865, s. 6, and therefore no special appeal would lie. *KASHEE CHUNDER DUTT v. JUDONATH CHUCKERBUTTY*

10 W. R., 29

152. ——— Suit to recover possession of share of a boat—*Act XXIII of 1861, s. 27.*—A suit to recover possession of a share of a boat by establishment of the plaintiffs' right is a suit for personal property within the meaning of Act XI of 1865, s. 6, and therefore no special appeal lies in such a case under Act XXIII of 1861, s. 27. *MAHOMED AZIM BROOYAH v. MAHOMED SOMER*

[21 W. R., 413

153. ——— Suit for the value of trees and fish—*Trees destroyed by defendant.*—A suit to recover the value of a tree destroyed by the defendants and for the value of fish taken from the plaintiff's tank (the claim being under R500) is a suit cognizable by a Small Cause Court, and no special appeal lies to the High Court. *SUJJAD ALI v. BHOLARAM*

5 N. W., 24

154. ——— Suit for recovery of value of fruit from trees.—Where a suit was brought for the recovery of the value of the fruit of certain mango trees alleged to have been misappropriated by the defendants,—*Held* that, as the suit was of the nature of a suit cognizable by Courts of Small Causes,

## SPECIAL OR SECOND APPEAL

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## 4 SMALL CAUSE COURT SUITS—continued

a special appeal would not lie **SHAMAYUND v. NUD-KOOMAR**

[3 Agra, 290. Agra, F. B., Ed. 1874, 153]

155 — Suit for value of sugar mill.

—A stone sugar mill is moveable property, and a suit for the value of it, if under Rs 500, will lie in the Small Cause Court. No special appeal lies therefore in such a suit. **HORMUSAL SINGH v. ATUL SINGH**

[4 N. W., 15]

156 — Suit by widow to recover

personal property or its value taken from deceased.—*Act XXIII of 1861, s. 27*—The widow and heiress of a deceased person sued the defendants to recover personal property, valued at Rs 200 said to have been taken by them from deceased in his lifetime. *Held* that a special appeal was barred by s. 27, Act XXIII of 1861. **KAPANI BAWA v. KESH RAM KUCH**

[2 B. L. R., Ap. 23; 11 W. R., 83]

## (g) PROFITS OF LAND

157 — Suit to recover a certain

sum on account of a share in property.—*Civil Procedure Code (1852) s. 559*—*I aver for account*—*Question of title*—Plaintiffs sued to recover, on account of the share in the produce of certain dhara and khoti properties. Rs 33-14-2, or any other sum which might be found due to them on taking account from the defendant, who was the managing khoti. The defendant denied the plaintiffs' right to the produce of some of the properties. The first Court and the Court of appeal found that the amount due to plaintiffs was Rs 7-14-11. On second appeal, *Held* that the suit was a Small Cause Court suit, and no second appeal lay. The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. By merely asking in the alternative, for an account of the profits a suit cognizable by a Small Cause Court cannot be converted into one of a different nature. **NABAYAT BHASKER v. BALAJI BAPUJI**

[L. L. R., 21 Bom., 248]

## (r) RENT

158. — Suit for arrears of rent.—

*Act XXIII of 1861 s. 27*—In suits for arrears of rents of land when the claim is under Rs 500 a special appeal lies to the High Court such claims not being generally cognizable by Courts of Small Causes. **RAMCHANDRA BAGHUNATH v. ANAJI DIN RASTYA**

[6 Bom., A. C., 19]

159 — *Bom. Reg. XVII*

*of 1827, s. 31, cl. 3*—*Act XXIII of 1861 s. 27*—The expression "or former year" in Regulation XVII of 1827, s. 31 cl. 3, did not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a revenue officer when Act XI of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of

## SPECIAL OR SECOND APPEAL

—continued.

## 4 SMALL CAUSE COURT SUITS—continued.

this nature **KRISHNARAY RAMCHANDRA v. MAYAN DIN SAYAJI**

[11 Bom., 106]

180 — Suit by an

assignee of arrears of rent after they fell due, whether cognizable by the Small Causes Court.—*Provincial Small Cause Courts Act (IX of 1887), s. 8, sub s. 5*—*Provincial Small Cause Courts Act, 11, art. 8*—*Held* by the Full Bench (**DANWAR, J.**, dissenting) that a suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes and a second appeal therefore lies in such a suit. **SATISH CHITRA DEB ROSE v. NACHIM KAZI**

[L. L. R., 27 Cal., 827]

[4 C. W. N., 357]

181. — Suit for arrears

of rent brought by assignee of landlord.—A second appeal lies in a suit brought by an assignee of arrears of rent from the landlord. **MOHENDRA DATT KALA MARIE v. KOTILASH CHANDRA DOORA**

[4 C. W. N., 605]

182. — Suit for zamindari cess—

*Suit for payment for use of land*—*Act XXIII of 1861, s. 27*—Where the plaintiff claimed a sum of money under the name of a zamindari cess, but in point of fact what was claimed was claimed on account of the use of land.—*Held* that such a suit was a suit of a nature cognizable by a Small Cause Court under s. 6 Act XI of 1863, and that a special appeal would not lie. **BUCHOO CHOWHRY v. GHOOSELAIT**

[4 N. W., 56]

183. — Suit for Government assess-

ment and local fund cess.—*Suit for arrears of rent*—The defendant executed to the plaintiff in 1817 a mulgeni kalulat (i.e., one kalulat corresponds to a lease at a fixed rental) agreeing to pay to the plaintiff Rs 150 annually. At the date of the execution of the mulgeni the Government assessment was Rs 6-8-0 but in 1872 it was enhanced to Rs 129-8-0, and a local fund cess of Rs 4-0-0 imposed in addition. The plaintiff sued the defendant to recover from him the enhanced assessment and the cess. On appeal an objection was taken that, the amount claimed by the plaintiff being less than Rs 500, the suit was cognizable by a Court of Small Causes, and that therefore there was no second appeal. *Held* that the suit might be regarded as one for arrears of rent at an increased rate and as such, was not cognizable by a Court of Small Causes. **BARBHETTI v. VENKATRAMANA**

[L. L. R., 3 Bom., 154]

184. — Suits for rent.—*Civil Procedure*

*Code (1852), s. 558*—*Provincial Small Cause Courts Act (IX of 1887), s. 13* *sch. 11, art. 8*—*Suits of the nature cognizable in Courts of Small Causes*—A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 558 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the

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—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

Local Government with authority to exercise jurisdiction with respect thereto under s. 15 and sch. II, art. 8, of the Provincial Small Cause Courts Act, 1897. A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed Rs50. *Vedachala Mudali v. RAMASAMI RAJA*. . . I. L. R., 22 Mad., 229

185. ——— *Civil Procedure Code, 1882, s. 586*—"Suit of the nature cognizable in Courts of Small Causes"—*Suit for rent other than house-rent—Second appeal*.—A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. So held (SUBRAHMANYA AYYAR, J., dissenting). *Vedachala Mudali v. Ramasami Raja, I. L. R., 22 Mad., 229*, overruled. *SOUNDARAY AYYAR v. SENNA NAICKAN*. . . I. L. R., 23 Mad., 547

186. ——— *Civil Procedure Code (Act XIV of 1882), s. 586—Landlord and Tenant—Suit by tenant to recover excess payments of rent—Bengal Tenancy Act (VIII of 1885), s. 144*.—A suit between landlord and tenant for the recovery by the tenant of excess payments taken by the landlord in respect of the rent of the holding and not exceeding Rs50 is a suit cognizable by the Small Cause Court, and under s. 586 of the Civil Procedure Code no second appeal lies. There is nothing in s. 144 of the Bengal Tenancy Act to override the provisions of s. 586 of the Civil Procedure Code, as it determines only the venue and has no bearing upon the nature of the suit. *RANGO ROY alias RUNG LAL ROY v. HOLLOWAY*. . . I. L. R., 28 Calc., 842 [4 C. W. N., 95]

187. ——— *Suit by landlord against tenant for a certain sum payable by him out of the rent to a third person by assignment—Civil Procedure Code (1882), s. 586—Suit for rent or for damages*.—Held (by the Full Bench) that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent, and not for damages, and a second appeal lies therefore in such a case. *Rutnesser Biswas v. Hurish Chunder Bose, I. L. R., 11 Calc., 221*, referred to. *Mohabut Ali v. Mahomed Faizullah, 1 C. W. N., 455*. *BASANTA KUMARI DEBYA v. ASHUTOSH CHAKRABUTTY*. . . I. L. R., 27 Calc., 67 [4 C. W. N., 3]

## (a) SPECIFIC PERFORMANCE.

188. ——— *Suit for specific performance of contract*.—A s. it (valued at Rs50) for specific performance of a contract is not cognizable by a Small Cause Court. Consequently no special appeal will lie in such a case. *NILKANTH SERMAN v. BISHEN BASHEE*. . . . 6 W. R., 322

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—continued.

## 4. SMALL CAUSE COURT SUITS—continued.

### (t) SURETY.

169. ——— *Suit to establish surety's liability for rent—Necessity to prove non-payment by principal*.—A suit to establish a surety's liability on account of arrears of rent due from a patnidar where the non-payment of the rent by the patnidar would have to be established is not cognizable by a Small Cause Court; and consequently a special appeal was not barred in such a case by s. 27, Act XXIII of 1861. *MAHATAB CHUND BAHADOOR v. BROJONATH MITTER*. . . . 8 W. R., 111

### (u) TAX.

170. ——— *Suit for arrears of chowkidari tax payable by patnidar under patni settlement—Rent—Bengal Tenancy Act (VIII of 1885), s. 3 (5)—Civil Procedure Code (1882), s. 586*.—In a suit for arrears of chowkidari tax payable by the patnidar under the patni settlement, the Court found that it was not an illegal cess, and could be legally recovered. Held (upon the objection of the respondents that, the suit being one of the nature cognizable by a Small Cause Court and valued at less than Rs500, no second appeal would lie under s. 586 of the Code of Civil Procedure) that, as the consideration for the payment of the chowkidari tax was the occupation or the holding of the patni tenure, and as the payment was to be made periodically to the zamindar by the patnidar, and the amount agreed to be paid was lawfully payable, it came within the definition of "rent" in the Bengal Tenancy Act, and therefore a second appeal would lie. *Dheraj Mahatab Chund Bahadoor v. Radha Benode Chowdhry, 8 W. R., 517*; *Erskine v. Trilochun Chatterjee, 9 W. R., 518*; *Watson & Co. v. Sreekrishna Bhumi, I. L. R., 21 Calc., 12*; *Rutnesser Biswas v. Hurish Chunder Bose, I. L. R., 11 Calc., 221*, referred to. *ASSANULLA KHAN BAHADUR v. TIRTHABASHINI*

[I. L. R., 22 Calc., 680]

### (v) TITLE, QUESTION OF.

171. ——— *Issues affecting proprietary rights—Act XXIII of 1861, s. 27*.—The decision or order mentioned in s. 27 was confined to those decrees which, if made in a Small Cause Court, would be conclusively binding on the parties, and did not include a decree based upon an issue affecting the proprietary relations between the parties, which, if it had properly arisen incidentally in a suit brought in a Small Cause Court, could not then have been finally concluded between the parties. *BHOORNABAIN SAHOO v. MAHOMED HOSSAIN* [4 W. R., 60]

See *KISTO COOMAR CHOWDHRY v. ANUNDHONYE CHOWDHRAIN*. . . . 6 W. R., 123

172. ——— *Question of title incidentally raised*.—When a suit is of a nature cognizable by a Small Cause Court, there is no right of special

## SPECIAL OR SECOND APPEAL

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## 4 SMALL CAUSE COURT SUITS—continued

appeal although a question of title is incidentally raised, the finding of the Small Cause Court not being conclusive and only for the purpose of that suit. *SWAIR LALL PATIL v. GYAWAL & RAN KALER DUKAL*. 18 W. R., 104

173 — Question of title raised and tried—*Act XXIII of 1851, s. 27*—No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immovable property has been raised and tried in the Court below. *MOROSH MANTO v. PIR*  
[1 L. R., 2 Calc., 470 1 C. L. R., 33]

174. — Failure of Appellate Court to decide necessary question of title—*Act XXIII of 1851, s. 27*—Where a question of title arises in a suit of a nature triable by a Small Cause Court, which must be determined before plainiff can get a decree and the lower Appellate Court fails to determine it, a special appeal is admissible. *Regie Eam Bures v. Ram Chandra Dubey*, B. L. R. Sup. Vol., 34 W. R. F. B., 177, and *Nanda Kumar Banerjee v. Jiban Chandra Banerjee* 1 B. L. R., 4 C. 10 W. R., 150 (Calcutta). *PACHOO BAKER v. GEORGE HURV DASS* [15 W. R., 558]

175 — Where, in a suit cognizable by a Court of Small Causes, in order to determine the question at issue between the parties, it was necessary for the Court of appeal in the first instance to determine a question of title to land (which had been raised by the Munsif).—*Held* that a special appeal lay to the High Court though the Court below had omitted to determine such question of title. *KHINDRAM VALAD HIRA CHAND v. JATHI RAM VALAD MAGISTRAR* 5 Bom., A. C., 57

176 — Question of title decided by Appellate Court.—Where a suit appears from the plaint to be one of a nature cognizable in a Court of Small Causes but a question of title has been gone into and decided by the District Court in appeal a special appeal will lie. *DIXON v. DIXON* 2 Bom., 4

177 — Suit for damages involving question of title.—A suit for damages for an amount not exceeding Rs 100 is within the competency of a Small Cause Court to decide notwithstanding that it involves an inquiry into a question of right. No special appeal lies in such a case. *LUCKIES DEBIA CHOWDHURY v. MALICK*  
[W. R., 1864, 237]

*KHANSU VALAD KIRU v. TATTA VALAD VENTRA*  
[8 Bom., A. C., 23]

178. — Suit which may involve question of title—*Suit for damages for detention of materials of house—Act XXIII of 1851, s. 27*.—A suit for damages for detention of materials of a house involves no question of title. Such a suit is cognizable by a Small Cause Court if under Rs 100, and a special appeal was barred by a 27, Act XXIII

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—continued.

## 4 SMALL CAUSE COURT SUITS—continued.

of 1861. *KHURU CHANDER SHAMA v. BROXO MOTER DARRA*. 1 W. R., 35

179 — Suit involving question of title—*Suit for damages*.—A special appeal was held not to lie in a case for damages for value of crops misappropriated under Rs 100 cognizable by a Small Cause Court, notwithstanding that the case involved a question of title. *HINDASTOLLAR v. KARLOO*  
[7 W. R., 73]

*RAM DYAL GANGOOLY v. HIRU SOONLSEE DOWLA*. 10 W. R., 372

180. — *Suit for price of trees cut down and removed—Damages—Act XXIII of 1851, s. 27*—A suit for the price of trees cut down and removed is not the less a suit for damages, because the Court, in order to determine whether the plaintiff is entitled as damages to the value of his trees, has to go into evidence as to whether they belong to the plaintiff or not. Such a suit is cognizable by a Court of Small Causes, and no special appeal will lie. *THIS DEEN TEWARY v. BIKHAI RAM PRATAP SINGH*. W. R., 1864, 114, 3

181. — *Act XXIII of 1851, s. 27—Claim by zamindar to wrecked property—Saleage*.—A quantity of rice having been recovered from the wreck of a boat, a portion was left on the river bank by the owner for the remuneration of the sailors, including some left as "link zamindari," which the owners of a neighbouring jote carried away. In a suit brought by the former against the jotedar for the value of the portion last mentioned, the Court of first instance went into the question of the custom entitling to property so saved. *Held* that this question was only incidentally raised for the purposes of the suit, which was simply one for the value of moveable or personal property and cognizable by a Court of Small Causes, and, the value being less than Rs 100, a special appeal did not lie. *GHANT v. MOHMOO SODER* 237  
[10 W. R., 79]

182. — Suit for arrears of malkann allowance—*Act XI of 1865, s. 6*—Said a share in immovable property to M by a registered deed of sale, which contained the following provision: "The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay Rs 25 of the Queen's coin to me annually (as malkanna), which he had agreed to pay." M mortgaged the property to B, who obtained possession, and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of malkanna, the amount sued for being less than Rs 100. *Held*, upon a preliminary objection made with reference to s. 53 of the Civil Procedure Code, that the intention of the Legislature, as expressed in s. 6 of the Mortgaged Small Cause Courts Act (XI of 1865), was that suits directly and immediately involving questions of title to immovable property should not be cognizable by the Small

## SPECIAL OR SECOND APPEAL

—continued.

## 1. SMALL CAUSE COURT SUITS—concluded.

Cause Courts; that in the present suit such a question was directly involved; and that consequently s 586 of the Code had no application, and a second appeal would lie *Mahomed Karamutoollah v. Abdool Majed, 1 N. W., 205, and Bhawan Singh v. Chatter Kuar, Weekly Notes, All., 1882, p. 114, referred to Pestonji Bezant v. Abdool Rahiman, I. L. R., 5 Bom., 463; Qutub Husain v. Abul Husain, I. L. R., 4 All., 134, and Kadireswar Moorkerjee v. Gooroo Churn Mookerjee, 2 C. L. R., 388, distinguished. CHURAMAN v. BALI*

[I. L. R., 9 All., 591]

## (c) TRESPASS.

183. — Suit for damages for trespass—Suit cognizable by Small Cause Court—In a suit for damages for trespass laid at a sum under Rs 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below. *LUKHYNARAIN CHUTTORADHYA v. GORACHAND GOSWAMY*

[I. L. R., 9 Calc., 116; 12 C. L. R., 89]

## 5. GROUNDS OF APPEAL.

## (a) FORM OF.

184. — Requisites for grounds—Clearness and distinctness. The grounds of special appeal must not be vague and indistinct, conveying no information to the respondent what the point of law is that he has to meet. *NAND KISHOR DAS v. RAM KALP ROY*

[8 B. L. R., Ap., 49; 15 W. R., 8]

185. — Grounds of second appeal—Civil Procedure Code (Act XIV of 1854), ss. 584, 585.—The grounds upon which a second appeal lies to the High Court are those set out in s. 581 of the Civil Procedure Code, and s. 585 enacts that no second appeal shall lie except on the grounds mentioned in s. 584. The provisions of those sections should be strictly adhered to. *Anangamanjari Chowdhrami v. Tripura Sundari Chowdhrami, I. L. R., 14 Calc., 740. I. L. R., 14 I. A., 101; Pertab Chunder Ghose v. Mohendra Nath Parkait, I. L. R., 17 Calc., 291. I. L. R., 16 I. A., 233, Durga Chowdhrami v. Jewahar Singh Chowdhrami, I. L. R., 18 Calc., 23. I. L. R., 17 I. A., 122, and Ram Ratan Sukal v. Nandu, I. L. R., 19 Calc., 249. I. L. R., 19 I. A., 1, referred to KAMESHWAR PERSHAD v. AMANUTULLA. I. L. R., 28 Calc., 53*

[2 C. W. N., 649]

## (b) QUESTIONS OF FACT.

186. — Grounds of second appeal—Civil Procedure Code, s. 584.—Under the Code no second appeal will lie, except on the grounds specified in s. 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error

## SPECIAL OR SECOND APPEAL

—continued.

## 5. GROUNDS OF APPEAL—continued.

may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. *Anangamanjari Chowdhrami v. Tripura Sundari Chowdhrami, I. L. R., 14 I. A., 101. I. L. R., 14 Calc., 740, and Pertab Chunder Ghose v. Mohendra Parkait, I. L. R., 16 I. A., 233. I. L. R., 17 Calc., 291, referred to and followed Futehka Begum v. Mohamed Asur, I. L. R., 9 Calc., 309, and Nivath Singh v. Bhikki Singh, I. L. R., 7 All., 649, overruled. DURG CHOWDHRAMI v. JEWAHAR SINGH CHOWDHRI*

[I. L. R., 18 Calc., 23]

I. L. R., 17 I. A., 122]

187. — Doubtful findings of fact—Consideration of evidence—No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. *RAMPATAN SUKAL v. NANDU*

[I. L. R., 19 Calc., 249]

I. L. R., 19 I. A., 1]

188. — What are or are not questions of fact—Question of custom—A question of custom is a question of fact on which the lower Court alone can pass a decision, and on which the High Court cannot interfere. *HURSEHUR MOOKERJEE v. JUDHONATH GHOSE*

10 W. R., 153

ALI v. GOPAL DASS

13 W. R., 420

189. — Question of damages—Discretion of Judge.—A Judge has a discretion with respect to the amount of the damages which will not ordinarily be interfered with on special appeal. *TREKARAM KIBUTT v. RAJKISHAN ROY*

Marsh., 495

ARMEDOOLLA v. HUR CHURN PANDAH

[2 W. R., 236]

190. — Question of amount of damages—Difference of opinion on evidence between lower Courts.—In a suit for damages on account of false charge and consequent arrest, in which the Court of first instance found that there were probable and reasonable grounds for bringing the charge, and the lower Appellate Court took a different view of the evidence, it was held that the difference of view was not a subject for special appeal. The amount of damages to be awarded is a question for a jury to decide, and one with which the High Court cannot interfere in special appeal. *BANFF MADHUB CHATTERJEE v. BHOLANATH BANERJEE. HEERA CHAND BANERJEE v. BANEE MADHUB CHATTERJEE*

10 W. R., 164

191. — Question of amount of damages—Award of damages under Act X of 1859, s. 10.—An award of damages by a lower Appellate Court under s. 10, Act X of 1859,



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## 6. GROUNDS OF APPEAL—continued.

though excessive, if it is within the legal limit, can not be interfered with in special appeal as an error of law. **JOHNSONDOOREN MAROMED v. DAREE PERSEAD SINGH** . 13 W. R., 22

Affirmed on review . 13 W. R., 391

192. *Refusal to award damages—Beng. Act VI of 1863, s. 2—Discretion of Court.*—The refusal of a Court to award damages under s. 2 Bengal Act VI of 1863, is not a ground for special appeal, it being a matter of discretion to award them or not. **DUTTAJI MARATHA CHAND v. DEENDRA NATH THAKOOR** [W. R., 1884, Act X, 63

**GOPAL LAL THAKOOR v. MANOWD KANIR** [W. R., 1884, Act X, 73

193. *Question of law—Sufficiency of evidence.* It is a question of law for the Court to decide on second appeal whether there is evidence before the Court on which a Court could properly arrive at a given conclusion of fact. **BIDHUTKISH DAKRA CHOWDHURI v. KESHTY ULLAH** . I. L. R., 12 Cal., 83

194. *Jurisdiction.* Questions of—A special appeal will not lie upon a question of jurisdiction depending upon a question of fact, unless the fact has been determined by the lower Court or is admitted by the parties. *Quere.*—Whether if the fact appears, a special appeal will lie unless the error in procedure has affected the merits. **LUTEEPOOISSIA BEEKER v. POOLIS BERNARY SKIN** . W. R., F. R., 31. I Ind. Jur., O. S., 10 [1 May, 242

**S. C. POOLIS BERNARY SKIN v. LUTEEPOOISSIA BEEKER** . Marsh., 107

**COURT OF WARDS v. ROOP MOCHJURE KOOER** [25 W. R., 230

195. *Question of what parties are sale in execution of decree—Mixed question of law and fact.*—The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it. **GYANAK MAL v. METHEASAKI** . I. L. R., 13 Mad., 47

196. *Evidence of lower Courts found.*—Where both legal necessity—Where both that there was no necessary money, the High Court refused consider it other than a question they could not interfere. **INDIR CHUDDER CROWNEY** .

197. *Issue—Ours probandi.*—Where has gone into evidence upon the lower Courts to question as to on the one or on the other can arise. **HURRI MOHTI MOZOORAR v.**

[23 . R., 324

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—continued.

## E. GROUNDS OF APPEAL—continued.

Reversing the decision in **ASOTI BERNARY v. HURRI MOHTI MOZOORAR** . 23 W. R., 69

198. *Proceeding to enforce decree—Act XIV of 1859, s. 20.*—The question whether the action of the judgment creditor taken in execution of his decree was a proceeding taken to enforce the decree within the meaning of s. 20 Act XIV of 1859, was a question of fact for the decision of the Courts below, and not one of law on which to bring a special appeal to the High Court. **IRSHAD ALI v. RADHU SHAH** [13 R. L. R., Ap., 1: 21 W. R., 189

199. *Order finding proceedings to enforce decree not bono fide—Act XIV of 1859, s. 20.*—The question as to whether proceedings which had been taken to execute a decree had been taken bono fide to keep alive such decree was a question of fact, and no special appeal lay from an order finding that the proceedings taken were bono fide. **BHURAN MOHTI CHATTERJEE v. SATDAMINI DEVI** . 5 R. L. R., Ap., 59

200. *Service of notices.*—Where a Judge found no evidence that the notices in certain execution-proceedings were not caused to be properly served, and that those notices were not made in good faith, the finding was held to be a finding of fact which could not be disturbed in special appeal. **ABDOUL AZEEZ v. MATHURAJI** [11 W. R., 203

201. *Service of notices of enforcement.*—A decree that notice of enforcement was duly served cannot be interfered with in special appeal. **TARA PROSONTO MOZOORAR v. BISHO NATH SINGAR** . 23 W. R., 144

Reviewing on appeal **BISNONATH SINGAR v. TARA PROSONTO MOZOORAR** . 23 W. R., 433

202. *Right of way.*—In suits to enforce a right of way, the question whether the plaintiff has a right of way or not is a question of fact to be determined by the evidence he produces of user. Where, on the evidence, the Judge found the plaintiff had not a right of way, held there was no error of law which gave the plaintiff a right to a special appeal. **MANOMED ALI v. JERUL RAM CHANDRA** [5 R. L. R., Ap., 84: 14 W. R., 124

203. *Finding as to user.*—A finding of a lower Appellate Court as to a right of user being proved cannot be interfered with on special appeal, even though not very distinct as to the precise period of enjoyment. **WITTEKINDOOREN v. SREKOTED LALL** . 11 W. R., 265

204. *Civil Procedure Code, s. 584—Powers of High Court on second appeal.*—On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that, "though the tenant admitted the execution of the muchalka, it was not shown that he disposed

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—continued.

## 5. GROUNDS OF APPEAL—continued.

with the pottah," no objection was taken in the memorandum of appeal that the muchalka, which contained a statement that no pottah was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding. *NABAYANA v. MUNI*  
[I. L. R., 10 Mad., 363]

205. ——— *Finding on facts—Decision in regular appeal.*—When the decision passed in regular appeal turns upon a mere question of fact, if that question of fact is determined after due investigation, there is no ground of special appeal. *GOPAL KHUNDEE RAO v. DECKEE NUNDUN* 6 N. W., 172

206. ——— *Consent of parties.*—The High Court will not, even with consent of parties, pronounce a decree on the facts in a special appeal. *KADAMBINEE DOSSEE v. DOORGA CHURN DUTT* . . . . . Marsh., 4  
*S. C. DOORGA CHURN DUTT v. KADUMBINEE DOSSEE* . . . . . 1 Hay, 25

207. ——— *Inference of fact.*—It is most essential in special appeal that the High Court should be very careful in not interfering with inferences of fact drawn by a lower Appellate Court. *HAMEER MAHOMED CHOWDRY v. FOOL MAHOMED CHOWDRY* . . . . . 16 W. R., 311  
*WOOMA MOYEE BURMONTA v. KUNUCK CHUNDER MOOKERJEE* . . . . . 17 W. R., 418

Even though it is not an inference, the High Court itself would have drawn, provided the Judge was at liberty to draw it. *MAHOMED MANOO BHOOTAH v. MAHOMED ASANOULLAH CHOWDHRY*  
[17 W. R., 349]

*KALEE DOSS ACHARJEE v. KHETTRO PAL SINGH ROY* . . . . . 17 W. R., 472

208. ——— *Practice—Interference with finding of facts on second appeal.*—As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case has not been satisfactorily arrived at. *GOLUCK NATH alias RAKHAL DAS CHUTTAPADHYA v. KIRTI CHUNDER HALDAR*  
[I. L. R., 16 Calc., 645]

209. ——— *Ground for setting aside decision.*—If the reasons in a judgment are such as can be rightly given, and the inferences such as can be legally drawn, it cannot be set aside in special appeal, even if the High Court cannot agree with or support all the reasons given. *RUMMEZOOD-DEEN BHGOYAN v. JOYMALA* . . . . . 15 W. R., 303

210. ——— *Finding of fact, unsupported by reasons.*—The High Court is not bound, in second appeal, by a finding of fact of a lower Appellate Court, when such finding is not

## SPECIAL OR SECOND APPEAL

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## 5. GROUNDS OF APPEAL—continued.

supported by any reason. *PURSHOTAM SAKHARAM v. DURGOTI TUKARAM* . I. L. R., 14 Bom., 452

211. ——— *Finding of the Court of first instance without reasons given where contrary conclusion has been come to by the District Judge.*—The District Judge having expressed an opinion and recorded a finding without discussing the several grounds on which the Subordinate Judge came to a contrary conclusion,—Held that the finding of the District Judge ought not to be accepted. *MADHAY SHANBHOG v. VENKATASH MANJAYA* . . . . . I. L. R., 16 Bom., 540

212. ——— *Finding of fact unsupported by reasons—Defect in judgment of lower Appellate Court.*—Where no reasons are given by a lower Appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal. *Kamat v. Kamat*, I. L. R., 8 Bom., 363 (370), and *Regdwath Gopal v. Nilu Nathaji*, I. L. R., 9 Bom., 452 (454), referred to. *NINGAPPA v. SHIVAPPA*  
[I. L. R., 19 Bom., 323]

213. ——— *Decision on fact, though probably erroneous.*—In special appeal a lower Appellate Court's findings upon a question of fact were accepted as final, although it seemed to the High Court at least doubtful whether the judgment of the first Court was not the right one and it was not unlikely, if they had the power of going into the matter, that they might have come to a different conclusion from the lower Appellate Court. *LOOTYEE DHUR ATTO v. PROSUNNO MOYEE DOSSEE*  
[20 W. R., 267]

214. ——— *Error in law.*—A finding of fact by a lower Appellate Court may be disturbed in special appeal, if, as in this case, the reasonings and the views upon which that finding is based are erroneous in law, as where evidence is credited or disbelieved on unreasonable grounds. *JUGGURNATH DEB v. MAHOMED MOKEEY*  
[17 W. R., 161]

*SAGE v. MACKAY & Co.* . . . . . 2 Hay, 463  
*BEHAREE LALL NAEK v. SREERAM ROY*  
[20 W. R., 259]

*See KRISTO GOBIND KUR v. GUNGA PERSHAD SUEMA* . . . . . 23 W. R., 266  
*PUTSAHEE KOOPER v. SHEO PERSHAD RAM OPA-DHYA* . . . . . 24 W. R., 61

*CHAND MONEE DOSSEE v. OBHOY CHURN MAL*  
[24 W. R., 289]

*HUNSA KOOPER v. SHEO GOBIND RAOOT*  
[24 W. R., 431]

*GOBINDO CHUNDER MOULICK v. MUDHOSOTUN MOULICK* . . . . . 25 W. R., 550

*DHOONDH BAHADROO SINGH v. PRIAT SINGH*  
[17 W. R., 314]

*KEWAL KANDOO v. OMRAO SINGH*  
[25 W. R., 166]



## SPECIAL OR SECOND APPEAL —continued.

### 5. GROUNDS OF APPEAL—continued.

v. *Shamskhaton, I. L. R., 20 Calc., 93*, referred to. *KRISHNA KISHORE NEOGI v. MAHOMED ALI* [3 C. W. N., 255]

**223.** ————— *Finding of lower Court based on misconception of evidence—Defect in judgment of Appellate Court.*—The finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it. *GOVIND v. VITHAL, I. L. R., 20 Bom., 753*

**224.** ————— *Finding on the existence of custom or usage, mainly based on irrelevant matters—Evidence Act (I of 1872), s. 13—Mistrial—Remand.*—In suits by a landlord for ejectment of purchasers from raiyats having only a right of occupancy on the ground that the holdings of such raiyats were not transferable without the landlord's consent, the defendants pleaded custom or usage in support of the transfers. Questions arose as to the character of the usage required to be proved in such cases and the nature of the evidence required to prove the usage. In second appeal the High Court, upon an examination of the evidence relied on by the lower Court of appeal, and on reference to s. 13 of the Indian Evidence Act (I of 1872), held that, the finding of that Court on the existence of the usage having been mainly based on irrelevant matters, the appeal was not properly tried, and the case must be remanded for re-trial. *Womes Chunder Chatterjee v. Chandee Churn Roy Chowdhry, I. L. R., 7 Calc., 293*, referred to. *PALAKDHARI BAI v. MANNERS* [I. L. R., 23 Calc., 179]

**225.** ————— *Proof of custom—Misconception as to mode of proof.*—If a decree appealed against is based on wrong views of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal. *DESAI RAKHODDAS VITHALDAS v. RAWAL NATHUDHAI KESABHAI, I. L. R., 21 Bom., 110*

In another case the Court on second appeal did not consider it open (where the lower Court had found the existence of a custom) to arrive at an independent finding as to whether the evidence established the existence of such custom. *BAI SHRINIBAI v. KHARSHEDJI NABARTANJI MASALA VALA, I. L. R., 22 Bom., 430*

**226.** ————— *Reversed to the Appellate Court—Additional evidence in Appellate Court—Finding of fact upon evidence taken after remand—Procedure in the second Court of appeal—Civil Procedure Code (1882), ss. 568, 584, 555, and 547.*—In a second appeal, the High Court set aside the decrees of the lower Courts on the ground that certain issues raised in the suit were not considered by those Courts, and remanded the case to the lower Appellate Court for a proper decision of the case. The lower Appellate Court took evidence on

## SPECIAL OR SECOND APPEAL —continued.

### 5. GROUNDS OF APPEAL—continued.

the issues not tried before, and came to findings of fact on that evidence. Held that the lower Appellate Court tried the case, not as an original case, but as an appeal, and acting under the powers given to it took fresh evidence. Held that on second appeal the High Court is precluded by the Code of Civil Procedure from going into facts, and that restriction of power is not confined only to cases where evidence is taken in the first Court. *Gopal Singh v. Jhakri Rai, I. L. R., 12 Calc., 37*, followed. *Balkishan v. Javoda Kuar, I. L. R., 7 All., 765*, referred to. *Hinde v. Bragan, I. L. R., 7 Mad., 52*, not followed. *BENI PERSHAD KUARI v. NAND LAL SARU, I. L. R., 24 Calc., 98*

**227.** ————— *Enhanced rent on irrigated land—Implied contract.*—A zamindar tendered to raiyats on his estate pottabs providing (*inter alia*) for the payment of rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut. This had not been sanctioned by the Collector under the Madras Rent Recovery Act, s. 11, but it was found that it had been paid by the raiyats for many years. The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay it. Held that the finding as to the existence of an implied contract to pay the enhanced rent was a finding of fact, and must therefore be accepted on second appeal. *SRI-PARAPU RAMANNA v. MALLIKARJUNA PRASADA NAYUDU, I. L. R., 17 Mad., 43*

**228.** ————— *Civil Procedure Code (1882), ss. 584 and 585—Inference of law which the facts found are insufficient to justify.*—Where the lower Appellate Court arrives at a conclusion which is an inference based upon an erroneous view of law, the judgment is open to correction in second appeal. *Lachmeswar Singh v. Manuwar Hossein, I. L. R., 19 Calc., 253; I. R., 19 I. A., 48; Ram Gopal v. Shamskhaton, I. L. R., 20 Calc., 93; I. R., 19 I. A., 228*, referred to. *ISHAN CHUNDER DAS SARKAR v. BISHU SIRDAR* [I. L. R., 24 Calc., 825; 3 C. W. N., 665]

### (c) EVIDENCE, MODE OF DEALING WITH.

**229.** ————— *Evidence generally—Error in legal presumptions from facts—Decision without legal evidence.*—A Judge in this country is Judge both of law and fact, but if in deciding upon the facts he deals improperly with the presumptions which the law would raise, he commits error in law which the High Court can correct in special appeal. When a Judge decides without legal evidence, he commits an error in law. *SURKHOFF v. LUCHMEET DOOGRE, 9 W. R., 338*

**230.** ————— *Assumption made without evidence.*—Where an assumption is made by the Court without any evidence, that is an

## SPECIAL OR SECOND APPEAL

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error of law warrants a special appeal. **HIMMITY ALI KHANIM v. NAMTOOZILAH KHANIM**

[23 W. R., 250]

Upholding on appeal **NAMTOOZILAH KHANIM v. HIMMITY ALI KHANIM**

23 W. R., 519

231. — Drawing conclusions. Special appeal allowed, and case remanded for retrial, where the lower Appellate Court had drawn conclusions from the evidence not warranted by law or reason, and had failed to try a material issue in the case. **MAHARAJ SINGH v. NAKOWEI DAS MAHAJDAI**

7 B. L. R., App. 17

232. — Civil Procedure Code s. 554—*Substantial error in a first Appellate Court's finding without any evidence to support it*—The Court of first instance dismissed the suit upon the ground that the right which it was brought to establish had been taken away by a compromise entered into by a guardian on behalf of an infant party to former proceedings. This was reversed by the first Appellate Court, which decreed the claim holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court. *Held* that the High Court rightly reversed the decree of the first Appellate Court the above finding without any evidence to support it, being a substantial error in the proceedings, and good ground of second appeal within the meaning of s. 554, sub-s. (c), of the Civil Procedure Code. **HIMAWTA KUMARI DEBI v. BROJENDRO KISHORE ROY CHOWDHURY**

I. L. R., 17 Cal., 875

[L. R., 17 I. A., 65]

233. — Error in legal conclusion or inference from evidence—In a suit to enforce a right to share in the profits of a ferry the defendant set up an exclusive title and adverse possession. *Held* that the decision that the defendant's possession had been adverse having been an inference from a fact in the Courts below the correctness of this as a legal conclusion to be drawn or not was a question open to second appeal and the High Court was not precluded from deciding to the contrary. **LACHHESWARRINOR v. MANWAR HOSNITE**

[L. L. R., 19 Cal., 253]

L. R., 19 I. A., 48

234. — Omission of Appellate Court to consider presumption of facts material to case—When an Appellate Court appears not to have taken into its consideration a presumption of facts arising out of the circumstances in evidence, and materially affecting the decision of the case, that is such an omission and defect as 304 and 371, Act VIII of 1950, as the High Court will remedy on special appeal by direct an issue. **KILAYATCHI v. VEKATACHARI MUDALI**

[1 Mad., 131]

S. C. ANONIMO

2 Ind. Jur., O. S., 13

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## 5. GROUNDS OF APPEAL—continued

235. — Omission to draw inference—An omission of the Judge to draw an inference from the conduct of parties relied on as evidence is not an error of law with which the High Court will interfere in special appeal. **SATI v. POCHANCH**

25 W. R., 603

236. — Documentary evidence—Construction of document or inference to be drawn from its terms—Civil Procedure Code, s. 554—Question of law—The question of what is the proper inference to be drawn from the terms of a document is a question of law within the meaning of s. 554, Civil Procedure Code and can be considered in second appeal. **CHOCKALINGAM PILLAI v. MATHI CHETTIAR**

I. L. R., 19 Mad., 455

237. — Omission to consider evidence—Error in decision on the merits—Every Judge of a question of fact is bound to take into consideration all the allegations and proofs upon the record bearing upon that question, as well as the material presumptions arising therefrom, and to overlook them is a defect in law. But before such defect can constitute a good and valid ground of special appeal it must be of such a character that it may have caused an error in the decision of the case on the merits. **GURJE BISWAS v. KESORJI PATIL CHOWDHRY**

8 W. R., 395

238. — Decision of lower Court as to credit to be given to particular proofs—It is the province of the Court which has to decide issues of fact to determine the amount of credit to which each particular proof offered is entitled and with the fair exercise of its discretion in this respect by such Court, the High Court, as the Court of special appeal is not at liberty to interfere. **METRA DOS v. MACH SINGH**

2 N. W., 207

239. — Weight of reasons given for decision—No special appeal will lie on a ground relying merely to the weight of the reasons given by the lower Appellate Court for the decision arrived at. **DOORGA CHUNNY SETH v. RAMANUJ GOSWAMI**

12 W. R., 379

Or as to the worth of testimony. **MACKEFUE v. JOWAHIR MANTOON**

25 W. R., 157

240. — Error of evidence—Doctrine of Court under Act XL of 1857—Weight of evidence is not a point on which the High Court can interfere in special appeal, nor will it interfere with the discretion of the Judge in not allowing a person to represent a minor. **MOORE v. BANADORE SINGH v. PRASAD SINGH**

17 W. R., 814

241. — Error as to credit to evidence—Where the lower Appellate Court has dealt with the evidence on both sides, has weighed it, and come to the conclusion that one side ought to be believed, the giving in the course of his observations a bad reason for believing it is not a ground of special appeal. **SINGH GOLAM SANY v. MOHARRA LALL SARKO**

18 W. R., 110

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## 5. GROUNDS OF APPEAL—continued.

**242.** ————— *Difference between lower Courts on questions of evidence*—Where the first Court and the lower Appellate Court differ as to questions of evidence, it is not a ground of special appeal, nor are the parties entitled to argue in special appeal whether the former or the latter is right. *TARA PROSUNNO MOZOOMDAR v. BISHONATH SIRCAR* . . . . . **23 W. R., 144**

Reversing on appeal *BISSONATH SIRCAR v. TARA PROSUNNO MOZOOMDAR* . . . . . **22 W. R., 482**

**243.** ————— *Ground for discrediting evidence found not to exist.*—Where it was found, in special appeal, that the main ground on which the lower appellate Court had suspected the evidence for the plaintiff and given credence to the evidence for the defendant had no existence, the High Court ordered a consideration of the evidence. *AMEERUN v. CHERAG ALI* . . . . . **24 W. R., 343**

*MACKENZIE v. JOWAHIR MAHTOON* [25 W. R., 137]

**244.** ————— *Erroneous dealing with evidence.*—Whether or not a lower Appellate Court commits such an error in dealing with a case on the evidence before him as would make his conclusion on the facts bad in law, if he does not treat the evidence otherwise than reasonably, he gives no room for special appeal. *MOHUR MATOON v. UMATUN* . . . . . **18 W. R., 499**

**245.** ————— *Improper mode of dealing with evidence—Remand.*—On special appeal it appearing that the Judge had dealt with the evidence in the case in an improper manner, it was pointed out, where he had committed errors and the case was remanded, that he might pass a fresh decision upon it. *RAM DAS SAHA v. MANMAHINI DAS* . . . . . **7 B. L. R., Ap., 4**

**246.** ————— *Judgment showing want of consideration of evidence.*—A judgment which shows on the face of it want of due consideration of evidence and the introduction of foreign matters into the case may be brought up before the High Court in special appeal. *SOORAS KANT ACHARYA v. KHOODES NARAIN MANNA* **22 W. R., 9**

*KOOLDEEPNARAIN SINGH v. RUMMON SINGH* [22 W. R., 278]

**247.** ————— *Civil Procedure Code, 1882, s. 584—Grounds impugning findings of fact.*—Held by the Full Bench (PETHERAM, C.J., dissenting) that under s. 584 (c) of the Civil Procedure Code it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible

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## 5. GROUNDS OF APPEAL—continued.

reasons for arriving at its findings of fact, the High Court may take notice of all such matters in second appeal. *Fattema Begam v. Mohamed Ausur*, *I. L. R., 9 Calc., 309*; *Assanullah v. Hafiz Muhammad Ali*, *I. L. R., 10 Calc., 931*; and *Zal Mahomed Bepari v. Shoola Bera*, *11 C. L. R., 104*, referred to. *Per PETHERAM, C.J.*—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final. By "specified law" in cl. (a) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower Appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Cl. (b) can only refer to mistakes in law, and does not extend the operation of cl. (a). The term "procedure" in cl. (c) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact. *Per MAHMOOD, J.*—That the Legislature, by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal, and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnarin v. Bhawandin, Weekly Notes, All., 1882, p. 104*, and *Sheoambar Singh v. Lattu Singh, Weekly Notes, All., 1882, p. 155*, referred to. The word "procedure" in cl. (c) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Court. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or

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where as in the 1st case is based upon evidence inadmissible by law or proceeded upon an error on the view of the legal effect of any material part of the evidence or are arrived at under a misconception of the law of the rules of evidence or of any other law such errors, though they purport to be based on fact, are errors of law, would lay the judgment of the lower Appellate Court open to second appeal under cl. (c) of s. 554 so long as the error was material enough to have possibly affected the justice of the case upon the merits. *NAVATH SINGH v. BHIKKI SINGH BHIKKI SINGH v. NAVATH SINGH* [I. L. R., 7 All., 649]

248.

Finding on

issue of fact remitted—Civil Procedure Code 1882 s. 565 s. 566 s. 567. It is held by the Full Bench (TYRRELL, J. dissenting) that the finding upon issue is remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to the findings must be restricted to the law with which the original case in second appeal are confined. *NAVATH SINGH v. BHIKKI SINGH I. L. R. 7 All. 649* referred to. *PER PETHURAM C.J. and TYRRELL, J.*—S. 565 and 567 of the Civil Procedure Code are as far as may be incorporated in Ch. XLII of the Code relating to second appeals and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. *PER STRAIGHT J.*—S. 15 of the Civil Procedure Code does not mean that the provisions of Ch. XLII relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Pennam v. Blawan d. n. Weekly Notes All., 15 p. 101 and Slesamdar S. v. Lallu S. v. Weekly Notes All., 1552 p. 158* referred to. *PER TYRRELL, J.*—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, in so much as the appeal may not be entertained on "grounds" of fact, but under the circumstances of a case of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Navath Singh v. Bhikki Singh*, I. L. R. 7 All. 649 the Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court, still acting under s. 60, has been obliged in the absence of evidence on the record to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court, the term "finding" being used in s. 66 in its restricted sense of an answer to the proposition referred for inquiry and

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not of an award of decision of the issue before the Court. *BALKISHAN v. JASODA KARAN* [I. L. R., 7 All., 785]

249.

Findings of

fact—Procedure of the High Court—Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence and to give weight to other evidence in which it is not entitled and has thus been led not into any mere incidental mistake but totally to misconceive the case the High Court will interfere in second appeal though it is not the ordinary course of procedure for it to interfere in such cases with its findings of fact which have been arrived at by the lower Appellate Court. *PUTHURAM BROTHERS v. M. HOOKED AGENTS* [I. L. R., 9 Cal., 303]

250.

Questions of

fact—Findings on evidence—The finding of a fact by a lower Appellate Court upon evidence a portion of which was inadmissible is not such a "finding" of fact as cannot be interfered with in special appeal. *GERU DAS DEY v. JAMSHEDPUR CHURCH* [3 B. L. R., A. C., 259]

251.

Giving notice

to go to inadmissible evidence—Where the lower Appellate Court gave very great weight to evidence which ought not to have been treated as evidence between the parties, and this error materially affected the judgment there, then, the High Court in special appeal held that there had been a miscarriage, and remanded the case for reconsideration. *POWELL v. DINDIAL LALL* [21 W. R., 257]

252.

Error in law

—Rejection of evidence—There is a material difference between a case in which a Judge has assigned one bad reason for believing or disbelieving a particular piece of evidence, while he has given one or more good reasons for the same belief or disbelief, and a case in which put on this particular piece of evidence wholly aside, enough remains to support the judgment, and a case in which the essential question, or one of the essential questions to be decided rests upon the evidence believed or disbelieved, for a reason of great value or considered worthless, for a reason which is unsound and unsatisfactory. In the latter case an Appellate Court can interfere on special appeal. *HETU PRASAD ROY v. WOMATARA DEVI* [I. L. R., 7 Cal., 283 & C. L. R., 449]

253.

Error in procedure

—Finding of fact by lower Court not accepted by High Court where the District Judge, in consequence of a mistake as to a date, was hurried in dealing with the defendant's evidence—Where a Judge under a mistake thought that a bond, which was really dated 19th November 1885 was dated 23 November 1885, and consequently treated the deposit on of the defendant, in which he stated that the bond had been passed by him a fortnight before he signed in the plaint, his account took the account which was signed on dated the 10th December 1885, as

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"false," — *Held* that, as the Judge must have been biased by the strong opinion so formed as to the defendant's untruthfulness in dealing with the rest of the defendant's evidence, there was such a substantial error in the procedure as ought to preclude the High Court from accepting the Judge's finding as conclusive upon the point in dispute. Decree reversed, and the case sent back for fresh decision on the merits on the evidence as it stood. *Hemanta Kumari Debi v. Brojendra Kishore Roy Chowdry*, I. L. R., 17 Cal., 875 : L. R., 17 I. A., 69, referred to. *VIRBHADRAPPA v. MANANTAPPA*

[I. L. R., 15 Bom., 670

254. — *Error in dealing with question of admissibility of evidence and burden of proof.*—*Per MAHMOOD, J.*—It is the duty of the Court, when dealing with second appeals and in considering the conclusions at which the lower Appellate Courts have arrived, to consider whether or not those conclusions have been arrived at in due compliance with the rules of law governing the admissibility of evidence, and which involve questions of the burden of proof; especially in cases in which a title is asserted by a plaintiff who seeks to oust a defendant and that defendant denies the title and asserts that the plaintiff has no title at all. *WALI AHMAD KHAN v. AJUDHIA KANDU*

[I. L. R., 13 All., 537

255. — *Suit for ejectment—Proof of title—Inference of title from acts of ownership—Finding of lower Court on such question—Mixed question of law and fact—Finding of fact.*—In an ejectment suit the evidence of the plaintiff's title to the property consisted of evidence of acts of user from which the Court was asked to infer ownership in the absence of proof of a better title by the defendant. Upon review of the evidence the District Judge held that the plaintiff's title was not proved. *Held* that this finding, which was a mixed one of law and fact, was a finding with which the High Court could not interfere on second appeal. When, from the facts found by the lower Court, the legal inference to be drawn is certain, the High Court in second appeal may correct erroneous conclusions drawn by the lower Appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to the High Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this: Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them? or would he, on the other hand on certain facts being established, direct them to find in a particular manner? In either of these cases it would be open to the High Court in second appeal to come to a different conclusion from the lower Appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to the High Court to consider the propriety of the finding of the lower Appellate Court.

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*Laohmeswar Singh v. Manwar Hossein*, I. L. R., 19 Cal., 253 : L. R., 19 I. A., 43, and *Ram Gopal v. Shamskhaton*, I. L. R., 20 Cal., 93 : L. R., 19 I. A., 229, referred to. *RAJARAM v. GANESH HARI KADKHANIS* . . . I. L. R., 21 Bom., 91

256. — *Misdirection—Ground of special appeal—Error of law.*—The fact that the lower Appellate Court has misdirected itself as to the effect of evidence which has been admitted in a suit is an error of law affording a good ground for a second appeal. *RAMPRASAD DAS v. RAJO KOER* . . . 5 C. L. R., 94

257. — *Disregard of evidence.*—Where the lower Appellate Court's judgment was not based on the whole evidence on the record (it having left some important evidence out of consideration), the judgment was set aside in special appeal, and the case remanded for re-trial. *SHUNDHABUN MOHUNT v. SHRUT CHUNDER ROY*

[23 W. R., 160

*ABDUL ROHMAN v. SOFY MIKHAYESH SANEBA*

[24 W. R., 293

*MOHUN SINGH v. JUGBUTTY KOER*

[24 W. R., 297

258. — *Disregard of evidence—Error in law.*—A complete disregard of evidence which, although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand, amounts to an error in law. *HEERA LALL GHOSE v. KATER DASS MOOBERJEE* . . . 23 W. R., 65

*ANUND CHUNDER CHUCKERBUTTY v. RUTNESSUR DOSS SEN* . . . 25 W. R., 50

259. — *Irregular dealing with evidence.*—Where an Appellate Court ignores the great body of evidence on the record and places reliance on what can be shown either to be no evidence at all or which points almost exclusively the other way, and where it lays down, as positive dicta of law, points which are not law, the High Court would be justified in considering such proceedings as errors of law, notwithstanding that the Court below has ostensibly based its judgment on the evidence. *ROOF NARAINER KOER v. KESAB TEWARIE* . . . 24 W. R., 119

260. — *Improper dealing with evidence.*—In this case, departing from its general rule in special appeals not to disturb the finding of fact arrived at by the Court below, the High Court, seeing that, on the one hand, the Judge had misrepresented the effect of the evidence in some important particulars, and on the other hand omitted to notice facts very much in favour of the defendants, considered itself justified in saying that his mode of dealing with the appeal had led to material defects in the investigation of the case which had produced error in the decision on the merits. It accordingly reversed his judgment and remanded the



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case for re-trial. SHIBO SOONDHUR DOSSER v. CHUDDER HANT GHOSH 21 W R., 217

AMER HEPARER v. HURRER MOHUN KERMOKAR [23 W R., 87]

261. ————— Improper and erroneous dealing with evidence—Error in law.—The investigation of a case upon a portion of the evidence excluding the other portion under a mistaken impression that it was not legal evidence but conjecture is an investigation on erroneous in law and is likely to produce an error in the decision of the case on its merits. The mode in which evidence is to be dealt with discussed. MATURBA PANDAY v. RAM PRCHA TEWARI

[3 B L R., A C., 108 11 W R., 462]

262. ————— Partial consideration of evidence.—It is a ground for special appeal, if the Appellate Court directs one side of a case and turns its attention exclusively to the evidence on the other but it is no error of law merely to pronounce no objection upon the evidence on the former side. DEO SUREN POORY v. MAHOMED ISMAIL 24 W R., 300

263. ————— Ground for setting aside decision on facts.—The lower Appellate Court has quite as much authority to decide upon facts as the Court of first instance and the High Court is not at liberty to interfere with verdicts setting aside judgments of the Court of first instance simply because such judgments are more detailed or even more satisfactory on the evidence. DOLLO CHUDDER ROY v. WOOMA MOTER DEBIA

[19 W R., 321]

264. ————— Documentary evidence.—Reasons for reject of documentary evidence.—The reasons of a Judge for not giving any weight to documents offered as evidence cannot be questioned in special appeal. MURER DUTT SINGH v. CAMPBELL

[11 W R., 278]

But see SHROFFUTY DOSSER v. UMMA NUND B SWAN 24 W R., 192

265. ————— Finding as to sufficiency of documentary evidence.—Per BAYLEY J.—The omission in the first Court to enquire or specify in the judgment as to whether a pottah, which is admittedly 100 years old and which is supported by the evidence of old witnesses, comes from proper custody or not, is not a sufficient reason to invalidate the finding that the pottah is proved; nor is it a defect in the investigation affecting the merits of the case which would justify the interference of the High Court in special appeal. Per GLOVER, J.—The question as to proper custody is not in issue the Judge having found the pottah proved by the evidence of witnesses. BUDDHOODDER v. GOLAK PRER 17 W R., 279

266. ————— Error of Judge in not giving proper effect to evidence.—In order to support a contention that the judgment of the lower

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—continued

## 5 GROUNDS OF APPEAL—continued

Appellate Court is erroneous in law because the Judge has failed to give proper effect to the documentary evidence adduced, it is necessary for the special appellant to show not only that the evidence is calculated to support certain conclusions, but that these conclusions alone flowed from it. SHAM NARAIN v. COURT OF WARDS 20 W R., 157

267. ————— Finding as to genuineness of deed from copy put in evidence.—The finding of a lower Appellate Court pronounced on evidence, on the genuineness of a deed on the production of a copy (the original having been lost) is not open to interference in special appeal. BUTTWAY CHUDDER BAYLER v. DEKHINA DEBIA [8 W R., 356]

268. ————— Finding as to genuineness of document.—A decision that a document was not genuine cannot be interfered with on special appeal. TARA PROSOVNO MOHOMDAR v. BISHO NATH SINGAR 23 W R., 144

Reversed on appeal BISHONATH SINGAR v. TARA PROSOVNO MOHOMDAR 23 W R., 452

269. ————— Use of probableness as evidence.—Where the lower Appellate Court merely on the appearance of a document discarded the evidence of witnesses who testified to the making and signing of it, the High Court reversed its decision on the ground that probableness which are useful as aids in considering the true value of direct evidence can seldom be safely had recourse to alone for the purpose of entirely invalidating direct evidence. LALLAN JHA v. TELESMAATOO ZENRA 21 W R., 436

270. ————— Presumption and unnecessary presumption of fact.—Where the Court concluded against the genuineness of a document on a presumption erroneous or one which did not necessarily arise, its decision was set aside on special appeal. ALDO BIRER v. KOOVJO BIRER LALL [19 W R., 268]

WIRE v. BURIA KHATOON 19 W R., 269

GOPAL CHUDDER GHOSH v. TINGOWRE MEWEL [19 W R., 349]

MEHER BILGOL v. KERANTY ALI 23 W R., 402

271. ————— Comparison of signatures in several manner leading to erroneous conclusion.—Where the lower Appellate Court relied on a comparison between the signature in a mortgage-deed and the signature in a vakalatnama, and it appeared in special appeal that there were very considerable discrepancies between the signatures, the High Court (departing from the ordinary assumption in such cases that the comparison had taken place in open Court before the parties in the usual way) concluded that the comparison had been conducted in some way which led the lower Court into error. They accordingly reversed its decision and remanded the case for re-trial. PHOONDER BIRER v. GORISH CHUDDER ROY 22 W R., 272

## SPECIAL OR SECOND APPEAL

—continued.

## 5. GROUNDS OF APPEAL—continued.

**272.** *Receipts for rent—Comparison of signatures—Credibility of evidence.*—In a suit for rent the defendant pleaded payment and put in evidence receipts for the rent claimed. The Court of first instance disbelieved this evidence and gave a decree for the plaintiff. The Judge on appeal compared the signature of the plaintiff on the receipts with his signature to a document not in evidence in the case, and reversed the decree and dismissed the suit. *Held* that the decision of the Judge, proceeding upon the point as to the credibility and weight of evidence, could not be objected to on special appeal. **RAMSOONDER SINGAR v. KISTOBAG BAG**. *Marsh*, 322:2 Hay, 421

**273.** *Receipts for rent—Civil Procedure Code, 1859, s. 372—Error in investigation of case.*—In a suit for arrears of rent the defendant pleaded payment and filed receipts. The Collector distrusted the receipts, and gave a decree in favour of the plaintiff, saying that as to three of the receipts evidence had been given which he did not believe; and that with respect to the other receipts no evidence had been offered. The Judge, on appeal, reversed the decree, and gave a decree in favour of the defendant, expressing an opinion that the distrust of the evidence in support of the three receipts was without sufficient reason. *Held* that, with respect to the receipts in support of which no evidence had been offered, the plaintiff was entitled to a decree for the rents to which they applied, and that the finding of the Judge that such rents had been paid without any evidence having then been given of such payments was an "error in the investigation of the case" which had produced error in the decision of the case upon the merits, within s. 372 of Act VIII of 1859, and was therefore ground of special appeal. **MOHUN CHUNDER DHUR v. KIDGE**

*Marsh*, 381:2 Hay, 419

**274.** *Misapprehension of, and irregular dealing with, evidence by Appellate Court—Ground for reversing decision.*—Where the lower Appellate Court misapprehended the documentary evidence, mistook the statements of witnesses, and without recording clearly its reasons for doing so sent for documents which had not been put in evidence before the first Court, and also came to the conclusion that certain documents whose authenticity had been sworn to were fabricated merely because their appearance seemed to indicate this, the High Court in special appeal held that the case had not been properly tried, and, reversing the decision of the lower Appellate Court, remanded the case for retrial, excluding from the evidence on the record the evidence which had been received in the appeal stage without any reasons being recorded for its admission. **NOWAB KHAN v. RUGHONATH DOSS**

[20 W. R., 474]

**275.** *Error in law—Misconstruction of document.*—The misconstruction of a document is an error in law sufficient to form a ground of appeal **ODIT NARAIN v. MAHESHUR BUX SINGH**. *Agra, F. B.*, 52: Ed. 1874, 39

## SPECIAL OR SECOND APPEAL

—continued.

## 5. GROUNDS OF APPEAL—continued.

**276.** *Misconstruction of document—Error on facts.*—Where the Court in recording the words of a document on which it relies puts one term for another, it is a misconstruction "affording ground for special appeal," but where for reasons given it places a particular boundary mark in a particular spot, its decision, even though wrong on the facts, would not be a misconstruction unless incompatible with the wording of the document. **KALEE CHURN PATTUR v. CHUNDEE CHURN MUNDUL**. . . . . 9 W. R., 366

**277.** *Misconstruction of documents.*—*Per AIKMAN, J.*—*Seem*—That a ground of appeal to the effect that the lower Appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure. **RUDE PRASAD v. BAIJNATH**. . . . . I. L. R., 15 All., 367

**278.** *Question of fact—Erroneous use of admission by lower Courts.*—The High Court, in special appeal, interfered with the concurrent finding of the first Court and the lower Appellate Court on a finding of fact, where the decision turned entirely on the construction of a written admission which had been wrongly understood. **LALLA HIRIT LALL v. MAHOMED LALLZAMAH**

[18 W. R., 447]

**279.** *Mistake as to meaning of evidence—Misconstruction of document.*—The misconstruction of a document which is the foundation of the suit, being in the nature of a contract or a document of title, is a ground for special appeal, although not named in Act VIII of 1859, s. 372. But a special appeal does not lie because of a mistake as to the meaning of some portion of the evidence which is in writing, if it is connected with other evidence affecting its construction. **NOWBUT SINGH v. CHUTTER DHAREE SINGH** 19 W. R., 222

**280.** *Error in construction and dealing with sale certificate.*—A Judge is bound to give full effect to the terms of a sale certificate; and when he proceeds to limit the effect of that certificate by certain inferences and conclusions drawn from other documents, he does that which he is not at liberty to do, and commits an error of law which it is in the power of the High Court to remedy on special appeal. **MOOKHYA HURUCKRAY JOSHEE v. RAM LALL GOMASHTA**. 14 W. R., 435

**281.** *Construction of depositions of witnesses.*—The construction of the deposition of witnesses is not a question of law, and therefore not a ground of special appeal. **HIMMAT ALI KHADIM v. NIAMUTOOLLAH KHADIM**

[23 W. R., 250]

Upholding on appeal, **NIAMUTOOLLAH KHADIM v. HIMMAT ALI KHADIM**. . . . . 22 W. R., 519

**282.** *Construction of document—Question of fact.*—Where the conclusion of the lower Appellate Court rested, not only upon the contents of a document involving the question of its

## SPECIAL OR SECOND APPEAL

—continued—

## 5 GROUNDS OF APPEAL—continued.

correct construction but also upon all the facts of the case and the whole conduct of the parties.—*Held* that it was not open to special appeal. **HUGHES DEER MANATA v. MUDHOO SOOLAN CROWDER**

[23 W. R., 406]

283. — *Decision without sufficient evidence*—In a suit on a kaboolist, the Court of first instance found that the kaboolist had not been signed by the defendant, but by a third party, and that there was no evidence that such third party was authorized to sign it. The Judge on appeal reversed the decision. *Held* that the decision of the Judge holding the defendant responsible for these signatures of a person of whose authority there was no evidence was erroneous in point of law and was a ground of special appeal. **RAM CHAND BISACK v. BUDHO CHUNDER CHAT TEEJ**

[March, 1896 2 May, 1893]

284. — *Findings of fact*—The lower Appellate Court finds as a fact that the Ameen's report is untrustworthy as it is map wrong, the finding cannot be interfered with by the High Court in special appeal. **SHRO DIAL SINGH v. HODGKINSON**

[24 W. R., 342]

285. — *Omission to record opinion on error*—The omission to record an opinion on one of many items of evidence (e.g., an Ameen's report) is no such an error in law as to come within the scope of the provisions for special appeals. **BUDHO DOOGOLAH v. JOY SINGH SINGH**

[24 W. R., 1864, 367]

**HIMMET ALI KHADIM v. NIAMTOOLAH KHADIM**

[23 W. R., 250]

Upholding on appeal an order the Letters Patent the decision of **KEMP, J.**, in **NIAMTOOLAH KHADIM v. HIMMET ALI KHADIM**

[23 W. R., 619]

286. — *Entry in account book—Error in law*—The improbability of plaintiff having received payment for one bill whilst another and older one remained unpaid was no reason for the Judge refusing to consider the evidence adduced by plaintiff in support of her demand and his not having done so was held to be an error of law. So also the Judges having entirely ignored the evidence with regard to an entry in the plaintiff's day-book on which the first Court decided the case was held to be an error of law in the investigation and a proper subject for special appeal. **DAWMO DEBER v. HERRSCHER MOOREHEAD**

[18 W. R., 63]

287. — *Documents improperly admitted*—Where a Judge is influenced in his estimate of oral testimony by the result of his consideration of documents which he ought not to have dealt with as evidence, there was held to have been no proper trial of the case. The High Court on special appeal remanded the case. **BOIDONATH PA ROO v. RICHARD LALE MITTEN**

[9 W. R., 274]

**PURAN CHUNDER CHATTERJEE v. GRISH CHUNDER CHATTERJEE**

[9 W. R., 450]

## SPECIAL OR SECOND APPEAL

—continued.

## 6 GROUNDS OF APPEAL—continued

288. — *Oral evidence—Difference of opinion between lower Courts as to credibility of witnesses*—Where the Courts differ as to the credibility of witnesses, such difference does not form a ground of special appeal. **SARKISST GROSS v. HIRWAN CHUNDER MEY**

[24 W. R., 13]

289. — *Finding as to materiality of evidence or witnesses*—Though a Judge has a right to say that in the absence of a witness he considers material he cannot give the plaintiff a decree, yet where he stated that unless a certain witness (from whom the plaintiff had got a conveyance which it was necessary for him to prove) attended and gave evidence the plaintiff could have no right whatever, his decision was held to be wrong in law and was not a ground of special appeal. **RAM DUNN RAMSINGH v. RAM NARAIN MOORTHY**

[11 W. R., 511]

290. — *Discrediting witnesses for general reasons—Error in law*—Yet the lower Appellate Court to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law which can be the subject of a special appeal. **DEHO PURSANT PANDIT v. BACH SARTY**

[24 W. R., 251]

291. — *Disbelief of witness as interested party*—A special appeal will not lie merely on the ground that the lower Appellate Court has disbelieved a witness by reason of his being an interested person or for any other reason within its discretion. **DWAKAVATH DONG BISWAS v. MEDDIN MOHUN CHUCKERBUTTY**

[10 W. R., 282]

292. — *Omission to give reasons for believing witnesses disbelieved by lower Court*—The omission of a lower Appellate Court to give its reasons for believing witnesses disbelieved by the first Court does not constitute a ground of special appeal. **LUCKHER MOHUN BOSE v. RAJESHORE PAUL**

[4 W. R., 106]

Nor the omission to give reasons for confirming the decision of the lower Court. **SHAMER MOHAMED v. PRODHAN PALEN**

[5 W. R., 178]

293. — *Omission to give reasons for believing witnesses*—No general rule can be laid down as to when the reasons should be stated by an Appellate Court for believing one set of witnesses rather than another; and the omission of a lower Appellate Court to state such reasons is a ground for special appeal. **SHUMSHEEDDIN v. JAN MAHOMED SIKHAN**

[21 W. R., 260]

**MUKDOOMTAKISSA v. NOORHY SINGH**

[24 W. R., 286]

294. — *Omission to remind witness of former contrary statement—Refusal to statement on judgment*—When witnesses under examination make statements which are contrary to statements previously made by them, the

## SPECIAL OR SECOND APPEAL

—continued.

## 5. GROUNDS OF APPEAL—continued.

Court ought to draw their attention to the contradiction; but an omission to do so does not make the judgment bad in law, because he has remarked on those contrary statements in his judgment. *SHAM LALL alias SHAMA v. ANUNTEE LALL*

[24 W. R., 312]

295. ————— *Putting onus of proof on wrong party—Irregularity affecting merits—Error in law.*—A suit instituted in the Court of the Principal Sudder Ameen was transferred under s. 6 of Act VIII of 1859 to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sudder Ameen; and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif, upon evidence recorded by the Principal Sudder Ameen; and that the onus of proving the *bona fides* of the transaction, which was the subject-matter of the suit, was thrown by the District Judge on the plaintiff, instead of on the defendant, who alleged the want of it. *Held* (1) that the Munsif's having used the evidence recorded by the Principal Sudder Ameen was only an irregularity which was waived by the plaintiff not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case, the decree of the Munsif being in the plaintiff's favour, it was not a ground for reversing the decree on special appeal; (2) that the onus was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law, as the Judge did not hold that the defendant was entitled to succeed without giving any evidence, unless the plaintiff disproved the allegation of the want of *bona fides*. *NARANBHAI VIKJBHUKANDAS v. NAROHANKAR CHANDRO SHANKAR*

[4 Bom., A. C., 98]

296. ————— *Admission or rejection of evidence—Error in admission of document insufficiently stamped.*—An error in the admission of an insufficiently stamped promissory note was held not to be an error affecting the decision of the case on its merits. *MAKBUL AHMAD v. IFTIKHARUNNISSA BEGUM*

7 N. W., 124

297. ————— *Order under s. 20, Stamp Act XVIII of 1869—Discretion—Ground of special appeal.*—A District Court refused to allow under Act XVIII of 1869, s. 20, an insufficiently stamped document to be admitted on payment of the full amount of stamp duty, and the penalty, on the ground that it was wilfully executed in fraud of the stamp law. *Held* that the High Court could not in special appeal question the correctness of the District Court's refusal. *Pendse v. Malse, 3 Bom., A. C., 94*, commented on. *GAMBHIRMAL v. CHEJMAL*

[10 Bom., 408]

## SPECIAL OR SECOND APPEAL

—continued.

## 5. GROUNDS OF APPEAL—continued.

298. ————— *Error in admission of secondary evidence.*—Whether secondary evidence is admissible in the place of primary is a question for the determination of the Court which tries the case on its merits, but such determination is open to special appeal, if it is come to without evidence at all, or without evidence legally sufficient. *CHUNDERKANT GHOSE v. SHOWDAMINEE DEBIA*

[19 W. R., 517]

299. ————— *Refusal to admit secondary evidence of lost deed.*—All that it would be right for the Court to require for the protection of the revenue in cases where a lost deed was shown not to have had a stamp would be that the same money should be paid, before admitting secondary evidence, as would have to be paid if the deed itself were produced. If the Court does not do that, but allows secondary evidence to be given of the contents of the deed, it is not an error which affects the merits of the decision or is a ground for special appeal. *HARAN CHUNDER BHOOREE v. RUSSICK CHUNDER NEOGY*

20 W. R., 63

300. ————— *Refusal to allow additional evidence—Discretion of Court.*—The parties in an appeal are not entitled as of right to put in additional evidence. The Appellate Court allows additional evidence in certain cases, but a special appeal will not lie in the event of the Court refusing to allow it. *GOZAM MUCKDOOM v. HAFEEZOONISSA*

[7 W. R., 489]

*KULPO SINGH v. THAKOOR SINGH*

[15 W. R., 429]

301. ————— *Refusal to allow additional evidence—Civil Procedure Code, 1859, s. 355.*—The High Court on special appeal cannot interfere with the refusal of a lower Court to comply with an application, under s. 355, Act VIII of 1859, to file additional exhibits. *MOHESH CHUNDER SHAH v. SHOSHNE MOOKHEE DEBIA*

6 W. R., 198

302. ————— *Taking of additional evidence by Appellate Court—Civil Procedure Code (Act XIV of 1892), s. 568.*—Where the lower Appellate Court allows additional evidence to be taken, though it is not satisfied that the evidence is necessary under cl. (a) or cl. (b) of s. 568 of the Code of Civil Procedure, the High Court will interfere on special appeal; but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere. *HAFIZ ABDUL KURRIB v. SHI KISSEN RAI*

[I. L. R., 11 Calc., 139]

303. ————— *Omission to give reasons for admission of additional evidence.*—A sued B for rent, making C a defendant; the suit was dismissed and A appealed. Then C sued B for rent; A intervened and was made a defendant; a decree was passed in favour of C, and A again appealed. On appeal the Subordinate Judge tried both suits on

## SPECIAL OR SECOND APPEAL

—cont. *used*5 GROUNDS OF APPEAL—*concluded*

the same evidence though there was evidence in the second case which was not before the lower Court on the hearing of the first. *Held* that he should have recorded his reasons for doing so, but that the judgment would not be set aside on that ground it not appearing that the party taking the objection had been prejudiced or that it had been raised before the subordinate Judge. **PRANVATH SANDAL v. RAM COOMAR SANDAL** 2 C L R., 33

304 ————— *Improper rejection of evidence*—The improper rejection of evidence affecting the decision of the case on the merits is an error in law which may be set aside on special appeal. **HEBO CHUNDER CHOWDHURY v. GORIND CHUNDER MOITRA** 17 W. R., 255

305 ————— *Rejection of evidence which ought to have been admitted—Ground for interference*—The fact that the Judge may have rejected evidence which ought to have been received and considered does not warrant the High Court in interfering to set aside an order of such Judge. **VESEKATACHELLA CHETTI v. PARVATAMMAL** [2 Mad., 418]

## C OTHER ERRORS OF LAW OR PROCEDURE

## (a) APPEALS

306 ————— *Appeal wrongly admitted—Orders and proceedings thereon without jurisdiction*—Where an appeal was allowed from an order rejecting a review, and other acts and proceedings took place based on such illegal order the High Court set aside all the proceedings in special appeal. **JEWEL BIKER v. BUDDY MUNDU** [9 W. R., 489]

307 ————— *Appeal heard ex parte decided without objection where no appeal lay*—Although Act XXIII of 1861, s. 26 barred an appeal from an order or decision passed in a suit instituted under Act XII of 1859 s. 15, yet where an appeal was made in such a case no objection taken, and the appeal decreed the High Court refused to interfere, the lower Appellate Court's decree having given the plaintiff what the first Court ought to have given. **HARDYAL SINGH v. KUNHYA LALL** [19 W. R., 247]

308 ————— *Appeal heard ex parte without respondent being aware of hearing*—Application for rehearing barred before he was aware of decree against him—*Civil Procedure Code, ss 560 and 584 (c)*—*Limitation Act s. 11, art 169*—*Power of High Court to interfere on special appeal*—Where an appeal was heard *ex parte* by a lower Appellate Court and the decree of the Court of first instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served, and who was not aware of the proceedings till after the time for applying for a rehearing under s. 560 of

## SPECIAL OR SECOND APPEAL

—*continued*C OTHER ERRORS OF LAW OR PROCEDURE—*continued*

the Civil Procedure Code and Limitation Act s. 11, art. 169, had expired—*Held* that the High Court in second appeal had power to interfere under s. 194 (c), Civil Procedure Code. **BALAJI RAO v. SIVANAGOR** [L. L. R., 19 Mad., 414]

309 ————— *Order reject of appeal not presented in time without sufficient cause for delay—Discretion of Judge—Exercise of discretion not to be interfered with*—Where an appeal has been dismissed as barred by Limitation the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision. **PARVATI v. GANPATI POKHARI NAIK** . . . . . [L. L. R., 23 Bom., 513]

## (b) COSTS.

310 ————— *Interference with award of costs*—The Court may interfere with the award of costs on appeal. **JAPANE BHOOM v. ANNEE HOSSEIN KHAN** . . . . . 1 Agra, 270

311 ————— *Question of costs*—There may be circumstances which would justify an appeal upon a mere question of costs. **CHITRAVEL alias KUNATH AHMED KOYA v. IRUMANON VITHAL KANHA MATH HAZI** . . . . . 3 Mad., 270

312 ————— *Mode of award of costs*—The question of how costs have been awarded is not a point for special appeal. **BIRU PERSHAD v. DOORGA PERSHAD** W. R., 1884, 215

313 ————— *Appeal from portion of decree relating to costs—Held*, in conformity with a Full Bench ruling of the late Sadler Court, that a special appeal lies from the order of the lower Courts in matters relating to costs and that there is nothing in the law limiting or taking away the right to appeal specially from that part of a decree which relates to costs in any case where any legal ground for special appeal is shown to exist. **ASSA RAM v. KASHMIREER DASS** [Agra, F. R., 90; Ed. 1874, 68]

314 ————— *Discretion in awarding costs—Civil Procedure Code 1857, s. 157*—Where no appeal is made against the judgment passed on the subject matter of the suit, the discretionary power of assessing costs given by s. 14 of Act VIII of 1859 should not, unless in a very exceptional case, be interfered with by the Appellate Court. **KUTUBUDDIN KHAN v. NARSINGH** [1 Mad., 74]

315 ————— *Improper exercise of discretion in awarding costs*—An improper exercise of discretion in awarding costs against which a regular appeal would be no ground for allowing a special appeal, unless the award is contrary to some

## SPECIAL OR SECOND APPEAL

—continued.

## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

particular law on the subject. *AMIRSAHEB HAFIZ-ULLA v. JANSHEEDJI RUSTAMJI*

[4 Bom., A. C., 41

*PESAJI LAHMAJI v. BHATANIDAS NAROTAMIDAS*

[8 Bom., A. C., 100

316.

*Improper exercise of discretion in awarding costs.*—There is no foundation for the opinion that an Appellate Court has no authority to interfere with the discretion of the lower Court as to costs. To assess the defendant in a suit with the plaintiff's costs, when plaintiff's suit is dismissed for want of any cause of action, is irregular and unreasonable. *DANTYLURI NARAYANA GAJAPATI RAZU GARU v. SURAPPA RAZU*

[3 Mad., 113

317.

*Erroneous order as to costs.*—The Court below gave the plaintiff a decree in a suit for mesne profits for such an amount as should be ascertained to be due, and ordered that the plaintiff should have his costs on the amount claimed. *Held* that this constituted no ground of special appeal, but that the remedy of the defendant was by application to the Court below to amend the order. *BHUGGOBAN CHUNDER GHOSE v. SHUMBHOO CHUNDER GHOSE*

Marsh., 503

318.

*Error in improper exercise of discretion as to costs.*—Where the first Court's discretion is improperly exercised in the matter of costs, the error may be rectified in regular appeal; but, if this is not done by the lower Appellate Court, the error is not such as would justify the High Court's interference in special appeal. *OOMA CHURN alias GOPAL CHUNDER ROY MOZOOMDAR v. GIRISH CHUNDER BANERJEE*

25 W. R., 22

319.

*Order in discretion of lower Court.*—Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs.—*Held* that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule, as laid down in *Gridhari Lal Roy v. Sundar Bibi, B. L. R., Sup. Vol., 496*, being that an order as to costs cannot be interfered with in special appeal unless it is illegal. *FUTEEK PAROOR v. MOHENDER NATH MOZOOMDAR*

I. L. R., 1 Calc., 385: 25 W. R., 226

Reversing on appeal under the Letters Patent the decision in *MOHENDER NATH MOZOOMDAR v. FUTTECK PAROOR*

24 W. R., 319

*ACHUMBHIT SINGH v. KUNHYA LAL MOHAJUN*

[7 W. R., 208

(c) DISCRETION, EXERCISE OF, IN VARIOUS CASES.

320. — *Order for security for costs—Appeal struck off in default—Absence of error in law.*—When the Civil Procedure Code gives to a Court of regular appeal a discretionary power, and that discretionary power has been fairly exercised,

## SPECIAL OR SECOND APPEAL

—continued.

## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

it is no good ground of special appeal that a wiser exercise of the discretion would have led to different results. In a regular appeal the District Judge, at the instance of the respondent, on 26th March, called upon the appellant, who resided out of British territory, to show cause, within two days, why, under s. 342 of Act VIII of 1859, he should not furnish security. The appellant appeared on the 13th of May, and filed a written statement that he owned land in Jhansi, and prayed that, if the statement was denied, inquiry might be made. There was nothing to show that this statement was disputed. The Judge on the same day made the following order: "As I cannot say whether or no this is true, and am not aware of the terms under which land is held in Jhansi, if indeed the appellant holds any land there, the excuse cannot in its present form be accepted, nor can the respondent be exposed to risk while enquiries are pending. The appellant must file security within fourteen days or the appeal will be struck off." On 28th May the appellant produced certificates that he held manulands in Jhansi. The Judge, not considering these to be security, after recording that no further order could be passed, struck off the appeal with costs. A special appeal having been admitted from the Judge's orders, the respondent objected that no special appeal would lie. *Held* that the High Court ought not to interfere in special appeal merely on the ground that, in the exercise of the discretion given to the lower Appellate Court, another Court might have thought it unnecessary to call upon the appellant to furnish security. *Held* also that, unless it could be shown that the investigation of either of the issues of fact touching the appellant's residence and property had been defective, or that there had been error in law, the High Court had no power to interfere in special appeal. *Held* also that, if the appellant had, after the order of 26th March, come into Court without delay, or even on 13th May applied for an adjournment to enable him to put in proof that he held land in Jhansi, and been refused that permission, the Court would have interfered in special appeal. *GOPAL KHUNDER RAO v. DEOKEE NUNDUN*

[6 N. W., 172

321. — *Exercise of discretion not to be interfered with—Civil Procedure Code (Act XIV of 1882), s. 55A—Limitation Act (XV of 1877), s. 5—Appeal rejected as not presented in time without sufficient cause for delay—Discretion of Judge.*—Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision. *PARTATI v. GANPATI ROKDAJI NAIK*

I. L. R., 23 Bom., 513

322. — *Execution of decree—Discretion of Court executing decree—Civil Procedure Code, 1859, s. 207.*—It is entirely in the discretion of

## SPECIAL OR SECOND APPEAL

—continued

## 6 OTHER ERRORS OF LAW OR PROCEDURE—continued.

the Court executing a joint decree to make arrangements under Civil Procedure Code s. 207, regarding its execution by one of the decree-holders and to take necessary steps for the protection of the interests of the rest, a different course to do that, it cannot be pronounced wrong in special appeal. **HIRA ROY v. GUJADHAR PRESHAD NARAIN SINGH** [24 W. R., 289]

323 — Refusal to grant fresh summons—*Delay*—An exercise of the discretion of the Court in refusing to grant a fresh summons on account of delay in applying for it cannot be interfered with on special appeal. **BRISO LALL MOOKERJEE v. AUGHOR LALL GHOSAL** 25 W. R., 71

324 — Order for payment of decrees by instalments without providing for interest or penalty agreed upon on default—*Discretion*—*Arbitrary exercise of*—*Civil Procedure Code 1859 s. 194*—When the lower Courts ordered the decree to be paid by instalments which were hardly sufficient even to cover the interest and did not provide for the interest and penalty conditioned in case of default—*Held* that they had exercised the discretion vested in them by s. 194 Act VIII of 1859 arbitrarily and without due caution, and their order could be interfered with and set aside on special appeal. **HIRA GOBIND v. HURKHO** [1 Agra, 116]

**JAYREE BEGUM v. AHMED HOSSEIN KHAN**

[1 Agra, 270]

325 — Refusal to allow application to amend plaint—*Discretion to allow amendment of plaint*—A lower Court has discretion to permit or not the filing of a petition to amend a plaint and its refusal is no ground for special appeal. **WATSON & Co v. NIDHOO DINGAR** 10 W. R., 87

326 — Interest, Award of—*Interference on de re*—*Discretion of Court in allowing*—The Court executing a decree has a discretion in allowing interest, which will not be interfered with in special appeal. **PARSH NATH MUKHOPADHYA v. KISTOMOHAN SAHA** [3 B. L. R., Ap. 105 12 W. R., 12]

(d) ISSUES, OMISSION TO DECIDE

327 — Omission to consider material facts—*Removal of appeal heard by a District Judge to District Judge—Act XIX of 1866*—If on second appeal it is found that material facts, having an important bearing on the question at issue in the suit have been considered by the lower Appellate Court the High Court will interfere with the decision of the lower Appellate Court even though it be on a question of fact. **DENA NATH BANERJEE v. HARI DAS** [I. L. R., 11 Cal., 499]

328 — Omission to try question of possession when material—When the

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—continued

## 6 OTHER ERRORS OF LAW OR PROCEDURE—continued

plaintiff sued as owner of property in dispute and in which the defendant admitted the plaintiff's possession, but qualified it by saying that the plaintiff held as tenant, peshgirdar or mortgagee, the omission of the Appellate Court to try the question of possession is an error of law in the investigation which the Court will take notice of on special appeal. **GOPAL ROY v. TEKART ROY** 8 W. R., 333

329 — Omission to decide on limitation—An omission by the Judge on appeal to decree according to the law of limitation applicable to the case as stated by the plaintiff although the objection may not be raised in the grounds of appeal, is an error or defect in the decision of the case on the merits and a ground of special appeal. **SALUZI KESRAJI v. RAJBANGSI JAYESANGSI** [3 Bom., 169; 2nd Ed., 163]

330 — Omission to inquire into defendant's plea—*Suit for confirmation of title and possession*—Where a purchaser sues for confirmation of title and possession and the plea set up by the defence is that the rights and interests in question were previously transferred to another party who had sold it to the defendant a vendor the omission of the Court to inquire into the alleged transfer and see whether it was genuine, and, if so, whether it was a real or only a colourable transaction is an error in the decision which is a ground of special appeal. **HIRU GOBUTTY v. BIKHARAJEST SINGH** 8 W. R., 477

331 — Omission by Appellate Court to decide on the question of ownership—*Suit before Subordinate Judge depending on issues of ownership as well as on a rent note*—Where it appeared that an issue was raised as to ownership and that both parties at the trial before the Subordinate Judge gave evidence on such issue (although the claim was based, in the main, on a rent note), and the lower Appellate Court omitted to find on such issue—*Held*, reversing the decrees of the lower Appellate Court that it ought to have found on the issue as to ownership. **RAMKOR GOWALI v. QAYOARAM** I. L. R., 16 Bom., 545

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## (e) JUDGMENTS

332 — Reversal of judgment without reasons—*Differences of opinion as to*—A special appeal lies from an Appellate Court's judgment in which the decree of the lower Court is reversed without any reasons given for differing as to. **GOBURDHUN v. SADDHO** 1 W. R., 214

333 — Omission to state reasons for judgment—*Civil Procedure Code (Act XIX of 1852), ss. 574 581*—The fact that the judgment of an Appellate Court is not drawn up in the manner prescribed by s. 574 of the Civil Procedure Code is no ground for a second appeal under s. 581 unless it can be shown that the judgment has failed to determine any material issue of law. **BISWANATH MAITI v. BAIJANATH MANDOL** I. L. R., 13 Cal., 199

## SPECIAL OR SECOND APPEAL

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

334. ————— *Finding of fact*  
—*Civil Procedure Code, 1852, s. 201.*—A finding unaccompanied by the reasons for it, as required by s. 201 of the Code, is not a conclusive finding of fact binding on a Court of second appeal. *KAMAR v. KAMAT* . . . I. L. R., 8 Bom., 368

335. ————— The Judge decided that the plaintiff was barred by limitation, but his judgment did not disclose the grounds on which he held that plaintiff was not entitled to deduct, in calculating the twelve years' limitation, the time occupied by certain suits brought for the same property, in which he was non suited. *Held* that it was no ground of special appeal that the judgment was silent on the subject of the claim to deduction, and that, whether the point was urged in the lower Court or not, the plaintiff had no ground of special appeal in respect of omission of all notice of it in the judgment. *RAMSOONDER DOSS v. MAHOMED ABDED*  
[1 Ind. Jur., O. S., 102

336. ————— *Error of procedure*—*Civil Procedure Code, 1859, s. 359.*—A lower Appellate Court's omission to give reasons cannot be considered a ground for special appeal when it has not produced error or defect in the decision upon the merits. Where a lower Appellate Court has omitted to state reasons, and it appears to the High Court that reasons should have been stated, the proper course is to retain the case on special appeal, but to return the proceedings and require the omission to be supplied. *DOOLEE CHUND v. OONDA BEGUM* . . . 18 W. R., 473

337. ————— Omission to state points for decision and reasons in judgment—*Omission to follow direction in Civil Procedure Code, 1859, s. 359.*—S. 359, Act VIII of 1859, requires the points for determination—those in appeal as well as those in the original pleadings—to be stated, and the reasons upon which the decision was arrived at thereon: an omission to do this is ground of special appeal. *ROOF CHAND ROY v. RAM KANT KOBBERAS* . . . W. R., 1864, 98

338. ————— Omission to give reasons in judgment until after appeal.—*The fact of a Judge not writing a judgment containing the reasons for his decision until after the decree in appeal was passed was held not to affect the decision of the case on the merits, and was therefore not a ground of special appeal.* *BHAGYATSANGJI JAJAMSANGJI v. PARTABSANGJI AJJABHAL GANPATRAM LAKHMIRAM v. JAICHAND TALAKCHAND*  
[4 Bom., A. C., 105, 109

339. ————— Decision on point not contested.—In a suit by a talukhdar, where the dispute was whether certain land which the plaintiff held was what he was entitled to hold as lakhiraj, under a sanad which he produced, and as to the genuineness of which no question was raised, the lower Appellate Court indicated that it considered the sanad not to be genuine. *Held* that this was an

## SPECIAL OR SECOND APPEAL

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

important error, as the genuineness of the sanad was in no way in issue, and that the judgment must be set aside and the case remanded. *RAM SOONDUR BANERJEE v. KALER PERSHAD HAJRAH*  
[19 W. R., 287

340. ————— Decision for plaintiff on ground not alleged by him—*Civil Procedure Code, 1859, s. 350*—*Error not affecting merits.*—In a suit for possession of a quantity of land, where the first Court gave plaintiff a decree on the ground that he had proved title by purchase, and the lower Appellate Court, in confirming the decision on the substantial issue raised, went further, and found that one of the defendants was plaintiff's raiyat, contrary to the allegation set up by the plaintiff himself.—*Held* in special appeal that the error did not affect the merits of the case or the jurisdiction of the lower Court; and the High Court could not therefore interfere under s. 350 of the Code of Civil Procedure. *RAM CHUNDER CHATTERJEE v. RAM JEEBUN DASS* . . . 14 W. R., 141

341. ————— Decision founded on issues not raised in the suit—*Error of law.*—In a suit for the recovery of land upon an alleged lease found to be not genuine, the defendants set up a sale by plaintiff's father. The lower Court found that there had been a sale in fact, but held it to be invalid according to Hindu law, as having been without the concurrence of the plaintiff, the son of the vendor. *Held* that the validity of the sale not having been questioned by the plaintiff, who had rested his case on entirely different grounds, and no issues having been raised as to the validity of the sale, the Judge had committed an error of law affecting the merits in so deciding; and his decision was reversed on special appeal. *PANANI YANDI KAUNDAN v. MUTTUSAMI KAUNDAN* . . . 2 Mad., 441

## (f) LOCAL INVESTIGATIONS.

342. ————— Order directing local investigation—*Discretion of Court.*—Directing a local investigation or not is a mere matter of discretion in which no special appeal will lie of right. *GRAHAM v. LOPEZ* . . . 1 W. R., 141

*BYKUNT NATH SEIN v. PEAREE MONEE DASSEE*  
[1 W. R., 196

*POORNO PERSAD ROY v. CHUNDER NATH CHATTERJEE* . . . 1 W. R., 249

*RAJKISHEN MOOKERJEE v. HURO MOHUN MOOKERJEE* . . . 5 W. R., 248

343. ————— Order as to local inquiry—*Discretion of Judge*—It is within the discretion of a Judge to order or refuse a local inquiry. When, in the exercise of a reasonable discretion, he refuses such inquiry, his order should not be interfered with, unless very strong grounds are shown for the necessity of the inquiry. *RASH BEHAREE SINGH v. SAHEB ROY* . . . 12 W. R., 76



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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued

344 ——— Omission to direct local investigation *Error in law*—It is not an error in law in the investigation of a case where the Courts below do not direct a local investigation of their own motion when they are not asked by the parties to do so. *MACDONALD v. MUKAR ROY* [B. L. R., Sup. Vol. 358. 3 W. R., Act X, 153]

345 ——— Local inquiry in suit as to enhancement of rent—*Discretion of Judge to order local inquiry in suits to contest notice of enhancement—Order of Judge*—In a suit brought to contest a notice of enhancement, a Judge is not bound to order a local inquiry merely because he incidentally states such an inquiry to be the best source from which to obtain reliable evidence upon the point of rates. Nor will a special appeal lie on the subject of the Judge exercising a discretion as to ordering or not ordering such an inquiry. *HERA LOLL SEAL v. GENGADHUR SANKAPATTY* (W. R., F. B., 19. 1 Ind. Jur., O. S., 8. 1 Hay, 229)

*GENGADHUR SANKAPATTY v. HERALOLL SEAL* [Marsh., 60]

346 ——— Irregularity in local inquiry—*Civil Procedure Code, 1859 s. 180—Appointment of improper officer*—Though s. 180, Act VIII of 1859 makes it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local inquiry non-compliance with this requirement of law is not per se a ground of special appeal. *RAMDOSS KOOBDOO v. NIKRANTO DUTTA* 8 W. R., 6

347 ——— *Disregard of report on local investigation—Disputed boundary—Grounds of appeal—Civil Procedure Code (Act XIV of 1859) s. 584*—The Court of first instance accepted as correct a boundary line mapped by an Ameen dividing the estates of the opposite parties. The lower Appellate Court, after remanding the suit for a second local investigation and report determined to disregard the second return, which differed from the first and affirmed the judgment. Both parties having appealed the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below. *Held* by the Privy Council that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction, and that it had no power to hear the appeal as a second appeal there not having been in the proceedings below any error or defect, within the meaning of s. 584 of the Civil Procedure Code, which contained the only grounds of second appeal. *LEKHI NARAIN JAGADH v. JODU NATH DEO* (I. L. R., 31 Calc., 504. L. R., 21 I. A., 39)

348. ——— *Hearing and deciding case after granting commission for local investigation, without awaiting return of such*

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

*commission—Ground of appeal—Civil Procedure Code, s. 584*—Where a Court on the application of a party or otherwise has issued a commission for a local investigation, it is a substantial error in procedure and therefore a ground of special appeal, under s. 584 of the Code of Civil Procedure, if the Court proceeds to hear and determine the case without having the return of such commission before it. *MADHO SINGH v. HANSH SINGH* [I. L. R., 16 All., 342]

## (g) MISTAKES

349 ——— Mistake in account—*Review, Application for*—A mistake of account not being an error in law or procedure is not a ground for special appeal. The remedy lies in an application for review. *RAM HANSH ROY CHOWDHURY v. KALSH MONTU MOOKERJEE* 22 W. R., 310

*PROSTENGO COOMAR DUTT v. CHITTUNGO CHITRA BIDYALUNKAR* 25 W. R., 74

350. ——— Error in description of defendant as a minor—*Appeal by guardian treated as appeal by minor*—The father of a defendant filed an appeal from the judgment of the first Court, describing his son as a minor. It afterwards appeared that the defendant was not a minor, and the lower Appellate Court refused to pass an order, allowing the appeal by the father to stand as an appeal by the defendant. *Held* that the lower Appellate Court could, in the exercise of its discretion, allow the appeal to stand as an appeal by the defendant, but the High Court could not interfere with the order in special appeal. *SHAMA CHARAN GHOSH v. TARAK NATH MUKHOPADHYA* [3 B. L. R., Ap., 115]

351. ——— Decree proceeding on mistake as to applicability of law—*Mistake of Judge not affecting merits*—The Court will not interfere on special appeal with a decree proceeding on a mistake as to the applicability of a law when such error does not affect the decision of the case. *KRISHN KHAH v. MURDOOZ*

(W. R., F. B., 16. 1 Ind. Jur., O. S., 77. 1 Hay, 228)

*S. C. JUGGENDROO MOZOOMDAR v. GOOROO PERBARD ROY* Marsh., 53

*ESSAN CHUNDER DUTT v. PRANVAUTH CHOWDHURY* [Marsh., 370; 2 Hay, 238]

*AKRISH ALLY v. HOSSAIN ALLY* [1 Ind. Jur., N. S., 101; 5 W. R., Mils., 29]

## (h) MULTIPARTICULARITY.

352. ——— Misjoinder of causes of action—Misjoinder of causes of action is not alone a valid ground of special appeal. *SHYAMU PATUKE v. LALA SIBO CHURN LAL* [2 N. W., 443. Agra, F. B., Ed. 1874, 238]

# SPECIAL OR SECOND APPEAL —continued.

## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

353. ————— *Absence of material injury.*—Misjoinder of claims, without proof of substantial injury sustained thereby, is no ground for special appeal. *DURSHUN PANDEY v. SAMINAH BEDEE* . . . . . 1 W. R., 114

354. ————— *Material irregularity.*—Where a plaint containing separate causes of action or the part of distinct plaintiffs, though but one prayer—was filed and tried as a single suit, the Court trying the case was held to have committed not a mere technical irregularity, but an incorrect proceeding liable to lead to injustice and a ground for interfering with the judgment on special appeal. *RAMCOOMAR SIKKAR v. KALEE COOMAR DUTT* . . . . . 10 W. R., 279

355. ————— *Objection on ground of misjoinder.*—Where an objection on the score of misjoinder is disallowed by the first Court, but rightly allowed by the lower Appellate Court, the fact that the latter Court holds the objection to be good is no ground of special appeal. *MAHOMED HOSSEIN v. POTUS* . . . . . 20 W. R., 147

### (i) PARTIES.

356. ————— *Adding parties—Discretion of Court.*—The exercise of the discretion a Court had to add parties under s. 73, Act VIII of 1859, could not be interfered with on special appeal unless it was manifestly unjust and wrong. *GYARAM SEAL v. ISSUR CHUNDER CHUCKERBUTTY* . . . . . [2 W. R., 158]

*POHAN MUNDUL MOLLAH v. SHAM CHAND GHOSE* . . . . . [1 W. R., 228]

357. ————— *Error in adding party as plaintiff—Civil Procedure Code, 1877, s. 591.*—In a suit for rent where the defendant alleged that a person not on the record had a joint interest with the plaintiff in the property in respect of which the rent was due, and where the plaintiff disputed this and the third person was added by the Court as a co-plaintiff.—*Held* this would be an error or defect to which objection could be taken in the memorandum of appeal under s. 591 of Act X of 1877. *GOOGLEE SAHOO v. PREMLALL SAHOO* . . . . . [I. L. R., 7 Cal., 148]

358. ————— *Unappealed order—Civil Procedure Code, 1892, s. 591—Order making person respondent.*—S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Googlee Sahoo v. Premall Sahoo, I. L. R., 7 Cal., 148*, referred to. During the pendency of an appeal the plaintiff-respondent died, and on the application of the appellant the name of *H* was entered on the record as respondent, in place

# SPECIAL OR SECOND APPEAL —continued.

## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

of the deceased. Subsequently *K* applied to be substituted as respondent, alleging that he, and not *H*, was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents. *Held* that, on appeal from the decree of the Court below, *H* was entitled to object to the order adding *K* as a respondent, though he had not appealed from the order, itself. *HAR NARAIN SINGH v. KHARAG SINGH* . . . . . I. L. R., 9 All., 447

359. ————— *Erroneously making intercenor party to suit.*—An error in allowing an intercenor to be made a party to the suit is one of procedure only, and is not a ground of special appeal, unless it is shown that the decision of the case was affected by such error. *NUNHO MAHTOON v. TELLOCO KOONER* . . . . . 18 W. R., 313

360. ————— *Refusal to add party—Discretion of Court in refusing to add party under s. 73, Civil Procedure Code, 1859.*—The High Court will not on special appeal interfere with the discretion of a Court in refusing to add a party under s. 73, Act VIII of 1859, unless it is clear the discretion was exercised capriciously, or it appears absolutely necessary to add the party. *JAGADAMBA DAS v. HARAN CHANDRA DUTT* . . . . . [10 W. R., 108; 6 B. L. R., 526 note]

361. ————— *Misjoinder of parties—Irregularity producing error or defect on the merits.*—Where a suit was brought in the Court of the Subordinate Judge by joining as parties defendants who ought not to have been joined, and if they had not been joined the suit would have been cognizable by the Munsif.—*Held* that the irregularity of the course by which the matter of the suit was brought before another Court than which would otherwise have had cognizance of it was calculated to produce error or defect in the decision on the merits and therefore a ground of special appeal. *GUNGA RAI v. SAKREENA BEGUM* . . . . . 5 N. W., 72

362. ————— *Death of party—Filing plaint in name of dead person—Irregularity.*—Where a plaint was filed in the name of a deceased party of whose death the person filing the plaint was ignorant, and the heir and representative of the deceased was at once put upon the record as plaintiff in his room, the irregularity (if any) was held in special appeal to be immaterial and not such as the Court would take notice of. *GOLUCK CHUNDER DUTT v. COURT OF WAHDS* . . . . . 10 W. R., 127

363. ————— *Objection of non-joinder of parties—Error causing wrong decision.*—The objection of non-joinder of parties cannot be made a ground of special appeal unless the want of parties has caused a wrong decision to be given. *HEERA LALL CHOWDHRY v. BISTOO LALL CHOWDHRY* . . . . . [22 W. R., 288]

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## G. OTHER ERROPS OF LAW OR PROCEDURE—continued

## (j) REMAND

364 — Order of remand irregularly made. *Error in law—Civil Procedure Code 1908*. It is an error in law for a lower Appellate Court to remand a case except in accordance with s. 51 of the Civil Procedure Code. A special appeal will lie against a decree remanding a suit. *NATARAJ NAROTOMDAS v. JAYSHREE GOVINDAS*. [6 Bom., A. C. 156]

365 — *Remand of case under s. 501 Civil Procedure Code 1909—Irregular procedure*.—A special appeal does not lie merely because the lower Appellate Court remanded a case under s. 51 of Act VI of 1859 instead of calling for additional evidence and s. 303 without proof that the special appellant has been prejudiced. *Now* *COWDER MENDOL v. MOOKTA BIKER*. [2 W. R., 181]

Or instead of forming issues on which the case might be tried. *J. J. CHANDRHO HAJDAR v. SUFF KANAIN MISTER*. [20 W. R., 188]

But see *RAM KANT PANDIT v. GUNDESH KOOB WTR*. [6 W. R., 47]

366 — *Improper remand under s. 351 Civil Procedure Code 1909—Errors in procedure*.—Where a lower Appellate Court, instead of keeping a case on its file and either calling for further evidence or remitting issues under s. 304 of Act VIII of 1859, improperly remanded it under s. 351, but its decision on the merits was not prejudiced by the error in procedure the High Court refused to interfere in special appeal. *FALDRO PRESHAN v. GOLAR KHAN*. [6 N. W., 101]

*GHASI SINGH v. BUDH SINGH*. [7 N. W., 193]

367 — *Civil Procedure Code 1909 s. 351*.—It does not necessarily follow when a lower Appellate Court remands a suit under s. 301 of Act VIII of 1859 instead of s. 351 that the order of remand is void and reversible in special appeal. Where however a lower Appellate Court, directing certain persons to be made parties to the suit, erroneously remanded it under s. 31 for the trial of a particular issue—*Held* that, if the case went back under s. 301 inasmuch as the error by restricting the Court of first instance to that particular issue and thus leaving the finding of the lower Appellate Court or other portions of the case final, might have produced error in the lower Appellate Court's decision on the merits, the decision should be reversed and the lower Appellate Court directed to remand the case under s. 304. *GHURAS SINGH v. BHAI SINGH*. [6 N. W., 114]

368. — *Irregularity in remanding case—Civil Procedure Code 1909, ss. 352 & 304*.—Where a Judge instead of remanding a case under s. 302 of Act VIII of 1859 when the Munsif had not disposed of the case upon any preliminary point, ought to have disposed of it under s. 304, keeping

## SPECIAL OR SECOND APPEAL

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## G. OTHER ERROPS OF LAW OR PROCEDURE—continued

the case on his own file, and ordering the Munsif, after taking the necessary evidence and deciding any issue filed by him, to send up his finding with the evidence to his Court and then proceeding to try the case as an appeal.—*Held* that the irregularity was not one which affected the merits of the case or the jurisdiction of the Court, so as to justify interference with the Judge's decision in special appeal. *GRISA MOHAR DOSSER v. JESSE CHUNDER SHARA*. [17 W. R., 465]

369. — *Error in trial of case*.—In a suit for a potah, the Deputy Collector had failed to take the evidence of certain witnesses produced by the plaintiff for examination, the lower Appellate Court remanded the case with a view to the evidence being taken. This was done, and the case was retried by the Deputy Collector, who again dismissed the plaint. On appeal the decision was reversed. *Held* that the Judge may have been so far in error, in that, while remanding the case, he did not direct the lower Court to send the case back to him with the additional evidence; yet as the error did not interfere with the merits of the case or the jurisdiction of the Court (the evidence having been before the Judge in appeal), it would not warrant interference with his decision in special appeal. *DESSHOODDHY HOSSEIN CHOWHAT v. LALE MAHOMED PERAMANICK*. [13 W. R., 234]

370 — *Improper dealing with remanded case—Re-hearing and decision of errors remand for particular purpose*.—The Court of Appeal directed a remand to try the issue of a plea of payment. The lower Court determined the whole case over again. *Held* that it had no power to do more than try the issue referred, and that, on this ground, its decision might be set aside on special appeal. *MOLTAN AILAN v. SHEW BIKER*. [Marsh., 603]

## (k) REVIEW

371. — *Order granting review—Order admitting review to correct error or omission*.—Where a lower Court with materials before it comes to the conclusion that a review which has been applied for is necessary to correct an evident error or omission or for the ends of justice and grants the application accordingly, the order admitting the review is not open to be questioned in special appeal. *SANERAY BIKER v. SUDDER ARI*. [22 W. R., 238]

But when a review is admitted on no grounds the order is open to question. *KOLLEHOODDHY MENDOL v. HERRIN MENDOL*. [24 W. R., 156]

372. — *Admission of review on improper grounds*.—Where a review has been granted without proper ground, the High Court on special appeal can set aside the order and restore the former judgment. *CHANDER CHAKR ARYABANDY v. LOODITRAM DEB*. [25 W. R., 324]

## SPECIAL OR SECOND APPEAL

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

373. ——— Grant of review on improper or insufficient grounds.—Where a Court has granted a review, the High Court will not interfere on appeal, though the grounds for granting the review were improper or insufficient. *GURMURTI NAYDU v. PATIL NAYDU*

[1 Mad., 164]

See *POORJI HOSSEIN v. BHAIJI ALI KHAN*

[2 W. R., 288]

374. ——— Reviewing predecessor's judgment and reversing it on insufficient grounds. Where a District Judge, as the lower Appellate Court, reversed his predecessor's judgment and reversed his decision, and the High Court in special appeal saw no ground on which it could rightly disturb the judgment in question, it set aside the review and restored the judgment. *PARETHI CHUN Doss v. PRATAP CHUNDER SEN*

[23 W. R., 275]

375. ——— Order reviewing judgment of predecessor—Order on insufficient grounds.—Though a Judge ought not to admit (merely on the facts and without any new evidence being adduced) a review of judgment passed by his predecessor, yet his doing so is not *per se* a ground of special appeal. *GHOLAM HOSSEIN v. OKHOT COOMAR GHOSH*

[3 W. R., Act X, 169]

376. ——— Omission to correct error in decree on review.—When the parties neglect to get an error of law in a decree of the High Court corrected by a review, the High Court will decline to correct it when the case comes up before them again in a subsequent special appeal. *SAKHU NARAIN KHANDALKAR v. NARAYAN BHUKAJI KHANDALKAR*

[8 Bom., A. C., 238]

AKRISH ALI v. MILLICK MENDON BRKSH

[25 W. R., 63]

## (I) VALUATION OF SUIT.

377. ——— Error in valuation—Error not affecting decision or jurisdiction of Court.—An error of valuation, which does not affect the jurisdiction of the Courts in which a suit is tried, and does not tend to a defect in the decision on the merits, is not sufficient ground for interference in special appeal. *KISTO CHURN MOHOMDAR v. DWARAKA NATH BISWAS*

[10 W. R., 32]

378. ——— Increase of costs to defendant.—*Semble*—That an error in the valuation of the plaintiff's claim, on account of which error the defendant is compelled to pay more costs than he would otherwise have to pay, is not in general a ground of special appeal. *NANDRAM SUNDARJI NAIK v. BHAJI VITHAL*

[5 Bom., A. C., 153]

379. ——— Dismissal of appeal for improper valuation.—The Civil Judge dismissed an appeal on the ground that the appellant fraudulently presented a stamp insufficient to cover the stamp duty properly payable by him on appeal,

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

although the appellant offered to supply additional stamps to make up the proper amount. On special appeal, the proper stamp duty having been paid, the High Court held that the course taken by the Civil Judge amounted to such a substantial error in the investigation of the case as called for the interference of the High Court, and remanded the case for investigation on the merits. *AMBALA RAMASWAMY IYENGAR v. MAHAMADALLY RAVUTAN*

[5 Mad., 330]

## (m) WITNESSES.

380. ——— Refusal to summon plaintiff as witness—*Discretion of Court*—It is within the discretion of a Judge to refuse to summon a plaintiff who a defendant desires to have before the Court as his witness, and that discretion will not be interfered with in special appeal unless shown to have been exercised illegally. *INDRO LOCHUN GHOSH v. GRISH CHUNDER ROY CHOWDHURY*

[10 W. R., 134]

381. ——— Order as to party refusing to attend—*Civil Procedure Code, 1859, s. 170.*—*Discretion of Court.*—Under s. 170, Act VIII of 1859, it is discretionary with a Court to pass such orders as it thinks proper in regard to a party who disobeys its orders to attend, and its directions do not form a ground of special appeal. *NARAIN Doss v. MAHARAJAH OF BIRDWAN. NARAIN Doss v. MAHARAJA CHUNDER*

[10 W. R., 174]

382. ——— Dismissal of suit on refusal of plaintiff to answer questions—*Civil Procedure Code, 1859, s. 170.* The High Court will not interfere on appeal with the decree of the lower Court dismissing a plaintiff's suit (under s. 170, Act VIII of 1859), on the ground of his refusing to answer a question material to the case when duly required to do so. *Semble*—It might be otherwise had plaintiff since decree endeavored to purge his contempt. *JESHTA RAMJI SHETTY v. AWAKFE MULLANDEAGATA KUNHI*

[3 Mad., 299]

383. ——— Improper procedure in summoning party as witness—*Civil Procedure Code, 1859, s. 170.*—When a plaintiff was summoned as a witness and did not attend, and the first Court, instead of enforcing his attendance or proceeding to pass a decree against him under s. 170, Act VIII of 1859, tried the case on the merits and gave the plaintiff a modified decree,—*Held* that the lower Appellate Court, instead of reversing the decision and dismissing the plaintiff's claim on the ground of non-attendance, should have again summoned the plaintiff and then acted under s. 170. *KISTO COOMAR CHOWDHURY v. GOBIND COOMAR*

[W. R., 1864, 133]

384. ——— Improper interference on appeal with order of lower Court on refusal of party to attend as witness—*Civil Procedure Code, 1859, s. 170.*—The first Court having decreed against the special respondent on the ground

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## 5. OTHER ERRORS OF LAW OR PROCEDURE—continued

of his refusal to come forward and give evidence after being summoned by the special appellant, the lower Appellate Court was not authorized by law (with reference to s. 17, Act VI of 1850) to come to a contrary decision without insisting on the absentee's evidence being recorded, or giving any reasons for dispensing with it. **BURKHOO v. HATU CHAND SAROO** . 1 W R., 114

365 ——— Omission of witness to appear—*Auction-purchaser at sale in execution.*—In a case wherein lands were sold in execution, not withholding intervention under a 248 Code of Civil Procedure, by a plaintiff who claimed under a hitba which was held by the lower Courts to be false the High Court refused to interfere merely because the auction purchaser had not appeared to give evidence. **ARBOOL HIRU v. AMER ALI**

(8 W R., 422)

380 ——— Refusal of Munsif to fine recusant witness.—The refusal of a Munsif to interfere at a time upon recusant witnesses is no ground for special appeal. **PRAN KRISHO DEO v. KALER DOOS DEO** . 7 W R., 480

387 ——— Refusal to allow witness to be called—*Discretion of Court.*—It is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses. There is no right of special appeal upon the point. **RAHUL DOOS MURDO v. PRATAP CHANDER HAZAR** . 12 W R., 455

388. ——— Omission to record evidence of witnesses.—To enable an appellant in special appeal to succeed on the ground that the depositions of witnesses were not recorded, he must show that apprehension was duly made that they should not be summoned, or that, being present, application was duly made for their examination. **SIRM RAN v. UDHAN RAN** . 3 N W., 209

389 ——— Refusal of lower Courts to send back commission after its return unexecuted.—Where a commission to examine a witness on behalf of defendant had been returned unexecuted, and the defendant's petition to have it sent a second time was refused both by the first Court and the lower Appellate Court, the High Court in special appeal remanded the case for the issue of the commission holding that the lower Appellate Court's refusal had been based on manifest grounds. **JYOTI SINGH v. GOPAL SINGH** . 23 W R., 457

390 ——— Adjournment for attendance of witnesses—*Civil Procedure Code (Act XII of 1859) s. 155—Discretion, Exercise of.*—*Witnesses, Attendance of—Power of High Court on second appeal.* On the day fixed for the hearing of a suit the defendant applied for process against certain of his witnesses who had been summoned, but who had failed to attend, asking for an adjournment to obtain their attendance. This application was refused, and the case was proceeded with. The

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—continued.

plaintiffs' evidence was recorded and that of one of the defendants, the defendants being unable to produce further evidence, the Court recorded that the case was closed, and that judgment would be delivered on the following day the 31st December. On the day following the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs. **Held per PITHEAW, C.J.**—That the omission to examine the defendants' witnesses on the 31st December was a substantial error in procedure, and that the Munsif had therefore exercised his discretion wrongfully. **Per GROSS J.**—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice. **MOHI LAL BANSOPADHYA v. KRISHO DAS** . 1 L R., 20 Cal., 740

See **TAYLOR v. SARAY CHANDER POY CHOWHRY** [L. R., 20 Cal., 745 note

## (a) MISCELLANEOUS CASES.

391 ——— Final order in regular appeal *Civil Procedure Code, 1859, s. 312, 313*—*Question of fact—Exercise of discretion—Error in law.*—The term "discretion passed in regular appeal" in s. 372, Act VIII of 1859 might embrace orders rejecting or dismissing an appeal, although such orders were passed before an appeal was heard on the merits, and might not necessitate the preparation of a decree. **GOPAL KRISHNA DAS v. BROJESH CHETTY** . 6 N W., 173

392. ——— Appeal dismissed on default of appearance—*Refusal of postponement.*—Where an appellant is refused postponement, and his appeal is dismissed in his absence, the case must be looked upon as one of default, even though the Judge looked into the facts and found the appeal was not to be upheld. The appellant in such a case might apply for a re-hearing or for a review of judgment, but is not entitled to a special appeal. **BRUNO MISSE v. ARMOED HOSSEIN** . 15 W R., 145

393 ——— Refusal to give decree on terms—*Discretion of Court.*—Though it would have been more satisfactory if the lower Appellate Court, instead of declining to give plaintiffs a decree for possession of certain mortgaged lands on the ground that the sum tendered by them was insufficient to liquidate the mortgage-debt, had made a decree in favour of plaintiffs, contingent upon their paying such sum as should be found due, yet the plaintiffs had no strict right to such a decree, and it cannot be said that the lower Appellate Court had committed an error in law in refusing to make such a decree. **BOHISTIA DOOS KOOSDO v. HIRDOO NARAIN HAZAR** . 17 W R., 408

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## 6. OTHER ERRORS OF LAW OR PROCEDURE—concluded.

394. ——— Omission to apportion to every part of the land its own rent—*Suit for enhancement of rent*.—In a suit for enhancement the omission of the Ameen or Judge to appropriate to every portion of the land which varies in quality its own rent is no ground of special appeal. *GOORODOSS ROY v. HUKRONATH ROY*. W. R., 1884, 81

395. ——— Irregularity in exercise of jurisdiction—*Absence of error in decision*.—A Collector's decree, which is right on the merits, cannot be set aside on appeal, merely because of an irregularity in the exercise of the jurisdiction which he had in the case. *CHUNDER KANT CHUCKERBUTTY v. ELIAS*. 5 W. R., Act X, 29

396. ——— Giving relief inconsistent with plaint—*Plaint wrongly framed*.—A reversioner sued to set aside alienations made by an heir in possession, but framed her plaint wrongly, asking for immediate possession, to which she was not entitled. The Court declared the alienations good only for the life of the alienor, and gave a decree only for such relief as the plaintiff was entitled to. *Held*, that there was no error or defect in the investigation of the case with which the Court would interfere in special appeal. *BAMA SOONDREE DOSSRE v. BAMA SOONDREE DOOSSEE*. 10 W. R., 183

397. ——— Refusal to examine plaintiff's title on erroneous ground—*Civil Procedure Code, 1859, s. 372—Defect in law in procedure*.—Where the Courts below have lawfully abstained from examining into a plaintiff's claim of title to land the subject of the suit, on the ground that the plaintiff was a party to the deed under which the defendant claimed, when in fact the deed showed he was no party to it, this constitutes a defect "in the procedure and investigation of the case producing error in the decision of the case upon the merits" within Act VIII of 1859, s. 372, and a special appeal will lie. *ABDOOZ SALAM v. IMRAGOONISSA BEBEE*

[Marsh., 6:1 Hay, 28

398. ——— Failure to obtain certificate of administration after adjournment of case for that purpose—*Dismissal of case—Debt due to deceased person—Suit by legal representative—Act XXVII of 1860*.—The plaintiffs in this suit sued the defendants on a bond, claiming as the heirs of the deceased obligee. The defendants denied that the plaintiffs were the heirs of the deceased obligee, and contended that they should have obtained a certificate under Act XXVII of 1860 before suing. There being good reason to doubt the validity of the title of the plaintiffs, the lower Appellate Court postponed the decision of the case for a certain time in order to give the plaintiffs an opportunity of obtaining such certificate. The plaintiffs failing to avail themselves of this opportunity, the lower Appellate Court dismissed the case. The High Court on second appeal refused to disturb the lower Appellate Court's decision. *BATASI v. MAHESH*

[I. L. R., 5 All., 555

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## 7. PROCEDURE IN SPECIAL APPEAL.

399. ——— Filing memorandum of appeal—*Copy of decree—Civil Procedure Code, 1877, ss. 541 and 557*.—The Code of Civil Procedure, Act X of 1877, does not require the appellant in second appeal to file a copy of the decree of the Original Court with the memorandum of appeal. *PIRATHI SINGH v. VENGOOTRAMANAYAN*

[I. L. R., 4 Mad., 419

400. ——— Extension of time for presentation of appeal—*Power of High Court*.—The High Court has the power of extending the time for the presentation of an application for the admission of a special appeal (*dissentiente Trevor, J.*). *KASHINATH ROY v. MENOODDEEN CHOWDERY*

[W. R., F. B., 146

On due cause being shown for delay *FLOWEST v. KOOTUB HOSSEIN*

[Agra, F. B., 100: Ed. 1874, 75

401. ——— Recording findings unnecessary for disposal of case—*Appellate Court—Judgment—Findings unnecessary for disposal of case—Appeal by successful party—Civil Procedure Code, 1859, s. 203*.—When a suit has been dismissed on the merits in the Court of first instance, and that decision is upheld by the District Judge on appeal, merely on the ground of non-joinder, the District Judge should not record any findings in the appellant's favour on the merits of the case; and, if he does so, such findings will, on second appeal to the High Court, be expunged from the record. *NANDA LAL RAI v. BONOMALI LAHIRI*. I. L. R., 11 Cal., 644

402. ——— Objections by respondent—*Civil Procedure Code, 1859, s. 343 (1882, s. 561)*.—S. 348, Act VIII of 1859, was as applicable to special as to regular appeals. *NARAYAN AYYAR v. LAKSHMI ANMAL*. 3 Mad., 216

403. ——— Right of respondent to urge objections under s. 343, *Civil Procedure Code, 1859*.—In a special appeal, as well as in a regular appeal, it is competent for the respondent to show that points decided against him ought to have been decided in his favour. In an appeal in a suit for enhancement of rent, where the tenant is appellant and seeks to reduce the amount, the respondents may show, on other points of law, that it ought to have been enhanced beyond that which the decree gave him. *HILLS v. ISHORE GHOSE*. Marsh., 151

S. C. ISHORE GHOSE v. HILLS W. R., F. B., 48

[I. Ind. Jur., O. S., 25: 1 Hay, 350

Contra, *MAKUDU RAVULAN v. MASTAN SAHIB*

[I. Mad., 102

404. ——— Changing issues on special appeal.—A party was not allowed on special appeal to go behind the issues by which he was content to abide in the lower Court. *ARMED MUNDUL v. SONAOOLLAH*. 8 W. R., 5

405. ——— Direction of trial of issue—*Right of respondent to take objection—Civil Procedure Code, 1859, s. 372, and Act XXIII of*

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## 7 PROCEDURE IN SPECIAL APPEAL

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1861 s. 25—Where an issue has been directed and the finding and evidence returned, a special appellant cannot take an objection going to the merits which otherwise would not properly be open upon special appeal. S. 25 of Act XVIII of 1861 gives no rights inconsistent with s. 372 of Act VIII of 1859. *NILAYATACHI v. VENKATACHALAM MUDALI*

[1 Mad., 250]

406 ——— Omission to determine material issue—*Civil Procedure Code, 1877 s. 560. Applicability of*—Where a Court of first appeal omits to determine a material issue of fact the High Court as a Court of second appeal is not competent under s. 565 of the Civil Procedure Code to determine such issue itself but should refer it for determination to the Court of first appeal. *SURO RATAN v. LAPPET ETAR*. I L R., 5 All., 14

407 ——— Payment of stamp duty where not tendered in Court below—Where an appellant has not tendered the stamp duty and penalty on a document which the Courts below have held to be insufficiently stamped the High Court will not allow him to do so in special appeal. *RAM KRISHNA GOPAL v. VITHU SUTVAJI*. 10 Bom., 441

408 ——— Ground taken for first time on appeal—*Ground arising out of facts alleged and admitted*—In special appeal a new ground may be taken if it manifestly arises out of the facts alleged and admitted, whether pressed or not before the lower Appellate Court. *KALIMOHAN CHATTERJEE v. KALI KRISHNO ROY CHOWDHURY*

[2 B L R., Ap, 39 11 W R., 183]

409 ——— Plea taken for first time on appeal—*Facts stated in plaint necessary to support it*—A plea may be taken in special appeal though not set out in the plaint, if the plaintiff did set out all the facts necessary to support the plea, and there was no omission calculated to mislead the Court. *JUDOOBAYH MULLICK v. KALIE KRISHNO TAGORE*

[22 W R., 73]

410 ——— Objection taken for first time in special appeal—Where in a suit under the Madras Local Boards Act in the Courts of first instance and first appeal no objection was taken to the frame of the suit with reference to the provisions of s. 27—*Held* that the defendants should not be permitted on second appeal to raise such objection to the frame of the suit. *PRESIDENT TALUKH BOARD, SIVAGANGA v. NARAYANAN*. I L R., 18 Mad., 317

411 ——— New point raised in second appeal—*Question of law*—The High Court will allow on second appeal a new point to be raised for the first time, provided it is purely a question of law arising on the findings of the Courts below, and not affected by any facts outside those findings. *NAGREN v. GURURAO*. I L R., 17 Bom., 303

412 ——— Point of law raised for first time in second appeal—In a suit by a mortgagee for possession of the mortgaged land, the mother of

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## 7 PROCEDURE IN SPECIAL APPEAL

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the deceased owner claimed to remain in possession of it in virtue of her right to maintenance. At the hearing of the second appeal, a claim was made on her behalf not merely to maintenance, but to a share in the property as mother of the last owner. The point had not been taken in the lower Courts, nor was it one of the grounds of appeal. *Held* that it could not be taken for the first time in second appeal. It set up a new right differing in kind from that asserted throughout the trial, and not differing merely in degree, as was the case in *Nagesh v. Gururao*, I L R., 17 Bom., 503. *RACHAWA v. SHIVATOGARA*

[I L R., 18 Bom., 679]

413 ——— New point—*Discretion of Court*—On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record and even if it falls within the above exception, it is purely discretionary with the Court whether to consider it or not. *PAKIR CHAND AUDHIKARI v. ABUNDA* (HINDUS BHUTTACHARJI). I L R., 14 Cal., 569

414 ——— Objection that mesne profits ought to have been settled in execution and that no suit lies—*Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal*—*Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 244*—A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that, if the amount were not paid within fifteen days, the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that, if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie, as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code. *Held* that, as the suit was instituted in the Munsif's Court, and the Munsif, under the circumstances of the case, was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif, which he did not possess, and that, upon the

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## 7. PROCEDURE IN SPECIAL APPEAL

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authority of the decision in *Purmessuree Pershad Narain Singh v. Jankee Kooer*, 19 W. R., 90, this could not be made a ground of objection on appeal. Held also that, the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. *AZIZUDDIN HOSSEIN v. RAMANUGRA ROY* . . . I. L. R., 14 Cal., 605

415. Objection to parties—*Non-joinder of parties.*—Held by MUTHUSANI AYYAR, and BRANDT, JJ. (KERNAN, J., dissenting), that the objection as to non-joinder of parties is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. *MORDIN KUTTI v. KRISHNAN* I. L. R., 10 Mad., 322

416. Objection taken for first time on appeal—*Necessity of notice to quit—Objection as to want of parties—Practice—Suit for specific performance.*—An objection as to the necessity of notice to quit is one which may be taken in second appeal. An objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, cannot be taken for the first time in second appeal, as it only involves a question of practice. *DODHU v. MADHAVBAO NARAYAN GADRE* . . . I. L. R., 18 Bom., 110

417. Where an objection was taken in the first Court that a notice to quit ought to have been served through the Court, and on second appeal the objection was based on the ground that it should have been served by proclamation and beat of drum under rule 3 framed by the Local Government under the provisions of the Bengal Tenancy Act, it was held that the objection so taken could not be entertained in second appeal. *LOKE NATH GOPE v. PETAMBAR GHOSE* . . . 3 C. W. N., 215

418. Question of limitation.—Where the question of limitation was raised for the first time in second appeal,—Held that it could not be decided in favour of the plaintiff. *SHIBAPA v. DOD NAGATA* . . . I. L. R., 11 Bom., 114

419. Plea raised at the hearing which was not taken in the memorandum of appeal—*Practice.*—A plea that the memorandum of appeal in the lower Appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation, is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal. *RAM KISHEN UPADHIA v. DIPPA UPADHIA* . . . I. L. R., 13 All., 580

420. Civil Procedure Code, ss. 541, 542, 584, 585, 587—*Plea of limitation as to first Appellate Court taken orally on second appeal.*—An appellant in a second appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondents'

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## 7. PROCEDURE IN SPECIAL APPEAL

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appeal to the lower Court (where they had been appellants) had been barred by limitation when it was presented. Held that, even though the plea proposed to be raised was one involving a question of limitation, the appellant was not entitled as of right to be heard in support of it without the leave of the Court granted under s. 542 of the Code of Civil Procedure; and that the Court was not itself bound to consider that plea, and under the circumstances did not think it necessary to enter into it. *Ram Kishen Upadhia v. Dipa Upadhia*, I. L. R., 13 All., 580, approved. *ABDUL ALI v. WARIS HUSAIN*

[I. L. R., 15 All., 123]

421. Argument on point not before raised—*Civil Procedure Code, 1859, s. 374.*—The High Court ought not, under s. 374, Act VIII of 1859, to allow a point of law to be argued in special appeal when it was not distinctly raised in the first Court, nor alluded to in the lower Appellate Court. *LALLA JOWAHIR LALL PANDEY v. COURT OF WARDS* [17 W. R., 214]

422. Objection on appeal not raised before remand—*Question of law.*—The High Court is bound to notice an argument on a point of law raised in special appeal, even though it was not raised before the Court on a previous occasion, when it passed an order of remand. *DARIMBA DEBIA v. NILMONEE SINGH DEO* . . . 15 W. R., 180

423. Setting up new case—*Pleas and objections raised for first time in special appeal.*—Parties are not entitled in special appeal to set up a new case, involving an argument entirely different from that raised in the Courts below, and a state of facts entirely inconsistent with their statements there. *BUNSEE LALL v. AOLADH AHSAN* 22 W. R., 553

424. Raising new issue—*Changing original allegations.*—A party cannot be permitted to change in special appeal the allegations on which he went to trial in the Courts below, and to raise altogether a new issue. *SHIV DAS NARAYAN SINGH v. BHAGWAN DUTT* [2 B. L. R., Ap., 15: 11 W. R., 10]

425. Changing ground of action.—A plaintiff suing for redemption, on the ground of holding in right of dower, cannot in special appeal claim to redeem on the ground of being heir to the mortgagor. *RAHMAN v. FUZULONISSA* [W. R., 1864, 326]

426. Changing ground of action.—A claim as heir to a widow cannot be heard on special appeal when the plaintiff did not sue on that ground in the Court below. *KRIPANATH MOJJOONDAR v. SARODA CHOWDHRAIN* [1 W. R., 283]

427. Changing ground of action.—When a plaintiff has ineffectually sued for a declaration that certain property was his own self-acquired property, he cannot in special appeal



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ask for a declaration of his title to a moiety of the property as a member of a joint Hindu family  
**DUTY KRISTO ROY v. HURO CHANDER ROY**  
 [5 W R., 197]

428 ———— *Claim through widow in right of dower—Allegation of right by inheritance*—The defendants in the Court below unsuccessfully claimed to retain possession of some land under a kobsala from a Mahomedan widow who was alleged by them to have been absolutely entitled thereto under her right of dower. *Held* that the defendants could not in special appeal set up for the first time that the widow was entitled to a share by inheritance if not as dummohur no case of that kind having been made in the Courts below and no inquiry asked for into the state of the family or whether any and what share came to the widow  
**AMRITA CHARAN DUTT v. NADIR HOSSAIN**  
 [2 B. L. R., A. C., 258]

S C CHAKRA CHURN DUTT v. NADIR HOSSAIN  
 [11 W R., 133]

429 ———— *Rules for special appeal—Sufficiency of evidence on the record* *Question as to*—A case which is tried in special appeal is subject to all rules provided for regular appeals so far as the same may be applicable. The question whether evidence on the record is legally or reasonably sufficient to support the findings of the lower Appellate Court may be dealt with in special appeal without a remand or re-hearing  
**JOY RAM ROY v. OMRAO ROY.**  
 13 W R., 431

430 ———— *Omission after favourable finding of law to appeal against adverse finding of fact in lower Court—Power of High Court reversing judgment on law to decide on fact without remand*—The Court of first instance found against the defendant on a matter of fact but decreed in his favour on a point of law and on appeal by the plaintiff the defendant omitted to file a memorandum of objections to the adverse finding of fact of the Court of first instance. The Appellate Court, without going into the question of fact confirmed the decree of the Court of first instance on the point of law. *Held* that the High Court, in special appeal, could under these circumstances give judgment in favour of the plaintiff without a remand.  
**WAIGAN KIR v. WADEKAR**  
 5 Bom., A. C., 194

431. ———— *Power of High Court to draw inference of fact from evidence*—The High Court is not at liberty in a special appeal to draw any inference of fact from the evidence in the case  
**DWARKADAS LAITHEAL v. ADAM ALI SULTAN ALI.**  
 3 Bom., A. C., 1

432. ———— *Mode of obtaining record of facts where ground of appeal is misconduct of Judge in not hearing a pleader*—The Court on special appeal is bound to take the facts from the Judge's statement. Where therefore a party desires or intends to make the misconduct of

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a Judge a ground of appeal to the High Court, he ought always to draw the Judge's attention to the matter, either by presenting a petition or otherwise so that a proper record may be at once made of the facts which he desires to establish in appeal.  
**RAM KOOMAR KUTBERTO DASS v. SONATY DASS POST MANICK.**  
 3 C. L. R., 23

433 ———— *Appeal to Chief Court, Punjab—Civil Procedure Code, 1882 s. 534—Questions of fact*—An appeal from an Appellate Court to the Chief Court of the Punjab is not limited as such appeals are under the Civil Procedure Code 1882, s. 534; but evidence may be dealt with, and questions of fact are open for decision.  
**HUDRA MAL v. BHAGWAN DAS**  
 [I. L. R., 18 Cal., 303]

434 ———— *Treatment by High Court of finding of fact—Suit for wrongful dismissal*—The finding of the lower Courts upon a question of whether there was sufficient ground for the dismissal of a pagoda hereditary servant by the dharmlakars must be treated by the High Court on special appeal as a conclusive finding upon a matter of fact, unless it be supported by no evidence whatever.  
**KRISHNABANT TATACHARY v. GOMATY RANGACHARY.**  
 4 Mad., 63

435 ———— *Power of High Court as to facts—Appeal from order of remand—Civil Procedure Code 1877, s. 562 and s. 598 cl. 2*—On an appeal from an order under s. 562 of the Civil Procedure Code remanding the case the High Court cannot consider the facts on which the lower Appellate Court passed the order of remand. All that it can do under s. 598 cl. 2, is to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case.  
**NOJMOHALL PRAMANICK v. GURISH NARAIN MOONSHER.**  
 I. L. R., 8 Cal., 674

436 ———— *Effect on special appeal of recording further evidence by Appellate Court—Right to appeal on facts*—A special appeal is not converted into a regular appeal because the Judge sitting as a Court of appeal recorded further evidence under s. 356, Act VIII of 1850 or pronounced a judgment on the evidence recorded which had not been considered by the first Court as described in s. 353.  
**LALLA HERRA LAL v. GORLEN BIRJATH PERSHAD.**  
 4 W R., 43

437 ———— *Civil Procedure Code 1859, s. 553—Right to go on for facts on appeal*—The provision in s. 563 of Act XIV of 1842 as to an Appellate Court recording its reasons for admitting additional evidence is directory merely, and not imperative. Where the first Court of Appeal has admitted additional evidence the hearing in the second Court of Appeal will not be treated as a first appeal, so as to allow the pleaders to go into the facts.  
**GOPAL SINGH v. JHAKRI RAI.**  
 [I. L. R., 12 Cal., 37]

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438. ———— *Right to examine evidence taken by lower Appellate Court under s. 355, Civil Procedure Code, 1859.*—The High Court is not entitled in special appeal to examine the evidence of a witness summoned by the lower Appellate Court under Act VIII of 1859, s. 355, which was not before the first Court, nor treat the appeal as a regular appeal. *MAHOMED KAMIL v. ABDUL LUTEEF* . . . . . 23 W. R., 51

Reversing decision in *ABDUL LUTEEF v. MAHOMED KAMIL* . . . . . 20 W. R., 369

439. ———— *Right to go behind order of remand—Omission to apply for review of order.*—Where a suit was remanded for assessment of mesne profits on the principle laid down in a certain case, if the plaintiff was himself found to have cultivated the lands, and the first Court, finding that to be the fact, assessed the mesne profits on the principle laid down in that case, but the Judge reversed the decision on the ground of a later ruling as to mesne profits, the High Court on special appeal held that the special respondent, if dissatisfied with the order of remand, ought to have applied for a review, and, not having done so, he was not entitled to ask the Court to go behind that order and consider whether it was wrong with reference to the latter case. *NURSINGH ROY v. ANDERSON*

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See *RANKUVARBAI v. DAMODHAR NARDBHERAM*  
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440. ———— *Objection to previous order in the case to be taken in memorandum of appeal—Civil Procedure Code, ss. 562, 591.*—Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the case under s. 562 of the Code of Civil Procedure. *TILAK RAJ SINGH v. CHAKABDHARI SINGH*

[I. L. R., 15 All., 119

441. ———— *Order adding defendant—Civil Procedure Code (1882), s. 32.*—Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh*, I. L. R., 15 All., 119, referred to. *BANSI LAL v. RAMJI LAL*

[I. L. R., 20 All., 370

442. ———— *Power of High Court to deal with evidence—Necessity for remand—Evidence of existence of legal necessity.*—Held by *PEACOCK, C.J.*, that the High Court has the power in special appeal, before remanding a case, to see whether there is any evidence on the record which would warrant a contrary finding to that already come to by the Judge below; and that it would be

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worse than useless to remand the present case to the Judge to find whether any necessity existed for the sale, when the Court sees that there is no evidence on the record to prove the existence of such necessity, and when the Judge has found that there was no necessity: if he were to come to a contrary finding upon the evidence as it stands, his judgment would be reversed upon special appeal as being a finding without any evidence in support of it. *Held, contra*, by *BAXTER, J.*, that, under s. 372, Act VIII of 1859, the Court in special appeal cannot try facts on the evidence on the record, or whether the evidence is sufficient to enable the Court to come to a conclusion of fact on the question of legal necessity, and that the case should be remanded to the Judge for a clear finding on that question. *RAM PERSHAD SOOKUL v. RAJENDER SAHAY* . . . . . 6 W. R., 262

443. ———— *Civil Procedure Code, 1882, ss. 565, 566—Determination of case by High Court.*—In a suit for pre-emption, based on the *wajib-ul-arz* of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower Appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, viz., the amount of the consideration for the sale. On appeal from the order of remand, the High Court, on the 3rd January 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566 as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s. 566, as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiff's claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record. *Held per PETHERAM, C.J.*, and *OLDFIELD* and *TYRRELL, JJ.*, that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed in fact in the village, if the evidence for answering this question was already on the record, and that, in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen v. Jasoda Kuar*, I. L. R., 7 All., 765, referred to. *Per STRAIGHT* and *BRODHURST, JJ.*, *contra*. *Bal Kishen v. Jasoda Kuar*,

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*I L R.* 7 All. 765, referred to. *DROKHISER v. BANSI*. *I L R.* 8 All. 179

444. — Second appeal from order of remand—*Civil Procedure Code*, s. 562—*Effect of findings of facts and findings of law*—On an appeal from an order of remand under s. 562 of the Code of Civil Procedure, the High Court is bound to accept the findings of fact of the Court which made the remand, that Court being a Court of first appeal, provided that there is evidence to support them, but where the High Court has decided a question of law in an appeal from an order under s. 562 of the Code, that decision of the question of law will be final for all purposes in the suit and in any appeal which may subsequently be made to the High Court. *Deo Kishan v. Easvi* *I L R.* 8 All. 172 referred to. *GABRIELANTAR v. KANIMA BIRI*

[*I L R.* 15 All. 413

445. — Appeal from order of an Appellate Court—*Civil Procedure Code* (1932) ss. 562, 565—*Findings of fact of the Court below*—In an appeal from an order of an Appellate Court the High Court is bound to accept, as in a second appeal from a decree the findings of fact arrived at by the lower Appellate Court. *Gauri Sagar v. Karims Biji* *I L R.* 15 All. 413 approved. *TIKA RAM v. SHAMA CHANAN* *I L R.* 20 All. 42

446. — Determination of issues of fact by High Court—*Civil Procedure Code*, ss. 565, 566, 567—*Held by the Full Bench that s. 567 of the Civil Procedure Code does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court, in cases where the lower Appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record, but the High Court in such cases must remit issues for trial to the lower Appellate Court.* *Balkrishna v. Jasoda Khar* *I L R.* 7 All. 765, and *Drokhiser v. Bansi*, *I L R.* 8 All. 172 overruled on this point. *GIRIHARI LAL v. CRAWFORD* *I L R.* 9 All. 147

447. — Power of High Court to look into ground for admitting appeal after time.—It is competent to the High Court in special appeal to look into the grounds which a Judge has given for admitting an appeal after the lapse of the prescribed time. On appeal to the High Court against the decree of a subordinate Court, everything which preceded that decree as an act of Court is open to revision. *MOWRI BEWA v. CHANDRA NATH ROY* [2 B. L. R., A. C. 184; 10 W. R., 178

448. — Limitation Act (XV of 1877), s. 6, sub. L.—The High Court, sitting on second appeal, has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act. *Mowri Bewa v. Chandra Nath Roy*, 2 B. L. R., A. C. 184, followed. *CHANDRA DEOS v. BODHON LALL BOOKET*

[*I L R.* 8 Calc., 251; 11 C. L. R., 177

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449. — Power of High Court to vary order for execution—*Giving relief not asked for*—The High Court in second appeal should not vary the order for execution which had been passed in such a way as to give the decree-holder relief for which he did not ask. *PROTAP CHANDR DEOS v. PRATAP CHOWDHARI*

[*I L R.* 8 Calc., 174; 9 C. L. R., 433

450. — Decrees made without jurisdiction—*Suit cognizable by Small Cause Court*—*Order sending case on remand to Small Cause Court*—Where the decisions of the lower Courts were found, in special appeal, to have been without jurisdiction, and the suit to be cognizable by the Small Cause Court, the High Court made an order sending the plaint to the Small Cause Court for trial, upon the appellant (plaintiff) paying within three months all the costs of the litigation. *DUTY MOHAR CHOWDHARI v. WOMKA CHAND ROY*

[33 W. R., 445

451. — Objections under s. 567 raised for the first time in second appeal by plaintiffs—*Practise—Remand by lower Appellate Court under Civil Procedure Code*, s. 556—Objections which might have been, but were not, made under s. 567 of the Civil Procedure Code in a lower Appellate Court to the findings on remand of the Court of first instance, cannot be raised for the first time as grounds of second appeal from the lower Appellate Court's decree. *MUHAMMAD ABUL HAI v. SHROF AHMED RAI* *I L R.* 10 All. 23

452. — Filing one appeal from four separate decrees—*Dismissal of appeal*—In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor X. After the date of sale but before the whole of the purchase-money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D, and E, in execution of separate decrees against X, attached the sum in Court. The District Munsif ordered that B, C, D and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court. Held that A was bound to file a separate appeal against each of the decrees passed by the District Court, he was, however, allowed by the Court to amend his second appeal and file three more second appeals. *CHANDR V. KUSHANAND* *I L R.* 11 Mad., 280

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453. — Change of pleading in appeal—*Practice*.—The plaintiff, alleging himself to be joint in estate with A, his granduncle, sued to set aside an absolute gift of the house in suit made by A in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower Appellate Court, finding that A was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid and dismissed the suit. On second appeal the plaintiff contended that he was the heir of the donee, and that under the deed of gift she had no power to alienate. *Held* that, the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed. *KANHIA v. MAHIN LAL* . . . I. L. R., 10 All., 495

454. — Omission to examine witnesses—*Second appeal, Objection on, on the ground of such omission*.—A Subordinate Judge, after examining some only of the plaintiffs' witnesses, was of opinion that there was no necessity for further evidence, and passed a decree for the plaintiffs. Ten witnesses whom the plaintiffs had summoned were not examined. The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs did not inform the Judge that some of their witnesses had not been examined, nor did he become otherwise aware of the fact. He reversed the lower Court's decree, being of opinion, on appeal, that the plaintiffs' evidence had not proved their case. The plaintiffs appealed to the High Court, and contended that the decree of the lower Appellate Court should be set aside, in order that the excluded evidence might be taken. *Held* that there was no sufficient reason, on second appeal, to set aside the decree. The plaintiffs ought to have brought the facts to the notice of the lower Appellate Court, and, not having done so, they could not on second appeal take the objection in order to have a chance of a second trial. *GULAM v. BADRUDIN* . . . I. L. R., 18 Bom., 336

455. — Defective judgment of Appellate Court, reversing Munsif's decision on credibility of witnesses—*Practice—Procedure—Judgment, Form of*.—Case in which the High Court on special appeal, being of opinion that the judgment of the District Judge reversing that of the Munsif on the credibility of the witnesses did not fulfil the conditions that a judgment reversing such a decision ought to fulfil, brought up the case before itself and heard it as a regular appeal. *PURMESHUR CHOWDHRY v. BRISOLALL CHOWDHRY* [I. L. R., 17 Calc., 256]

456. — Objection to suit on ground of want of certificate—*Suit under Dekkan Agriculturists' Relief Act*.—An objection to a suit under the Dekkan Agriculturists' Relief Act on the ground that a proper certificate had not been obtained could, it was held, be taken for the first

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time in second appeal, as it was an objection affecting the jurisdiction of the Courts below. *NYAMTULA v. NANAYALAB FARIDSHA* I. L. R., 13 Bom., 424

457. — Change in nature of suit on second appeal—*Failure of proof of case as first stated in pleadings*.—Plaintiffs, being members of a joint Hindu family alleging division and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it. *Held* that the plaintiffs, having failed to prove division as alleged, were not entitled in second appeal to have their suit treated as a suit for partition. *MUTTUSAMI v. RAMAKRISHNA*

[I. L. R., 12 Mad., 292]

458. — Powers of Appellate Court—*Question of fact—Civil Procedure Code, 1882, ss. 554, 555*.—The limitation to the power of the Appellate Court in hearing a second appeal under ss. 554 and 555 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot be allowed to question the finding of the first Appellate Court on a question of fact. *PERTAP CHUNDER GHOSE v. MOHENDRANATH PURKAIT*

[I. L. R., 17 Calc., 291  
I. R., 16 I. A., 233]

459. — Objection taken for first time on appeal—*Misjoinder of causes of action—Civil Procedure Code, s. 44*.—Where an objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action was raised for the first time on appeal, the High Court on second appeal declined to entertain it. *Dhondiba Krishnaji Patel v. Ramchandra Bhagrat*, I. L. R., 5 Bom., 554, followed. *MAULA v. GULZAR SINGH*

[I. L. R., 16 All., 130]

460. — Objection to jurisdiction on ground of wrong valuation of suit—*Suits Valuation Act (VIII of 1889), s. 11*.—The High Court held that it was not at liberty to entertain an objection taken for the first time on second appeal that the suit was not within the pecuniary limits of the District Munsif's jurisdiction, as it appeared on the merits that the appellant had not been prejudiced. *MUTHUSAMI MUDALIAR v. NALLAKT-LANTHA MUDALIAR* . . . I. L. R., 18 Mad., 418

461. — Objection taken for first time in second appeal that preliminaries to suit had not been taken—*Practice*.—In a suit for a declaration of the plaintiffs' right to have their names registered as purchasers, an objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not previously asked the Collector to place them on the register,—*Held* that

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this circumstance was not necessary to give jurisdiction although it might be a reason for treating the suit as premature. That objection however, being taken for the first time in second appeal was disallowed. **BRUKAJI BAJI v. PANDU**

[ I L R., 19 Bom., 43

462 ——— Objection based on point of law.—An objection based upon a point of law may be made in second appeal provided it does not involve the taking of any additional evidence on matters of disputed facts. **GAYDAIPA v. GIMMALAPPA**

[ I L R., 19 Bom., 331

463 ——— Objection taken on appeal from final decree to order of remand not appealed from.—The contention that a map was admissible in evidence was held to be open to the appellant on second appeal although he had not appealed against an order of remand made by the lower Appellate Court rejecting the map as not being admissible. **Sardar v. Ramji** [ I L R., 14 Bom., 432 and **Rameswar Singh v. Shadin Singh**, [ I L R., 12 All. 510 followed. **KANTO PRASHAD HAZARI v. JAGAT CHANDRA DUTTA**

[ I L R., 23 Cal., 335

464. ——— Offer to pay stamp duty and penalty in second appeal not allowed.—An instrument which is not duly stamped will not be admitted on second appeal on payment of stamp and penalty when there is no evidence that the stamp and penalty were tendered and refused on the hearing of the first appeal. **Kamkrishna Gopal v. Pithu Shiraji**, 10 Bom. 411, referred to. **LAKSHMAN DAS RAGHUNATH DAS v. RAMSHAI MALIA RAM**

[ I L R., 20 Bom., 791

465 ——— Wrong issue framed by lower Court.—Finding in judgment on the point raised by correct issue.—Ground for remand.—Where the lower Appellate Court framed a wrong issue for decision but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue. **VISHNU RAMCHANDRA v. GANESH APPAI CHAUDHARI**

[ I L R., 21 Bom., 325

466. ——— Amendment of plaint by putting new plaintiff on the record on second appeal.—Where plaintiffs had sued as co-owners by implication under a will which provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator which adoption had been made.—Held under the circumstances of the case, the plaint should be amended on second appeal by substituting the adopted son as plaintiff with one of the original plaintiffs as his next friend. **SUSHANNA v. CHENNAIPA**

[ I L R., 20 Mad., 467

467 ——— Apportionment of mortgage-debt.—Question of apportionment first raised

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in second appeal.—Practice.—A plaintiff who had purchased part of certain mortgaged property and sued for possession, obtained a decree ordering that he should get possession on payment of the whole mortgage-debt. He did not in the lower Courts ask that the mortgage debt should be apportioned but did so in second appeal to the High Court. Under the circumstances, the High Court refused to interfere with the decree. The plaintiff had a remedy by suit for contribution. **LADAO BABAJI v. CHAYANAY AMBO**

[ I L R., 31 Bom., 567

468 ——— Appeal to lower Appellate Court by respondent in High Court in sufficiently stamped.—Court Fees Act (VII of 1870), s. 10.—Where it was discovered in second appeal in the High Court that the respondent, when appellant in the lower Appellate Court, had not paid a sufficient court-fee on his memorandum of appeal in that Court and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency it was held that the proper procedure was not to dismiss the respondent's appeal to the lower Appellate Court under s. 10 of the Court Fees Act, but to stay the issuing of the decree, if any, of the High Court in favour of the respondent until such time as the additional court fee due by him might be paid. **NARAIN SINGH v. CHATTERJEE SINGH**

[ I L R., 20 All., 362

469 ——— Objection as to improper admission of document in evidence.—An objection that a document which per se is not admissible in evidence has been improperly admitted in evidence cannot be entertained for the first time in second appeal. **Miller v. Madho Das**, [ I L R., 19 All., 76. [ I L R., 23 I. A., 106, distinguished. **GHENDRA CHANDRA GANGULI v. RAJENDRA DATTA CHATTERJEE**

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## SPECIAL COMMISSIONERS.

—Jurisdiction.—*Beng. Reg. III of 1828—Release of resumed lands—Meean profits*—In 1805 the Privy Council decided against the right of the Bengal Government to resume and re-assess the ghatwali lands in the zamindari of Kurruckpore. In 1860 the Sudder Court acting as Special Commissioners under Regulation III of 1823, at the instance of the zamindar directed the release of the resumed lands, but did not decide as to the right to the meen profits which the Government had received from the ghatwals during the period of resumption, deeming this question beyond their competency as Special

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Commissioners The zamindar having appealed to the Privy Council, complaining of the omission, and contending that the mesne profits should have been wholly adjudged to him,—*Held* that the Special Commissioners had jurisdiction to decide upon the true title to the whole money in dispute, and to direct the payment and disposition of the same with interest. *LEELANUND SINGH v. GOVERNMENT OF BENGAL*. 1 W. R., P. C., 20: 9 Moore's L. A., 479

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**SPECIAL DAMAGE.**

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See *BENGAL TENANCY ACT, s. 102.*

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See *BENGAL TENANCY ACT, s. 108.*

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## 1. GENERAL CASES

1. Remedies for breach of contract—*Suit for damages*.—A party failing to perform his contract may be sued at pleasure of the other party either for specific performance or for damages. *MUNNE DUTT SING & CAMPBELL*

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2. Requisites to entitle party to specific performance—*Ability of plaintiff to perform his part of agreement*—*Absence of default*.—A Court of equity will not decree specific execution of an agreement in favour of a party who is not competent to perform his part of the agreement. To entitle a party to specific performance he must show that there has been no default on his part and that he has taken all proper steps towards performance on his own part. *BINGSZEDDER MULLICK & CALCUTTA AGENCY COMPANY*

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## 1. GENERAL CASES—continued.

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3. *Readiness to carry out agreement*.—One who asks the Court for a decree for specific performance of an agreement must show that he is willing and able to carry it on in all its material parts so far as he is concerned and also that no act of his own in relation to the agreement has in any material degree damaged his opponent. He can not select one part of the agreement for breach and another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary through the instrumentality of the Court to specifically execute the latter part of the agreement. *ISHVATYAT AT MANANRAM & RAJIV NARAYAN*

1 Bom., 283

4. *Absence of delay in coming before the Court*.—Parties seeking specific performance of a contract should come to the Court for relief within a reasonable time. *HAM & AFFRICK*

6 Mad., 75

5. *Absence of laches*.—*Right to damages*.—A suit for specific performance of a contract to sell land will not lie if the plaintiff neglects to enforce his rights for a long time (in this case three years) after he rights under the contract for sale accrued and if he does not act up to a condition precedent to the sale to him. If he has any claim at all, it would be for damages against the person breaking the contract for loss sustained by the non fulfilment thereof. *PURNIA SINGH & SHER SINGH*

8 W. R., 280

6. *Right to specific performance*.—*Lapse of time*.—*Agreement to compound & for mere profits due*.—*Surrender of land charges*.—The result of a long pending litigation was that the defendants were directed to pay wasil for certain lands which they had possessed under an invalid *lekhar* claim. They subsequently entered into a compromise with the plaintiff their zamindar and agreed that, if they defaulted in rent, or if the lands became *khas* of the zamindar or were by any means to be alienated, the defendants would point out the lands, or on failure to do this would pay damages for the loss of the same. *Held* that lapse of time and surrender of the lands were no impediment to the Court granting relief to the plaintiff in the shape of a decree for specific performance. *PROTAP CHYDER SINGH & GOOROO DOSS ROY*

[W. R., 1864, 76

7. *Delay in bringing the suit*.—*Specific Relief Act s. 23*.—*Joinder of a person not a party to the contract of which specific performance is sought*.—A plaintiff sued on the 24th February 1881 for specific performance of a contract entered into on the 1st March 1878 by defendant No. 1 and joined in that suit as a defendant a third person, who alleged that he was the owner of the property the subject of the contract, seeking to obtain possession and other relief as against such third

**SPECIFIC PERFORMANCE—continued.****1. GENERAL CASES—continued.**

person, stating that he was a benamidar of defendant No. 1. On second appeal such third person contended that the discretion given to the Court under s. 22 of the Specific Relief Act ought not to be exercised, as the plaintiff had slept on his rights for nearly three years. *Held* that, although the principle of the objection as to the delay of the plaintiff in bringing his suit was an important one, and one which ought to be considered by the Courts in the exercise of their judicial discretion under s. 22 of the Specific Relief Act, yet the point not having been taken in the Courts below, and there being nothing on the record to lead the Court to presume that the ordinary rule applicable to suits of this nature had been disregarded in the Courts below, the objection ought not under the circumstances to be allowed to prevail in second appeal. **MORUND LALL v. CHOTAY LALL**

[I L. R., 10 Cal., 1061]

**8. ———— Performance of portion of agreement.**—*Per PONTIPEX, J.*—It is of the essence of specific performance that part only of an agreement should not be performed. **CUTTS v. BROWN**

S. C. in lower Court. **BROWN v. CUTTS**

[5 C. L. R., 487]

and on appeal. **CUTTS v. BROWN**

[7 C. L. R., 171]

**9. ———— Specific performance of part of contract and damages—Power of High Court.**—The High Court could, under the Charter and Act VIII of 1859, grant specific performance of part of a contract and give damages for the breach of the remainder. In a suit for specific performance of a contract the cause of action is sufficiently shown by a statement of the terms of the contract, followed by the avowment of the refusal of the defendant to perform it, with a readiness and willingness of the plaintiff to do his part in it. **UNUNTORAM DOSS v. RAM-LOOHUN ATTCH**

14 W. R., O. C., 15

**10. ———— Ascertainment of damages—Civil Procedure Code, 1859, s. 192—Specific performance as applied to partnerships.**—The ascertainment of the amount of damages was a necessary preliminary to a decree under Act VIII of 1859, s. 192, for specific performance of a contract and payment of damages as an alternative in case of non-performance. The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases. There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed: first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed; secondly, where there has been an agreement which has come to an end to carry on a joint adventure, and the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account. **VIRDA-CHALA NATTAN v. RAMASAVANI NATKAN**

[1 Mad., 341]

**SPECIFIC PERFORMANCE—continued.****1. GENERAL CASES—concluded.**

**11. ———— Joint contractees—Right of one contractee to specific performance against the wish of the others—Specific Relief Act (I of 1877), s. 16.**—Under a single contract to convey land to several persons, it is not open to some of the joint contractees to enforce specific performance of the contract if the other contractees refuse to have specific performances. **SATYUR RAHMAN v. MAHARAM-UNNESSA BIDI**

I. L. R., 24 Cal., 832

**12. ———— Discretion of Court to give relief—Vendor selling land to third parties in breach of his contract.**—The fact that, subsequently to, and in breach of, his contract to sell, the vendor has sold the same land to third parties having notice of the contract, and that, if relief is refused to the plaintiff, the land may remain in possession of such third parties, does not affect the question as to the propriety of the exercise by the Court of its discretionary power to enforce the contract. **GURUSAVI v. GANAPATHIA**

I. L. R., 5 Mad., 337

**13. ———— Practice—Liberty to apply—Relief after judgment—Damages—Review—Alternative relief.**—On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages, and on the 24th November 1886 obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December 1886 the plaintiff discovered that it was out of the defendant's power to specially perform his contract, and he thereupon, on the 13th April 1887, applied to the Court which had granted the decree for re-hearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages, when assessed, might be entered up. *Held* that he was entitled to ask for such relief. **PEARISUNDARI DASSEE v. HART CHARAN MOZUMDAR CHOWDHRY**

I. L. R., 15 Cal., 211

**2. SPECIAL CASES.**

**14. ———— Agreement to purchase and payment of part of purchase money—Right of purchaser.**—When there is an agreement to sell and a part of the consideration-money has been received, the stipulating purchaser is entitled to specific performance on paying down the rest of the said money. **SHIB KISHEN DOSS v. ABDULL SOHRAN CHOWDHRY**

3 W. R., 103

But see **RAMTONOO SURMAH SIRCAR v. GOUR CHUNDER SURMAH SIRCAR**

3 W. R., 64

**15. ———— Contract in respect of adjustment subsequent to decree—Act XXIII of 1861, s. 11.**—A suit lay for specific performance of a contract in respect of an adjustment subsequent to, and for property beyond, the decree, notwithstanding s. 11 of Act XXIII of 1861, which applied only to subject-matters relating to the decree. **RAM LOOHUN BUBRA v. MADHUB CHUNDER BUBRA**

[3 W. R., 118]



## SPECIFIC PERFORMANCE—continued

## 2 SPECIAL CASES—continued.

16. — Re sale on purchase-money being unpaid.—*Delay in payment where no time is fixed.*—When the purchaser of an estate paid earnest-money and no time was fixed for the payment of the balance, and the vendor re-sold the property within a week,—*Held* that the vendor was bound to have waited a reasonable period; that the second purchaser took nothing; and that the first purchaser was entitled to a decree for specific performance. **MUTTAH ALI v. SHRO SAKOT SINGH**

[W. R., 1884, 281]

17. — Agreement to exchange land.—*Remedy of seller on refusal to give land.*—Where a piece of land was sold in consideration of receiving in exchange another piece of land which was not given,—*Held* that the seller's remedy, having regard to the terms of the contract made was not by a suit to get back the land sold, but by a suit for damages for breach of contract. *r* by a suit for the specific performance of the contract or so much of it as was left unperformed. **NASIR ALI v. GOVERNMENT**

[3 Agra, 394]

18. — Contract for lands for which others were to be exchanged.—*Suit for damages.* Where plaintiff had contracted with defendant to purchase from him a share of certain landed estates excluding from the contract certain land in those estates situated within a defined boundary defendant binding himself to make over to plaintiff other lands in exchange,—*Held* that, if defendant failed to make over the lands last mentioned, plaintiff might sue him for specific performance or for damages, but could not sue for the excepted lands. **KISHOREN DEBIA v. JAGANNATH ACHARJEE**

[9 W. R., 269]

19. — Refusal to act wholly on deed of partition.—*Suit for rights as they existed before deed.*—Where a partition deed has been made and partly acted upon and nothing is asserted against it in the way of undue influence,—*Held* that the proper course for the plaintiff was to sue to enforce performance, and not for her rights as they may have existed previously. **BHOWANEE KOOBWE v. THAKOOR DASS**

[2 Agra, 277]

20. — Agreement to re-unite after partition.—*Absence of money consideration.*—Certain patt dars applied for a butwara under the provisions of Regulation XIX of 1814. At the time of the butwara, it was stipulated between the pattidars of 6 and 7 annas shares that, in the event of a particular village falling by division wholly to either of them, they would re-unite and hold the 13 annas share joint as before. One party having resiled from this agreement it was held that the other party was entitled to sue for specific performance, and such a suit would lie only in the Civil Court. *Held* that the absence of mention of any money consideration in the agreement was no bar to its being enforced, as the parties thereto had waived all objection on the score of the particular village named, or any other, falling

## SPECIFIC PERFORMANCE—continued.

## 2. SPECIAL CASES—continued

wholly or in part to their respective shares. **CHAD SINGH v. HECWOODMAN DUTT SINGH**

[10 W. R., 69]

21. — Contract for appointment of arbitrators under Land Acquisition Act.—In the matter of land acquisition proceedings under Act VI of 1857 a notice was, on the 28th of November, served upon the defendants, signed by the Collector stating that he had appointed an arbitrator on behalf of Government, and requiring the defendants to appoint a second arbitrator to determine the amount of compensation for the land (described *r*) required by the B. D. and C. I. Railway Company. The defendants' secretary wrote in reply that the defendants had appointed an arbitrator on their behalf to determine the amount of compensation for their land required for the B. D. and C. I. Railway Company. *Result.*—That a contract was entered into by the last-mentioned notice and letter of reply to it, of which specific performance could be enforced. **KHAJESHEDJI NARAYANJI CAMA v. SECRETARY OF STATE FOR INDIA**

[5 Bom., O. C., 87]

22. — Agreement for renewal of lease.—*Agreement by husband alone.*—*Non-concurrence of mortgagee.*—Immoveable property situate in the Island of Bombay was conveyed in 18-9 to A and his wife (Panna), their heirs, executors administrators, and assigns, and was subsequently mortgaged by A and his wife, but the mortgagee did not enter into possession. In 18-11 A alone entered into an agreement with the plaintiff to give them a lease of that property for five years, the plaintiff being willing to accept that lease with such title as A could confer. *Held* that, notwithstanding the non-concurrence of the mortgagee and of A's wife, A must specifically perform his contract. The non-concurrence of the mortgagee could not prevent the right of the plaintiff to specific performance by A of the agreement, because A should either himself redeem the mortgage or permit the plaintiff to do so. **NAORAJI BERAJJI v. ROGERS**

[4 Bom., O. C., 1]

23. — Contract requiring registration.—*Failure to register.*—*Unregistered document.*—The plaintiff contracted with the defendant for the purchase of a piece of land, and paid him part of the purchase-money it being agreed that the balance should be paid after registration of the bill of sale. The defendant kept the document with him, but failed to get it registered. In a suit by the plaintiff to enforce specific performance,—*Held* the suit would lie. **TRIPPA SUNDARI v. LALJI CHANDRA KANTHGI**

[6 B. L. R., Ap., 134; 15 W. R., 189]

See **RANMATILLA v. SAKHITULLA KACHHI**

[1 B. L. R., F. B., 58; 10 W. R., F. B., 61]

**TULSI SANKU v. MAHADEO DAS**

[2 B. L. R., A. C., 105; 10 W. R., 433]

**PATI CHAND SANKU v. LILABEN SINGH DAS**

[9 B. L. R., 433; 14 Moore's L. A., 129]

[16 W. R., P. C., 28]

**PRABHURAM HAZRAH v. ROBINSON**

[3 B. L. R., Ap., 49; 11 W. R., 388]

## SPECIFIC PERFORMANCE—continued.

## 2. SPECIAL CASES—continued.

24. ——— Unregistered contract—*Agreement*.—The plaintiff lent defendant R20,000, and received a document in the following terms: "On demand we promise to pay *S V M R C* and *C T A C C* the sum of rupees twenty thousand, value received. Memo.—For the above promissory note, the grant of the dockyard and offices to be deposited in three days, and a proper agreement drawn out. The time of credit to be one year or eighteen months the interest at R1-10 per cent. per mensem." In a suit to compel specific performance and for damages for breach of the agreement contained in the above memo.,—*Held* that the memo. contained an agreement of which a Court of equity would grant specific performance, had not defendant rendered specific performance impossible. *CURRIE v. MUTU RAMEN CHETTY*. 3 B. L. R., A. C., 128; 11 W. R., 520

25. ——— *Registration Act* (III of 1877), ss. 48, 49, and 50—*Oral agreement, Evidence of—Effect of oral agreement as against subsequent registered conveyance*.—*A*, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to *B*, and thereupon executed two mokurari leases in favour of *B* which were not, however, registered. Afterwards *A* granted two mokurari leases of the same mouzabs, upon terms more favourable to himself, to *C* and *D*, who, at the time of such grant, had notice of *A*'s previous agreement with *B*. *Held*, in a suit for specific performance brought by *B* against *A* and to which *C* and *D* were added as defendants, that, notwithstanding the provisions of ss. 49 and 50 of Act III of 1877, *B* could obtain a decree for specific relief, and a declaration that the leases to *C* and *D* were void as against him. *NEMAI CHARAN DHABAL v. KORTI BAG*. I. L. R., 6 Calc., 534; 7 C. L. R., 487

26. ——— *Bill of sale—Agreement to transfer share of property in consideration of advances for suit for its recovery—Damages for breach of contract*.—Where it was agreed between *A* and *B* that, in consideration of certain proceedings to be instituted jointly by *A* and *B* and payments to be made by *B*, for the recovery of certain property claimed by *A* against *C*, *A* would make over the half of the property recovered to *B*, but *A*, contrary to the terms of the agreement, without the consent of *B*, compromised his claim with *C*, and obtained possession.—*Held* the agreement did not operate as a transfer of the property to *B*; she could not sue to eject *A*. *Semble*—*B*'s proper remedy was a suit for specific performance and for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by *A*. *BHOBO BOONDREE DASSEAH v. ISSUR CHUNDER DUTT* [11 B. L. R., F. C., 38; 18 W. R., 140

27. ——— *Agreement for mutual refusals before giving up dwelling-house—Condition precedent—Limitation Act, 1877, art. 113*.—Two brothers, *F* and *B*, in 1861 agreed together that part of their house should be divided

## SPECIFIC PERFORMANCE—continued.

## 2. SPECIAL CASES—continued.

and part enjoyed in common. Each brother was to occupy an assigned division and have the use in common of the rest. If either wished to leave the house, he was bound to offer his share to the other at a fixed price; or if he wished to purchase the share of the other and the other refused to sell, then the party refusing to sell at a fixed price was bound to buy the share of the other brother who wished to purchase. *F* called upon *B* in 1877 either to pay "418 or give up the house. *Held* that this was an agreement enforceable by law; that until demand no cause of action arose, and limitation only began to run from the demand; that specific performance should be granted in the alternative. *Venkappa Chetti v. Akku, 7 Mad., 219*, distinguished. *VIASAMI MUDALI v. RAMASAMI MUDALI*. I. L. R., 3 Mad., 87

28. ——— *Contract for sale of land by Receiver—Misdescription—Purchaser having personal knowledge—Title to land between high and low water mark*.—The defendant, who for twelve years had occupied land as tenant, purchased the land at a sale by the Receiver, but refused to complete the purchase on the ground of material misdescription in the advertisement of sale, in that a road and ghât, comprised within the boundaries mentioned in the advertisement, were not the property of the parties whose land the Receiver purported to sell; and also that, to make up the quantity of land as stated in the advertisement, viz., 20 bighas by estimation, land lying between high and low water mark had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been recinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantify, the defendant relied on a Collectorate chitta as showing that the area of the land sold was only 9 bighas 8 cottahs 10½ chittaks; the same chitta, however, in giving the eastern boundary of the property, described it as lying "on the west of the low water of the Ganga." *Held* that there had been no rescission of the contract; that the plaintiffs, being owners of the land down to low water mark, were entitled to all subsequent accretions, and were therefore entitled to include in their measurement all land down to low-water mark; and having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him to repudiate the contract on the ground of misdescription. The plaintiffs were entitled therefore to a decree for specific performance. *GANGADHAR SIKKAR v. KASINATH BISWAS*. 9 B. L. R., 128

29. ——— *Agreement to sell land at a valuation—Land of peculiar character—Construction of agreement in a pottah—Assignment of pottah—Rights of assignees against original lessors*.—The owners of ancestral village lands gave a mokurari pottah of land in a mouzahi to the proprietor of a neighbouring colliery "for quarrying coal,

## SPECIFIC PERFORMANCE—continued

## 2 SPECIAL CASES—continued

for building stores, for garden, for orchard for road making and for other uses. The pottah, besides the above contained the following, as translated: "You will build a factory according to any plan you choose and possess the same. Within that aforesaid mouzah we will not give settlement to anybody. If you take possession, according to your requirements of extra land over and above this pottah, we shall settle such land with you at a proper rate. Thereat we shall make no objection." The lessee after being in possession for some years under the pottah, assigned it to the plaintiff, who afterwards took possession of the whole of the extra land, and demanded a pottah therefor from the defendants, and made a contract advantageous to themselves to sell it to third persons. The defendants refused to grant them a pottah. In a suit for specific performance—*Held* in the High Court that where a contract is made to sell land at a fair valuation and there is no difficulty in ascertaining what a fair valuation would be, the Court will take the usual means of ascertaining it, and decree performance of the contract accordingly. But when having regard to the peculiar character of the property as in the case of land supposed to contain coal or valuable minerals the value of the land must be to a great extent a matter of guess and speculation the Court will not decree specific performance as it has no means of ascertaining by the ordinary methods what price the plaintiff should pay. *Held* by the Privy Council, on the construction of the pottah that if the lessee, or his assigns had required additional land for the purpose of carrying out the objects for which the pottah was granted, then the lessors would have been bound to settle so much of the adjoining land with them as might have been necessary for such requirements. *Held* also that the plaintiff's assigns, were not entitled to compel the defendants to grant them a pottah of the extra land even at a reasonable rate merely for the purpose of selling it. *Settle*—In a suit for specific performance of an agreement to sell land, the fact that on account of the extraordinary character of the property as its containing coal or other valuable minerals there is considerable difficulty in fixing a reasonable rate for it, is not a sufficient reason for refusing a decree. **NEW BERRHOOM COAL COMPANY v. BULAHIA MAHATA**

[1 L.R., 5 Cal., 175, 832  
L.R., 7 I.A., 107]

30 — Lease savouring of champerty—*Loan of money to carry on litigation*—Specific performance decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease the plaintiff was to lend the defendant money to enable him (inter alia) to commence legal proceedings against the then tenant of the subject-matter of the intended lease. **PITCHAKUTTI CHETTI v. KAMALLA NAYAKKAN**

[1 Mad., 153]

31 — Compromise made under alleged concealment of fact—*Husband and wife—Armenian Christians*—Specific performance decreed of an agreement in the English form made

## SPECIFIC PERFORMANCE—continued.

## 2 SPECIAL CASES—continued

between husband and wife (Armenian Christians) in the nature of a family compromise respecting the wife's separate property. In the answer of the wife it was alleged that property purchased by the husband had been concealed by him from her whom she executed the agreement. *Held*, under the circumstances, that that fact, even if proved, was not sufficient to entitle the wife to treat the agreement as a nullity. *Held* also that, if the property said to have been concealed by the husband had been purchased by him out of moneys belonging to the wife's separate estate which was clothed with a trust for the children of the marriage, the wife's remedy was to enforce her own and children's rights by bill to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement. **GREGORY v. COCHRANE**

[8 Moore's L.A., 275]

**AERATHOON v. COCHRANE** 4 W.R., P.C., 68

32 — Contract—Disability to contract—*Temporary disability of zamindar to contract, his estate being subject to the provisions of Act VI of 1-76 (Clastic Nagpore Encumbered Estates Act), amended by Act V of 1884—Effect of continuance of transactions after the release of his estate from management under that Act*—It is competent to a person who has been, but is no longer, in a state of disability, to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole. He may be bound by a contract, of which the terms are to be ascertained by what passed while he was disabled from contracting. The defendant's ancestral zamindari was placed under management by an order made under s. 2 of Act VI of 1876, and he became incapable of contracting in reference to it. He, however, agreed with the plaintiff that the latter should advance money on mortgage, and take a lease of part of the estate. Afterwards by an order whether well founded or not, at all events effectively made, under s. 12 as amended by Act V of 1884 he was restored to the possession of his estate again acquiring the right to contract about it. He carried on the transaction with the plaintiff, retaining the benefit of money paid by him, but in the end not completing. *Held* that he was bound by the contract, though its terms were to be ascertained by what had passed while he was disabled from contracting and that specific performance could be decreed against him. Whether his entering into the contract was against the policy of the Act, and whether the order under s. 12 had, or had not been made on good grounds, did not affect the question. **UDOT ADITTA DEX**

1 L.R., 17 Cal., 223  
[L.R., 16 I.A., 231]

33 — Transfer of Property Act, 1882, s. 83—*Civil Procedure Code, s. 375*—A sum of money having been deposited in Court under the Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the

**SPECIFIC PERFORMANCE—continued.****2. SPECIAL CASES—continued.**

mortgaged premises, which he consented to do. This agreement was not communicated to the Court, and the depositor refused to carry it out when the mortgagee had withdrawn the money as above. *Held* that the mortgagee was entitled to a decree for specific performance of the agreement to convey. **TATTA v. PICHAYTA** . . . I. L. R., 13 Mad., 316

**34.** ——— **Reversionary interest, Sale of—Purchase-money less than market value of reversion—Stat. 31 Vict., c. 4—Inadequate consideration.**—The rule observed in England until the passing of Stat. 31 Vict., c. 4, that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of the reversion, —*Held* not to be the rule in India. **GITABAI v. BALAJI KESHAV SHASTRI NAGARKAR** [I. L. R., 17 Bom., 232

**35.** ——— **Compromise—Specific Relief Act (I of 1877), s. 22—Specific relief granted in respect of an agreement concerning which both parties had at the time of making it equal means of knowledge, though their relative legal positions were subsequently discovered to be different from what they had supposed at the time.**—*N*, a large landed proprietor, died without issue in 1867. His widow *G* held possession of the estates down to her death in 1878. After some disputes as to the succession, one *N K*, claiming as widow of an alleged adopted son of *N*, was put into possession by the revenue authorities. Against *N K* two suits were brought for the property left by *N*. The first suit was brought in April 1879 by one *C*, claiming as sister's son of *N*. *C*, being a proper, sold a portion of the property in suit to one *M* for ₹20,000 and made *M* a co-plaintiff in the suit. The second suit against *N K* was instituted in May 1879 by *S* and others, the defendants, appellants in this present suit, who claimed title as the nearest sapindas of the deceased *N*. In each of these two suits the plaintiff or plaintiffs were successful. In each the defendant appealed. In the case of *C* the defendant was successful, and the plaintiff's suit was dismissed by the High Court on the 7th of December 1886; in the other case the parties on the 25th of July 1885 settled their dispute by a compromise. While the two suits above-mentioned were pending, *S* and his co-plaintiffs instituted a suit on the 2nd of July 1883 against *C* and *M* asking for a declaration that they were entitled to succeed to the property of the deceased *N*. In January 1884 the female defendant having died, the Collector of Bareilly was brought on to the record of this suit as guardian of her minor children, and on the 19th of January 1885 a compromise was entered into between the Collector, on behalf of the minor children of *M* and one adult daughter of *M* on the one hand and the plaintiffs on the other, whereby the representatives of *M* relinquished the suit and consented to a decree being passed in favour of the plaintiffs, and the plaintiffs agreed that, when they got possession of the property, they would make over certain villages and a certain sum of money to the representatives of *M*. On

**SPECIFIC PERFORMANCE—continued.****2. SPECIAL CASES—continued.**

the 6th of January 1888 the Collector of Bareilly instituted a suit for specific performance of the compromise of the 19th January 1885. The Court of first instance decreed the plaintiffs' claim. On appeal by the defendants to the High Court, it was *held* that there was nothing in s. 22 of the Specific Relief Act which would stand in the way of a decree for specific performance of the compromise. The compromise, when entered into in 1883, was not without consideration, and the subsequent course of litigation could not affect the position of the parties as regards the present suit based thereon. **SHIB LAL v. COLLECTOR OF BAREILLY** . . . I. L. R., 16 All., 423

**36.** ——— **Sale-deed fraudulently suppressed by defendant before registration—Cause of action.**—Where the defendant agreed to sell certain land to the plaintiff and executed a sale-deed in favour of the plaintiff to that effect, but subsequently obtained possession of it before registration and fraudulently suppressed it, —*Held* that the plaintiff was entitled to enforce specific performance of the contract by the execution and registration of a fresh document. **CHINNA KRISHNA REDDI v. DORASAMI REDDI** . . . I. L. R., 20 Mad., 19

**37.** ——— **Party entitled to damages for breach of contract—Right to specific performance—Injunction.**—A plaintiff who sues for damages, and is entitled to them, cannot likewise be entitled to specific performance, or to an injunction against the further breach of the agreement. **ASH-RUFONISSA BEGUM v. STEWART** . . . 7 W. R., 303

**38.** ——— **Contract to give in marriage—Hindu marriage and betrothal—Damages for breach of contract.**—The Court will not order the father of a Hindu girl, in a suit to which the girl is not a party, to specifically perform the marriage of his daughter with a person to whom the daughter has been betrothed. It will, however, award damages against the father for breach by him of the contract of betrothal. **UMED KIRK v. NAGINDAS NAROTAM DAS** . . . 7 Bom., O. C., 122

**39.** ——— **Hindu law—Ceremonies of betrothal.—Per GLOVER, J.**—A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not, by Hindu law, amount to a binding irrevocable contract of which the Court would give specific performance. **IN THE MATTER OF GUNPET NARAIN SINGH** . . . I. L. R., 1 Cal., 74

**S. C. GUNPET NARAIN SINGH v. RAJIV KOER** [24 W. R., 207

**40.** ——— **Suit to enforce betrothal of marriage—Suit for damages.**—The plaintiff, on behalf of her infant son, sued the father and guardian of *M B* to recover possession of *M B*, alleging that *M B* had been betrothed to her son, and that, under the Hindu law, betrothal was the same as marriage, and could not be repudiated, and that the defendant had on demand refused to give up

## SPECIFIC PERFORMANCE—continued.

## 2 SPECIAL CASES—continued

then sued D and R for ejectment and to recover possession. Held that D's remedy lay in an action for damages and that he could not claim specific performance unless R raised no objection to giving up possession. **BOURBONNE DUTT PATRICK v. MOORAD ALI** 23 W. R., 7

52. — Conveyance to other parties after previous conveyance to ones unregistered. *Remedy of prior vendee*—Where the executants of a deed of conveyance (kohna) omit to have it registered and the property is sold to a third party who takes it bona fide for valuable consideration the party in whose favour the conveyance was executed could seek his remedy against the executants, not in a suit for specific performance but in an action for damages. **NEED KISHORE LALL v. MOHUN LALL** 22 W. R., 164

53. — Refusal of specific performance where suit for damages is proper remedy—*Held*, on the circumstances of the case, that there was not such a contract in consideration received as to make this a case where a suit for specific performance rather than a suit for damages should be held to be the correct form of action. **BAL GOSIND MURTOO v. LUTAFU HOSSAIN** [7 W. R., 142]

54. — Agreement extending lease on conditions—*Right to possession under former lease expired—Agreement extending lease on conditions—Right to compensation for being kept out of possession*—The defendant's father was engaged in litigation for the purpose of obtaining possession of a zamindari under a lease for ten years, given by the zamindar commencing in 1857. While the suit was pending, the defendant's father sold five eighths of his interest under the lease to the plaintiff and agreed to give plaintiff possession and consideration of certain sums of money paid and certain liabilities undertaken by the plaintiff. The defendant's father obtained possession in 1858 but refused to put the plaintiff's agents in possession on the ground that the plaintiff had not complied with the terms of the agreement. In 1861 a decree for the defendant's father against the lease or the Zilla Council reserved to the zamindar leave to institute a suit for redemption upon payment to the defendant of all sums advanced to him. In a suit instituted by the zamindar for redemption in 1866, a rasmnamah was signed by the plaintiff and defendant in the suit by which the term of the original lease was extended to the year 1875 for the consideration therein stated. In 1877 the plaintiff brought a suit for possession and claimed the benefit of the stipulation contained in the rasmnamah, or for damages. Held that the plaintiff was not entitled to possession, on the ground that defendant was not in possession under the old lease since such as the effect of the rasmnamah of 1866 was not to extend the former lease, so that plaintiff was entitled to recover damages for loss of possession during the defendant's father's possession under the old lease. **BOONCHAIK v. VIRAJITHETMAN CHETTY** 5 Mad., 351

## SPECIFIC PERFORMANCE—continued

## 2 SPECIAL CASES—continued.

55. — Vendor and purchaser—*Suit by purchaser against vendor for specific performance of contract of sale—Covenant by purchaser to build a temple—Specific Relief Act (1 of 1877), s. 21*—On the 16th November 1893 the first defendant agreed to sell a house to the plaintiff. The contract contained a covenant on the part of the plaintiff to build a temple and to secure an annuity to the vendor and his wife. On the 21st of the same month the first defendant sold and conveyed the same house to the second defendant and put him in possession. In a suit brought by plaintiff against defendants Nos 1 and 2 for specific performance of the contract of the 16th November, held that specific performance could not be granted, the covenants contained in the agreement being such as the Court could not enforce. **RAMCHANDRA GANESH PURANDHAREE v. RAMCHANDRA KONDARI** [I. L. R., 22 Bom., 46]

56. — *Act I of 1877 (Specific Relief Act)*—Upon a contract for the sale of the proprietary right in lands the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the Appellate Court was about to be given against him on the ground that he was not entitled to what he claimed. Held that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this, and that the decree dismissing the suit ought to stand. Here the plaintiff insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account. **BINDESHRI PRASAD v. JAIRAM GHIL** [I. L. R., 9 All., 705]

L. R., 14 I. A., 173

57. — *Suit by vendor against vendor—Delay of vendor in completing—Rescission of contract by vendor—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice*—On the 27th February 1886 the defendant purchased a house from C for Rs 500 and paid C a considerable portion of the purchase money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June 1883, by an agreement in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of Rs 400. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by C to himself had been prepared, though not finally approved and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house, and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase

**SPECIFIC PERFORMANCE—continued.****2. SPECIAL CASES—continued.**

within twelve days from the date of the agreement (22rd June 1886), and this was duly inserted in the agreement. During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete, saying that he had not the money with him. After some hesitation the defendant extended the time to the 10th August. On the 21st July at late-t the drafts of the conveyance from C to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff. On the 23rd July he wrote to the plaintiff, reminding him that the time to complete would expire on the 9th or 10th of August, and requesting him to be prepared then to complete the purchase; otherwise he would consider the agreement of the 23rd June to be null and void, and would himself begin to repair the house. The plaintiff sent no reply to this letter, but at an interview with the defendant told him that he was considering the matter. He, however, took no steps in the matter beyond getting a draft conveyance prepared. The deed of conveyance by C to the defendant was ready for execution on the 23rd August. Matters remained in this state until September. On the 7th September the defendant through his solicitors served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June, and giving him notice that, in default of compliance within four days, he would consider the agreement at an end. The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from C without reference to the plaintiff. If the plaintiff had been ready to complete the purchase, the conveyance to him by the defendant and the conveyance by C to the defendant would have been executed simultaneously. Immediately after taking the conveyance from C, the defendant began to repair the house. When the repairs were almost complete, the plaintiff, on the 5th October 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June 1886. The defendant refused, and the plaintiff filed this suit for specific performance. *Held*, on the evidence, that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant. *Held* also that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time. *Barclay v. Messenger*, 43 L. J., Ch., 449. The defendant's letter of the 23rd July was but a timely warning to the plaintiff that the contract would not be kept in suspense after the extended time had expired. The plaintiff, though thus warned, took no steps to complete, and was not therefore in a position to enforce performance from the defendant after the

**SPECIFIC PERFORMANCE—continued.****2. SPECIAL CASES—continued.**

10th August had gone by. It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting and purported to put an end to it if not completed within four days; that the time so allowed was unreasonable; that the defendant, in fact, by that letter waived the plaintiff's previous default and gave the plaintiff a fresh starting-point. *Held* that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver could not be relied on. *Barclay v. Messenger*, 43 L. J., Ch., 449, and *Stewart v. Smith*, 6 Hare, 222. *Quære*—Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable. **FAKIR MAHOMED v. ABDULLA**

[I. L. R., 12 Bom., 658]

**58. ——— Failure to give possession under agreement—Suit for specific possession.**—A purchaser of property of which possession was contracted to be given, but which contract the vendor is unable to fulfil, is at liberty to rescind the contract and sue for repayment of the purchase-money, and is not obliged to sue for specific performance. **MOHUN LAL v. BEHAREE LAL**

[3 N. W., 336]

**59. ——— Agreement to pay money or in default to execute bond—Suit to recover money.**—By an agreement it was contracted that the defendant should pay to the plaintiff Rs. 4,000 within six months, and that, in default of payment within such period, he should execute a bond to secure payment with interest within a further period of six months. The money not having been paid and no bond having been executed, more than twelve months after the date of agreement, the plaintiff sued to recover the amount due under the agreement with interest. *Held* that the suit was rightly brought, and that the plaintiff was not bound to have sued for specific performance of the agreement to execute a bond. **ROHIMUNISSA BEGUM v. MOHAMED MIRZA**

10 C. L. R., 103

**60. ——— Agreement for assignment of rents—Suit for consideration-money—Damages.**—The plaintiff, having agreed to assign certain arrears of rent due to him to the defendant for a consideration, brought this suit in which he tendered the kobala of assignment and claimed the consideration-money with interest. *Held* that the plaintiff had misconceived the shape in which his suit was brought, and, as his claim was purely for money, he should have sued for damages for breach of contract, especially as it was found as a fact that the subject assigned was now worth less. *Held* also that, as in a former suit brought by the present defendant for specific performance of the same contract the present plaintiff (as then defendant) had succeeded successfully and without qualification, he could not now treat the

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## SPECIFIC PERFORMANCE—concluded

## 2 SPECIAL CASES—concluded

contract as subsisting *SHRO PEROSH ROY v IN JOBE TEWARR* 21 W. R., 433

61 Agreement by Government to pay moneys in lieu of *tora garas haks*—*Jurisdiction of Civil Courts—Pensions Act, XXIII of 1871 s. 4*—A suit against Government, upon an alleged agreement by Government to pay moneys from its treasury in lieu of *tora garas haks* falls within the prohibition in s. 4 of Act XXIII of 1871, to Civil Courts to entertain any suit relating to any grant of money made by the British Government whatever may have been the consideration for such grant, and whatever may have been the nature of the payment, claim or right for which such grant may have been substituted. Observations on the cessation of the collection of *tora garas* by Government. *Quære*—Whether Government bound itself to act perpetually as agent of the *garasias* in the collection of *tora garas*. *Quære*—Whether the Civil Courts would compel the specific performance of such an agreement. *MAHARAJ MOHANBANGSI v GOVERNMENT OF BOMBAY* I. L. R., 4 Bom., 437

## SPECIFIC RELIEF ACT (I OF 1877)

See INJUNCTION—SPECIAL CASES—EXECUTION OF DECREE I. L. R., 4 Cal., 330

See INJUNCTION—SPECIAL CASES—PUBLIC OFFICERS WITH STATUTORY POWERS. [I. L. R., 21 All., 348]

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR I. L. R., 18 Bom., 474 s. 9 (Act XIV of 1859, s. 15)

See APPEAL—ORDERS. [I. L. R., 22 Cal., 830]

See COSTS—SPECIAL CASES—SUMMARY SUIT FOR POSSESSION 15 W. R., 268

See PARTIES—PARTIES TO SUITS—PRINCIPAL AND AGENT [I. L. R., 5 Bom., 208]

See POSSESSION—NATURE OF POSSESSION [I. L. R., 15 Bom., 228]

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—NATURE AND EFFECT OF DECISION 20 W. R., 12

See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS [I. L. R., 8 Bom., 477]

See CASES UNDER SPECIFIC PERFORMANCE

See STATUTES, CONSTRUCTION OF [I. L. R., 19 Cal., 544]

See TITLE—EVIDENCE AND PROOF OF TITLE [5 C. L. R., 278]

This section corresponds with s. 15 of the Limitation Act of 1-79. The following are cases decided on that section:—

1. Criminal Procedure Code 1861, ss. 318-319—Dispossession—The object and

## SPECIFIC RELIEF ACT (I OF 1877)

## —continued

effect of s. 15 of Act XIV of 1859 considered, and the bearing of ss. 318 and 319 of the Code of Criminal Procedure with regard to cases of dispossession and the jurisdiction of the Civil Courts illustrated. *FAASTOLLAR CHOWDHRY v KISHORI SONDHER SHEMA* 8 W. R., 366

2. Object of section—Wrongful dispossession—Onus of proof—S. 15 did not affect the general law on the matters to which it related but provided a special remedy for a particular kind of grievance, e.g., to replace in possession a person who had been evicted by a wrongful act from landed property of which he had been in undisturbed possession and to prevent a powerful person from thus shifting the evidence of proof from himself to another less able to support it. *KALSH CHUDDER SEIN v ADGO SHAIKH* 9 W. R., 603

3. Possessory actions by persons wrongfully dispossessed—Civil Procedure Code 1859, s. 230—S. 230 of the Civil Procedure Code of 1859 which related to possessory actions by persons wrongfully dispossessed in execution of decrees, did not apply to a case determined under s. 15 of Act XIV of 1859. *GOBIND CHUNDER BAGGER v GOBIND GHOSH MUNDUL* 7 W. R., 171

4. Previous possession—Dispossession—Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act 1877, which must be brought within six months from the date of dispossession. *Khasht Faastollah Chowdhry v Kishori Sondher SHEMA*, 8 W. R., 369; *Ertaza Hossein v Hany Muter*, I. L. R., 9 Cal., 130; *Debi Churn Boida v. Isar Chunder Manjee*, I. L. R., 9 Cal., 39; *Kana Manjee v Khosar Buxio*, 6 C. L. R., 278; *Wim v Ametrannissa Khatoon*, I. L. R., 7 F. A., 73; *Krishnaras Iashtant v Vasudev Apoo Ghoshkar*, I. L. R., 8 Bom., 371; *Iemraj Bhagaram v Narayan Shivarum Khasht*, I. L. R., 6 Bom., 215; *Mohabeer Perahad v Mohabeer Singh*, I. L. R., 7 Cal., 591; 9 C. L. R., 164 referred to and explained. *PERMESHUR CHOWDHRY v BHOOLALL CHOWDHRY* I. L. R., 17 Cal., 256

*SHAMA CHURY FOX v ABDEL KAREEM* [3 C. W. N., 158]

*NISA CHAND GADLA v KANCHARAM BAGANI* [I. L. R., 28 Cal., 579] 3 C. W. N., 568

5. Suit to enforce right of way—S. 15 of Act XIV of 1859 was not applicable to a suit to enforce a mere right of way. *HAROD DIAL MOSE v KRISHO GOBIND DEIN* 17 W. R., 70

6. Nature of possession necessary for a suit—Possession as trespasser *Sema*—Mere possession as a trespasser was not sufficient to entitle a plaintiff to recover in a suit brought under s. 15 of Act XIV of 1859. There must be in the

## SPECIFIC RELIEF ACT (I OF 1877)

—continued.

plaintiff juridical as opposed to mere physical possession. *DADABHAI NARSIDA v. SUB-COLLECTOR OF BHOACH* . . . 7 Bom., A. C., 82

7. ———— *Warrant of execution—Seizure of immovable property not described in decree—Illegal possession.*—Where a warrant was issued to the Sheriff to seize certain specific immovable property not coming within the description in the decree, it was held that possession under such warrant would not be an illegal possession under the meaning of s. 15. *JADUB CHUNDER CHECHKY v. HERRALOLL SAHA*

[1 Ind. Jur., N. S., 21 : Bourke, O. C., 384

8. ———— *Right of way—Immovable property.*—A right of way is not "immovable property" within the meaning of s. 9 of the Specific Relief Act. *MANGALDAS v. JEWANBAM*

[I. L. R., 23 Bom., 673

9. ———— *Tenants illegally ejected.*—A tenant in possession after expiry of his lease can only be ejected by due course of law; and if illegally dispossessed, he was entitled, under s. 15, Act XIV of 1859, to sue and recover possession, notwithstanding a pottah set up by defendant. *SOPALLO KHAN v. WOOPAN KHAN* . . . 9 W. R., 123

10. ———— *Time within which suit must be brought.*—The suit must be brought within six months of the alleged ouster, otherwise anterior possession would be of no avail to the plaintiff. *AMEER BIDEH v. TUKROONISSA BEGUM*

[7 W. R., 332

Upheld on review in *TUKROONISSA BEGUM v. MOGUL JAN BIDEH* . . . 8 W. R., 370

*AMEERONISSA KHATOON v. WISE* . . . [24 W. R., 435

The plaintiff is entitled to recover notwithstanding any other title. *DOE D. KULLAMMAL v. KUPPU PILLAI* . . . 1 Mad., 85

11. ———— *Trial of question of dis-possession.*—Plaintiff having sued under s. 15, Act XIV of 1859, for possession of a parcel of land of which he alleged himself to have been dispossessed by defendants building a hut upon it, the Court of first instance determined that, as the land was part of a village and plaintiff had not sued for possession of the village, it could neither declare his possession of the entire village nor of the particular parcel. Held that there was no reason why the Court should not try whether the plaintiff was dispossessed as alleged, and whether he should not have possession. *OMAR-CHAND MAHATA v. NAWAB NAZIM OF BEGAL*

[11 W. R., 229

12. ———— *Right under decree for possession.*—A party recovering possession of land in virtue of a decree under s. 15, Act XIV of 1859, recovered the land with the crop growing upon it, and was fully entitled to cut the same. *SHIBAJDEE PRAMANICK v. EMAM BUKSH BISWAS*

[13 W. R., 104

## SPECIFIC RELIEF ACT (I OF 1877)

—continued.

13. ———— *Suit to set aside award under section.*—The defendant having had an award under s. 15, Act XIV of 1859, the plaintiff's allegation of possession and dispossession by the defendant required him specifically to prove those facts before the defendant could be called upon to prove his case. *JUGGURNATH DEB v. MAHOMED MOREEM*

[17 W. R., 161

14. ———— *Suit to set aside award under section.*—Although in a suit to set aside an award made under s. 15, Act XIV of 1859, plaintiff had to establish his own title before the party in possession could be required to make good his case, a Judge should look into the summary case itself, and ascertain if there had been a proper inquiry and trial in that case. *SURBO MOHUN ROY v. SURUT CHUNDER ROY* . . . 16 W. R., 34

15. ———— *Decree for possession—Evidence.*—A decree for possession in a suit under s. 15 of Act XIV of 1859 was *prima facie* evidence that the plaintiff in that suit was entitled to recover, from the defendant therein, mesne profits for the period of dispossession. *RADHA CHARAN GHATAK v. ZAMIRUNISSA KHANUM*

[2 B. L. R., A. C., 67 : 11 W. R., 83

Reversing *S. C. ZUMURUDONISSA v. RADHA CHURN GHUTTUCK* . . . 9 W. R., 590

See *JIAULLAH SHEIKH v. INU KHAN*

[I. L. R., 23 Calc., 693

and cases there cited.

16. ———— *Mortgagee in possession—Dispossession by mortgagor—Suit for possession—Fraud.*—It is no answer to a suit for possession under s. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy is by way of a suit to set aside the mortgage and recover possession. *SAYAJI BIN NIMBAJI v. RAMJI BIN LANGATA*

[I. L. R., 5 Bom., 446

17. ———— *Partial dis-possession—Suit for possession.*—A possessory suit lies under s. 9 of the Specific Relief Act, when plaintiff's possession has been partially, as well as when it has been wholly, disturbed. *SABAPATHI CHETTI v. SUBBAYA CHETTI* . . . I. L. R., 3 Mad., 250

18. ———— *Possessory suit—Constructive possession by receipt of rents.*—The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act. The object of that section is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent. IN THE MATTER OF THE PETITION OF *TARINI MOHUN MOZUMDAR*. *TARINI MOHUN MOZUMDAR v. GUNGA PROSAD CHUCKERBUTTY*

[I. L. R., 14 Calc., 649



## SPECIFIC RELIEF ACT (I OF 1877)

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19. — *Immovable property—Right in heru—Possession—Dispossession*—The plaintiff was fishermen belonging to the village of A. T. L. v. C. and in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagthana Creek between high and low water marks, within certain limits set forth in the plaint and under a. 9 of the Specific Relief Act (I of 1877) they sought to recover possession of that right from the defendants, who they alleged had dispossessed them within six months before the suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court and its extraordinary jurisdiction extended, that the order made by the first Court be varied, its jurisdiction the right of fishing not being immovable property within the meaning of that section. Held that the first Court did not sit without jurisdiction on the right claimed coming within the denomination of immovable property. **BURDIAL ANDS v. PANDOL PO. PATIL** I. L. R., 12 Bom., 221

20. — *Right of fishery—Suit for possession of right to fish in a khal*—A suit for the possession of a right to fish in a khal, the right of which belongs to another does not come within the provisions of a. 9 of the Specific Relief Act, 1877. **NATANAR PATEK v. KUBER PATEK** (I. L. R., 18 Cal., 80)

21. — *Immovable property—Right of fishery—Possession, Suit for—Held by the Full Bench (PALMER and PRIGOT JJ., dissenting)*—A suit for the possession of a right to fish in a khal, the right of which does not belong to the plaintiff does not come within the provisions of a. 9 of the Specific Relief Act. **PADU JHALA v. GOKA MONCH JHALA** I. L. R., 19 Cal., 544

22. — *Immovable property—Right of ferry*—A right of ferry is immovable property or an interest therein within the meaning of the Specific Relief Act, a. 9. **KRISHNA v. AKILANDA** I. L. R., 13 Mad., 54

23. — *Mawlatdars' Courts Act (Bom. Act III of 1876)—Suit by a trespasser to recover possession*—A trespasser, who has been dispossessed, is not entitled to bring a suit under a. 9 of the Specific Relief Act (I of 1877) or under Bombay Act III of 1876 to recover possession. **DADAIAH NARAYAN v. SUB-COLLECTOR OF BROACH** 7 Bom. II C. Rep., A. C. J. 82. **Krishna v. Yashwanth v. Vasudeo Appaji Ghoshkar** I. L. R., 8 Bom., 51 and **Virayandas Madhokdas v. Mahomed Ali Khan Ibrahim Khan**, I. L. R., 5 Bom., 209 referred to. **AMIRUDIN v. MAHAMED JAMAL** (I. L. R., 15 Bom., 685)

24. — *Possession—Suit for—Suit in ejectment on a possessory title*—Per EDMUND C. J., STRAIGHT and TRAVELL, JJ. (MAYMOOD, J., dissenting)—S. 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being whatever his title, in possession

## SPECIFIC RELIEF ACT (I OF 1877)

—continued—

of immovable property, is ousted therefrom. That section does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. **DUTTON v. GENT**, 26 L. J. Exch., 123. **Asher v. Whitlock**, L. R., 1 Q. B., 1; **Saxton v. Parbat**, L. R., 16 I. A., 195; I. L. R., 12 All., 51. **Imam Ali v. Mahomed Ghous** L. R., 20 I. A., 99; I. L. R., 20 Cal., 231, referred to. **31st Chaud Gasta v. Kanchiram Begam**, I. L. R., 25 Cal., 579, distinguished. Also that a. 9 of the

**II. L. R., 13 All., 537**

25. — *Nature of possession on a right of suit—Jurisdictional possession*—Where the plaintiff alleged that he was in possession of a certain room as representing his father and uncle who were alive, but who were not parties to the suit, and that he had been dispossessed from such room within six months of the institution of the present suit—Held that his possession, not being jurisdictional possession, did not entitle him to maintain a suit under a. 9 of the Specific Relief Act. Permission to be allowed to amend the plaint by alleging that the possession of the plaintiff was exclusive possession on his own account was not allowed, such allegations being inconsistent with the case on which he came. **to Court. NAIRTO LALL MIRZA v. RAJENDRO NARAYAN DEB** (I. L. R., 23 Cal., 523)

26. — *Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself*—Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother declining to accept the mortgage or the lease which had been granted under it as tending on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendants' title was found to be good. Held that a. 9 of the Specific Relief Act was not applicable and that plaintiffs could not succeed. **PER SUBRAMANIAM AYYAR, J.**—That it is an undoubted rule of law that a person who has been ousted by another who has no better right is with reference to the person so ousting entitled to recover by virtue of the possession he had held before the ouster, even though that possession was with any title. **Asher v. Whitlock** L. R., 1 Q. B., 1; **Saxton v. Parbat**, L. R., 16 I. A., 195; I. L. R., 12 All., 51. **Imam Ali v. Mahomed Ghous** L. R., 20 I. A., 99; I. L. R., 20 Cal., 231, referred to. **31st Chaud Gasta v. Kanchiram Begam**, I. L. R., 25 Cal., 579, distinguished. Also that a. 9 of the

## SPECIFIC RELIEF ACT (I OF 1877)

—continued.

Specific Relief Act cannot be held to take away any remedy available with reference to the well recognized doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But that the above propositions were inapplicable to the facts of the present case where the defendants were found to have good title. *Per O'TARRELL, J.*—The rule is that where plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of s. 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by a person who was found to have title, and a suit to recover possession would only lie under the provisions of s. 9 of the Specific Relief Act, and this was clearly not such a suit. *MUSTAPHA SAHEB v. SANTHA PILLAI*

[I. L. R., 27 Calc., 179]

27. — *Civil Procedure Code, 1877, s. 103—Re-hearing—Review*—S. 9 of the Specific Relief Act does not prohibit a re-hearing under s. 103 of the Code of Civil Procedure. A re-hearing differs widely from a review. *ANTHONY v. DUPONT*

[I. L. R., 4 Mad., 217]

28. — *Suit or possession of land by person wrongfully ejected—Joinder of other claims.*—A Court should in all cases in which it applied give effect to the provisions of the first paragraph of s. 9 of the Specific Relief Act, 1877, whether that section is expressly pleaded or not. There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided for by the above-mentioned section. *RAM HARAKH RAI v. SHRODHIAL JOTI*

[I. L. R., 15 All., 384]

29. — *Decree for possession—Form of decree.*—Where a decree was passed under s. 9 of the Specific Relief Act (I of 1877) giving the plaintiff possession, and also directed that the costs of removing huts and filling up excavations should be paid by the defendant under this decree,—*Held* that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act, and must be set aside. *TILAK CHANDRA DASS v. FATIK CHANDRA DASS*

[I. L. R., 25 Calc., 803]

## s. 18

*See VENDOR AND PURCHASER—MISCELLANEOUS CASES*

[I. L. R., 14 Mad., 459]

s. 19—*Suit for declaration under a mokurari pottah—Alternative relief—Civil Procedure Code (Act X of 1877), s. 28*—A suit to have a mokurari pottah enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the claim paid for the mokurari pottah returned, is in substance a suit to enforce a contract to place the plaintiff in possession of the land under the pottah, and to declare his rights to it as against all the defendants; and under

## SPECIFIC RELIEF ACT (I OF 1877)

—continued.

s. 19 of the Specific Relief Act the plaintiff is entitled to ask for compensation as against the defendant granting the pottah. Under s. 28 of the Civil Procedure Code, such an alternative claim may be allowed against one or more of the defendants. *RAJ-DHUR CROWDHY v. KALIKRISTNA BHATTACHARJYA*

[I. L. R., 8 Calc., 963; 11 C. L. R., 330]

## ss. 20, 21.

*See INJUNCTION—SPECIAL CASES—BREACH OF AGREEMENT.*

[I. L. R., 14 Mad., 18]

1. — s. 21—*Agreement to refer to arbitration—Refusal to refer—Pleading*—A contract to sell goods contained the following clause: "That any dispute arising hereafter shall be settled by the selling broker, whose decision shall be final." In a suit to recover damages for breach of the contract, the defendant pleaded that the dispute should have been referred to the decision of the selling broker, and that the suit was therefore barred under s. 21 of the Specific Relief Act, the latter clause of which provides that, "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." *Held* that, before that section could be relied upon, it must be shown that the plaintiff had refused to refer to arbitration; and that the filing of the plaint was not such a refusal. *KOUMUD CHUNDER DASS v. CHUNDER KANT MOOKERJEE*

[I. L. R., 5 Calc., 498; 5 C. L. R., 264]

2. — *Agreement to refer to arbitration—Award—Suit in respect of matter referred barred.*—The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held* that, under these circumstances, the further hearing of such suit was barred. *SALIG RAM v. JHUNNA KUAR*

[I. L. R., 4 All., 546]

3. — *Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings*—One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract. *Held* that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract,

## SPECIFIC RELIEF ACT (I OF 1877)

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See Oaths of Proof—Decrees and Orders  
 Suits to Enforce or Set Aside

[I. L. R., 12 All., 523]

See Right of Suit—Interest to Sur-  
 rogates

[I. L. R., 23 Bom., 375]

s 40 and Ch IV, ss. 35-38—

*Imposed by or any after execution of contract to perform a portion of suit to cancel such portion—A contract was entered into between the plaintiff and the defendant by which the plaintiff agreed to cultivate a portion of the defendant for a specified number of years in certain specified lands situated in different villages with respect to portion of which lands the plaintiff was a sub-tenant only during the continuance of the contract the plaintiff at possession of those lands through his immediate landlord having failed to pay the rent and having been in consequence ejected therefrom by the owner. In a suit to have so much of the contract as related to those lands cancelled on the ground that it had become impossible of performance through no neglect on his part.—Held that Ch IV (ss. 35-38) of Act I of 1877 (specific Relief Act) did not apply to such a case but that the plaintiff was entitled to the relief he sought under s 40 of that Act inasmuch as the contract was evidence of different obligations, viz., to cultivate lands in different villages. JUDGES: PERKINS, J. and CAMPBELL.*

[I. L. R., 7 Cal., 474 & C. I. R., 501]

s. 42.

See APPELLATE COURT—Errors Affecting or Not Merits of Case

[I. L. R., 9 All., 622]

See Cases Under Declaratory Decree, Suit For.

See JURISDICTION OF CIVIL COURT—HINDU AND REVENUE SUITS AND WILLS

[I. L. R., 11 All., 224]

See JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION

[I. C. L. R., 533]

See HINDU LAW—REVERSIONERS—ARRANGEMENTS BETWEEN WIDOW AND REVERSIONERS.

[I. L. R., 23 Cal., 354]

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[I. L. R., 18 Mad., 63]

See MADRAS LAND REVENUE ASSESSMENT ACT s 2

[I. L. R., 19 Mad., 293]

[I. L. R., 22 Mad., 270]

[I. L. R., 16 I. A., 16]

See Oaths of Proof—PARTITION

[I. L. R., 18 Cal., 117]

See PARTIES—SUIT BY SOME OF A CLASS AND REPRESENTATIVES OF CLASS

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See PARTITION—Miscellaneous Cases  
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See RIGHT OF SUCCESSION—WILLS AND TESTS.

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[I. L. R., 7 All., 583]

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[I. L. R., 23 Cal., 717]

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[I. L. R., 10 Bom., 309]

See Chairman of Calcutta Municipality, Discretion of, as to list of candidates and votes at elections—In favour of applications under s 45 of the Specific Relief Act for relief against the Chairman of the Calcutta Municipality with regard to the list of candidates for and the votes given at municipal elections. IN THE MATTER OF MUTTI LALL GHOSH.

[I. L. R., 19 Cal., 193]

IN THE MATTER OF RAJENDRA LALL MITTAL

[I. L. R., 19 Cal., 195 note]

IN THE MATTER OF THE ELECTION OF MUNICIPAL COMMISSIONERS FOR WARD NO 3, CALCUTTA.

[I. L. R., 19 Cal., 193]

—s 53.

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[I. L. R., 23 Cal., 351]

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See CO-SHAREES—ENJOYMENT OF JOINT PROPERTY—ERECTION OF BUILDINGS

[I. L. R., 12 All., 433]

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[I. L. R., 18 Bom., 702]

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[I. L. R., 13 Bom., 252, 674]

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*See* PARTIES—SUITS BY SOME OF A CLASS  
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CUTION OF DECREE

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*See* JURISDICTION OF CIVIL COURT—RENT  
AND REVENUE SUITS. N. W. P.

[I. L. R., 5 All., 429

*See* PARTIES—SUIT BY SOME OF A CLASS  
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[I. L. R., 22 Bom., 646

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*See* INJUNCTION—SPECIAL CASES—BREACH  
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[I. L. R., 14 Mad., 18

I. L. R., 18 Bom., 702

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*See* CANTONMENTS ACT, 1850 s. 14.

[I. L. R., 15 Calc., 452

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[I. L. R., 13 All., 580

I. L. R., 20 Bom., 791

**1. BENGAL REGULATIONS.**

*Beng. Reg. XII of 1826—Re-  
ceipt for Government paper.*—Under the old Stamp  
Law (Regulation XII of 1823, which was not regis-  
tered by the Supreme Court), agreements not on  
stamped paper executed in Calcutta *bona fide* by  
parties residing or carrying on business therein

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—continued

and not a contract broken up by the conduct of all the parties to it. **TANAL v. BISHBEE**

[I. L. R., 8 All., 57]

4. ———— *Contract to refer dispute to arbitration. Refusal to perform such contract—Right of suit.* To bar a suit under s. 21 of the Specific Relief Act a refusal to arbitrate must be before the action is brought. **CHIEF v. ALLARD**

[I. L. R., 23 Cal., 858]

5. ———— *Agreement to refer to arbitration—Refusal to perform agreement.* In an action against a brother-in-law for maintenance the defendant alleged that after the plaintiff had left his house an agreement had been made between them to refer their dispute to arbitration, that the agreement of reference had been actually made but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award and accordingly the arbitrators refused. The defendant contended that by reason of this agreement the plaintiff's suit was barred by s. 21 of the Specific Relief Act of 1877. The agreed statement of reference was to the following terms: "To D M and D D. We the undersigned two persons, given in writing to you as follows: We used to reside and act in the house together in peace and harmony daily a few days ago in consequence of a disagreement amongst the women. I resided separately upon permission having been given towards her. I again reside in the house together with her and now all are residing in the house in peace and harmony. If any one of you should arise and if any disagreement should take place amongst the women, in order to find a remedy for that, we the undersigned two persons give in writing to you as follows: As to whatever award or settlement you two persons together will make, in accordance with the truth, we agree to receive or pay. As to this we are truly to act on our true religious faith and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives all the 11th Jyesth Vadva Samvat 1939 the day of the event Friday the 1st June 1883. And as to this you are truly to make and deliver a settlement within fifteen days' time." Held that the plaintiff's suit was not barred. The agreement did not indicate what was the subject matter to be referred, and there was no evidence to show that the plaintiff's claim to maintenance had been laid before the arbitrator or that the plaintiff had refused to perform her agreement to refer in reference to that claim. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration—whether before or after the time allowed to the arbitrators to make and publish their award, viz., fifteen days. If the latter her withdrawal could not in any view of the case be held to be a refusal on her part to perform her agreement to refer. Even if the plaintiff's withdrawal was unjustifiable, it appeared that the defendant had taken no steps under s. 521 of the Civil Procedure Code (Act XIV of 1859) to have the agreement filed in Court and thus render her withdrawal of no effect. There was nothing to

## SPECIFIC RELIEF ACT (I OF 1877)

—continued

show that the defendant did not acquiesce in it. **Quere**—Whether the above agreement was not void by reason of uncertainty. **Quere**—Whether the actual submission of a subject in dispute to named arbitrators, followed by the temporary one of the parties to such submission to withdraw from it to prevent an award being made upon the submission, falls within the concluding paragraph of s. 21 of the Specific Relief Act of 1877. **ADHIBAI v. CHIEF DAS NATHU**

[I. L. R., 11 Bom., 189]

6. ———— *Arbitration—Agreement to refer—Order under s. 506 Civil Procedure Code to refer matters in dispute in action then pending—Order under s. 573 pending the reference granting plaintiff permission to withdraw with liberty to bring fresh suit.* The wording of s. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration and one of such matters is a suit which is proceeding in Court. The parties to a suit, which was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex-parte* application under s. 33 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject matter. The application was granted, the suit struck off and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877). Held that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* if there was such revocation, or if not involving it, left the order of reference still in force, that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. **Per TYRELL, J.**, that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section or having referred the suit to arbitration to restore the suit to its former status as awaiting the Court's decision. **BROOKS v. DEODAT**

[I. L. R., 9 All., 183]

s. 22.

See INTRODUCTION—SPECIAL CASES—BREACH OF AGREEMENT

[I. L. R., 18 Bom., 703]

[I. L. R., 10 Bom., 764]

s. 23 and s. 27, cl. (e)—*Contract to take shares*—S. 23 cl. (4), and s. 27 cl. (e) of the Specific Relief Act (I of 1877) do not apply to contracts to take shares, and only embody the English law as to cases where a company has taken the

**SPECIFIC RELIEF ACT (I OF 1877)***—continued.*

benefit of a contract, but refuses to carry it into effect. **IMPERIAL ICE MANUFACTURING COMPANY v. MENCHERSHAW HAFERUJI WADIA**

[I. L. R., 13 Bom., 415]

— B. 25.

*See* VENDOR AND PURCHASER—TITLE.

[I. L. R., 15 Bom., 657]

B. 28.

*See* EVIDENCE—PAROL EVIDENCE—VARIATION ON CONTRADICTORY WRITTEN INSTRUMENTS. **I. L. R., 4 Bom., 594**

*See* SPECIFIC PERFORMANCE—SPECIAL CASES. **I. L. R., 12 Calc., 152**

— B. 27.

*See* VENDOR AND PURCHASER—INVALID SALE. **I. L. R., 15 Mad., 43**

*See* VENDOR AND PURCHASER—NOTICE.

[I. L. R., 10 Calc., 710]

[I. L. R., 27 Calc., 358]

1.

cl. (b)—*Misjoinder*—*Joinder of causes of action—Multifariousness*—

The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immovable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree, defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. *Held*, with reference to s. 27 of Act I of 1877, that, under such circumstances, there was not necessarily a misjoinder of causes of action. **GUJANI v. RAM CHAUHAN**. **I. L. R., 1 All., 555**

2.

*Agreement to convey*

*the mortgaged property in case of default—Suit for specific performance of contract—Mortgage—First and second mortgagees*—On the 7th February 1873 *P* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August 1877 he mortgaged such estate to *P*, agreeing that, if he failed to pay the mortgage-money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sell effected and a deed of absolute sale executed." On the 6th October 1877 *P* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February 1873 was extinguished. In December 1877, *B* and *D* obtained a decree against *P* on the mortgage of the 6th October 1877, and in June 1878, in execution of that decree, such estate was put up for sale and was purchased by *D*. In February 1880 *P* sued *P* and *D* for the execution of a conveyance of such estate to him in accordance with *P*'s agreement of the 7th August 1877. *Held* that the mortgage of the 7th August 1877 was not in the nature of a mortgage by conditional sale, and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that *D* had no notice of the agreement of the 7th August 1877, it was very

**SPECIFIC RELIEF ACT (I OF 1877)***—continued.*

doubtful whether under s. 27 (b) of Act I of 1877 *D* could claim that specific performance of that agreement should not be granted, inasmuch as the contract lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien. **BADRI PRASAD v. DAYLAL RAM**. **I. L. R., 3 All., 700**

— B. 28.

*See* SPECIFIC PERFORMANCE—SPECIAL CASES. **I. L. R., 18 Mad., 415**

— B. 30.

*See* LIMITATION ACT, 1877, ART. 113

[I. L. R., 5 All., 283]

[I. L. R., 10 All., 3]

[I. L. R., 23 Mad., 593]

B. 31.

*See* DEED—RECTIFICATION.

[I. L. R., 14 Calc., 308]

[I. L. R., 14 I. A., 18]

*Landlord and tenant—Rectification or alteration of contract of tenancy—Specific Relief Act (I of 1877), s. 31*—Where a party to a contract of tenancy desires to have it rectified or altered, the suit should be brought under s. 31 of the Specific Relief Act. **ANARULLAH SHAIKH v. KOVLASH CHUNDER ROSE**

[I. L. R., 8 Calc., 118]

**S. C. KOVLASH CHUNDER ROSE v. ANARULLAH SHAIKH**. **9 C. L. R., 467**

SS. 31, 34.

*See* CONTRACT—BOUGHT AND SOLD NOTES.

[I. L. R., 20 Calc., 854]

— B. 35.

*See* CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—AGAINST PUBLIC POLICY.

[I. L. R., 3 Mad., 215]

*Rescission of contract, Suit for—Evidence necessary to set aside contract*—In order that a contract should be set aside under s. 35 (b) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant. **HARI BALKRISHNA v. NARO MORESHVAR**

[I. L. R., 18 Bom., 342]

SS. 38, 41.

*See* ESTOPPEL—ESTOPPEL BY CONDUCT.

[I. L. R., 26 Calc., 381]

— B. 39.

*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS.

[I. L. R., 7 Calc., 736]

[I. L. R., 23 Bom., 375]

*See* LIMITATION ACT, 1877, ART. 91.

[I. L. R., 5 All., 322]

## STAMP—continued

## 1. BENGAL REGULATION—concluded

when there was no intention of pleading such documents in the mofussil courts, were held to be good and binding. *GOURY CHAND MOOKERJEE v. JOGENDRONATH MOOKERJEE* W. R., 1864, 289

Beng Reg X of 1829.

See STAMP ACT 1879 sec I ART 49

[I. L. R., 7 Calc, 594]

s. 31—Stamp Act (X of 1862)—*Mirasi potlaks* Mirasi raiyati potlaks, where not required either by the old (Act X of 1829, s. 41) or new Stamp Law (Act X of 1862), to be written on stamped paper. *MONROODEN AHMED v. PRANATH ROY* (CROWDERY

[3 W. R., Act X, 142]

## 2. BOMBAY REGULATIONS

Bom Reg XVIII of 1827—

Will Regulation XVIII of 1827 did not require a will to be stamped during the testator's lifetime. *WEBER v. LEYER* 2 Bom., 55 2nd Ed., 52

1. s. 10—Construction of section. An objection to the validity of a document under Regulation XVIII of 1827, as distinguished from its admissibility in evidence or from a prohibition to Courts of Justice or public officers to Act upon it, was an objection on the merits under Act VIII of 1859. Where two documents were executed in the Island of Bombay respectively, under date the 29th August 1851 and 4th August 1852 and did not appear to have been originally expressly intended to operate within any of the talukhs subordinate to the Presidency of Bombay, —*Held* that they did not come within the scope of Regulation XVIII of 1827. That Regulation, being an enactment imposing stamp duties upon the subject must be strictly construed, and although the High Court believed that those documents were actually intended to operate so far as the particular property in question in the suit was concerned in the taluk of Tanna, the High Court declined to hold "expressly" to mean the same as "actually" as nothing appeared on the face of the documents to show where the property mentioned in them was situated. *GIRDHAR NAGJIABET v. GANPAT MORORA* 11 Bom., 129

2. s. 9 and account—*Friedance when unstamped*—A signed account showing a balance up to date and containing a promise to pay interest upon the consolidated balance cannot be made use of in evidence to support a claim to interest on that balance, unless it be stamped; but it may be used as an admission or a simple admission of a balance due, although not stamped. *DHONDU JAGANNATH v. NARAYAN RAMCHANDRA*

[1 Bom., 47]

3. s. 3—sub s. (3) Mortgage—*Lease—Consent report*—Where an agreement between a mortgagor and mortgagee contained a stipulation that the mortgage, or should at the time of redemption, make good the losses arising to the mortgagee from the default of tenants, which tenants were

## STAMP—continued

## 2. BOMBAY REGULATIONS—cont. used

agreed the mortgagee might put in, in case the mortgagor made default in payment of the rent agreed upon for the term of the mortgage, such an agreement was not a lease or the counterpart of a lease within the meaning of Regulation XVIII of 1827, s. 10 sub-s. 3, but was a contract of indemnity against losses to be incurred after the determination of the lease, which, not having any operation so long as the lease was in existence, was therefore not exempt from stamp duty under that Regulation. Where an appellant has not tendered the stamp duty and penal y on a document which the Court below have held to be insufficiently stamped the High Court will not allow him to do so in special appeal. *ELN KRISHNA GOPAL v. VITRU SHIVANI* 10 Bom., 441

s. 12, sub-s. (2)—*Suit to recover possession of immovable property—Proced. co.*—In a suit by plaintiff to recover possession of certain immovable property under a deed of sale executed to him by the defendants' father, while Regulation XVIII of 1827 was in force upon oneanna stamp paper, a question having arisen as to what stamp duty the deed should bear for the purposes of the suit, it was referred to the High Court. *Held* that the deed was sufficiently stamped under sub-s. (2), s. 12 of Regulation XVIII of 1827, but the plaintiff could not obtain on it a judgment for a sum or value beyond what was covered by that stamp unless he paid an additional stamp duty and penalty which the Court might allow him to do. *MULJI BECHAR v. JETHA JESHBANKAR* I. L. R., 10 Bom., 239

1. s. 13—*Intention to defraud revenue*—On documents insufficiently stamped under Regulation XVIII of 1827 the question did not properly arise under s. 13 of that Regulation, whether the intention of the parties in not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 10 of Act X of 1862. *KANTAR BHAVANI v. APPA*

[I. L. R., 5 Bom., 621]

2. s. 13—*Right to have document stamped—Intention to evade stamp duty*—A party has a right to have stamped, on payment of the prescribed penalty, an instrument executed while Regulation XVIII of 1827 was in force, and it should not be rejected on the ground of intention by the party to evade the stamp duty. *ANANT NIKANTH v. JIJABDAY VASUDAY* 10 Bom., 358

3. s. 14—*Bond stamped after death of grantor*—A bond or other writing, stamped after the death of the grantor is valid against his heirs. The personal representatives, or other persons claiming as heirs and kindred of a deceased grantor, stood, with regard to s. 13 and 14 of Regulation XVIII of 1827, in the same position as the deceased grantor would, and were not third parties within the meaning of s. 14. The previous decisions of the late Sudder Court to the contrary overruled. *KAGHIA v. DHARMA JHATHI* 1 Bom., 62

**STAMP—concluded.****2. BOMBAY REGULATIONS—concluded.**

**1. — s. 14, sub-s. (1)—Deed of sale of property given in gift from what time operative.**—A donee of the grantor was a third party within the meaning of Regulation XVIII of 1827, s. 14, sub-s. 1, and therefore, as against him, a deed of sale of the property given in gift was only valid from the date on which it was stamped. Precedents on this point questioned, but followed. **JAGANNATH VITHAL v. APAJI VISHNU** . 5 Bom., A. C., 217

**2. — Purchaser at sale in execution of decree—Validity of mortgage-deed.**—The purchaser at a Court-sale of the right, title, and interest of the judgment-debtor is a third party within the meaning of s. 14, Regulation XVIII of 1827, sub-s. (1), and therefore, as against him, a mortgage deed passed by the latter to a mortgagee is valid, not from the date of its execution, but from that on which it was stamped. **Jagannath Vithal v. Apaji Vishnu**, 5 Bom., A. C., 217, followed. **NARAYAN DESHPANDE v. RANGUBAI**

[I. L. R., 5 Bom., 127

**3. MADRAS REGULATIONS.**

**Mad. Reg. XIII of 1816—No provision for payment of penalty—Secondary evidence of unstamped document.**—In a suit to redeem a mortgage of 1833, executed upon an unstamped cadian, liable to stamp duty under Regulation XIII of 1816, secondary evidence of the contents of this document was tendered on payment of a penalty. Held that the evidence could not be admitted. **KOPASAN v. SHAMU** . I. L. R., 7 Mad., 440

**Mad. Reg. II of 1825, s. 4—Deed transferring property conditionally—Ad valorem stamp duty.**—An instrument, dated 1853, which purported to be a transfer by the executant of the property inherited by her from her husband subject to the payment of his debts, and in which a provision was made for the maintenance of the executant and for the retransfer of the property in case she gave birth to a son, held not to be liable to stamp duty. **REFERENCE UNDER STAMP ACT, s. 49**

[I. L. R., 16 Mad., 419

**STAMP ACT (XXXVI OF 1860).**

**Security bond given to abkari renter.**—A security bond executed by a third party to the abkari renter is not exempt from stamp duty. **RAMASWAMI CHETTI v. PAPPABEDDI** 1 Mad., 190

**s. 14—Bond executed on optional stamp.**—No larger sum could be recovered under s. 14, Act XXXVI of 1860, upon a bond executed on an optional stamp than that optional stamp covers, and no amount of penalty can make up the deficiency in the stamp. **KRAMUT ALI v. ABDUL WAHAB**

[17 W. R., 131

**1. — sch. A and s. 14—Promissory note containing agreement to waive jurisdiction.**—A promissory note containing an agreement by the

**STAMP ACT (XXXVI OF 1860)—concluded.**

maker that, in case of any dispute or difference arising concerning the payment of the note or the subject-matter thereof, the same shall and may be sued in the Supreme Court, and "to the jurisdiction of which I hereby waive and agree to waive all pleas," properly stamped as a promissory note, did not require an additional stamp as an agreement under Act XXXVI of 1860, sch. A, and s. 14. **RAKHALDASS SINGH v. ROY CHUNDER DUTT**

[1 Ind. Jur., O. S., 124

**2. — sch. A, art. 4—Promissory note.**—An instrument to the following effect: "On the 14th December 1861 we, A and C, bind ourselves to pay, with interest to you, B and C, Rs 500-10, being the balance of dealings held with your firm, and the amount received this day from you in cash on account of stamp,"—Held to be neither a bond nor a hundi, but to be in the nature of a promissory note and to come within the description in art. 4, sch. A of Act XXXVI of 1860. **HUTUMAN SAHIB v. HUSAIN SAHIB** . . . . . 1 Mad., 152

**3. — sch. A, art. 20—Partnership agreement.**—An agreement on a R24 stamp paper between A, who had obtained from Government the abkari farm of a certain talukh, and B, stipulating that, in consideration of Rs 2000 advanced by B for payment of deposit, the whole management should reside in B; that the parties should each have a half share and be respectively entitled and liable to profit and loss in respect of his share; that they should account with one another for the sums laid out by B, and should settle annually the accounts of profit and loss upon the half share,—Held to be a partnership agreement, and to be sufficiently stamped under Act XXXVI of 1860, art. 20, sch. A. In determining the stamp to be affixed to a document, the state of things at its execution is alone to be regarded. **CHINNATTA NATTA v. MOTTUSWAMI PILLAI**

[1 Mad., 226

**STAMP ACT (X OF 1862).****s. 3.**

**See GENERAL CLAUSES CONSOLIDATION ACT, 1868, s. 6 . . . 7 Mad., Ap., 9**

**1. — Offence under section—Engraving deed on unstamped paper.**—The mere engraving of a deed on unstamped paper was not an offence under s. 3 of Act X of 1862, nor did the signing such deed as a witness constitute any such offence. **REG. v. JITHA MOTI. REG. v. VIRJI KUVARJI** . . . . . 2 Bom., 135; 2nd Ed., 129

**REG. v. JOHI BIN SATU . . . 1 Bom., 37**

**2. — Penalty—Attesting witnesses and persons drafting documents.**—The words in s. 3 of Act X of 1862, "unless in any case in which a higher penalty is imposed" and "not exceeding," apply both to the penalty of Rs 100, and one higher than ten times the value of the omitted stamp. Attesting witnesses and persons who draft documents and note the fact with their signatures at the foot do not come within the words, "make, execute, sign, or



**STAMP ACT (X OF 1862)—contd.**

be a party to," used in the section and are therefore not punishable under it. *ANONYMOUS*

[3 Mad., Ap., 27

3. — and s. 53 Omission to get sanction of Collector — A power of attorney under s. 3 Act X of 1862 not valid unless sanctioned by the Collector or the stamp officer for the district or any other officer specially authorized by the Government in the behalf of the Collector. *THE GOVERNMENT OF BOMBAY v. ABRAHAM KUTUB KHAN*

[13 W. 183

1. — s. 14 Documents improperly stamped *Pendence Admissibility* — Documents not bearing proper stamps and r Act X of 1862 are not admissible in evidence or to show the terms of the deed as against the party producing the same. *OMKAR BIKHAR v. MATHAN KOTAKA*

[3 Agra, 103a

2. — Bond stamped after suit — A bond stamped subsequently to the institution of a suit is valid, under the provisions of the Civil Procedure Code and of the Stamp Act of 1862 and 1863 provided it be properly stamped when produced at the trial. *ATMARAM GULABHAI v. AMIR HANID JEFF CHAND*

3 Bom., A. C., 92

3. — Nature of instrument — Collector on stamp duty — required for any particular instrument, signed must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties if the contents of the instrument show that the title is a misnomer. *PASLER v. MALHOTRA*

[3 Bom., A. C., 61

4. — Two contracts and bearing one stamp — Allowance of value of stamp — Where a document contained two distinct contracts requiring separate stamps, but the whole was impressed with one sufficient stamp it was held that this stamp might be taken into account in making up the aggregate of the stamps required. *BALAJI MAHADEV v. BHIMNATH BIV CHIMBIAJI*

6 Bom., A. C., 85

5. — Copies of record of examination of depositions and of the witness and sentences pronounced by Criminal Courts, which require by s. 410 of the Code of Criminal Procedure to be filed with their petitioners of appeal when that instrument under the operation of the section does not admit that copies of any part of the record or paper could or only be furnished to applicants. *ANONYMOUS*

[4 Mad., Ap., 58

6. — Mortgage — Transfer of lease — Admissibility of evidence — The transfer of an under-lease, the loss of the lease, lack of the tenant's possession of the tenant

**STAMP ACT (X OF 1862)—contd.**

is not admissible in evidence unless it be shown that it was a separate deed. *THE GOVERNMENT OF BOMBAY v. ABRAHAM KUTUB KHAN*

S. C. PRIVATE ARMS v. GOVERNMENT OF BOMBAY [13 W. 242

7. — Redemption — Unstamped instrument — A bond executed in favour of the plaintiff and purported to be a deed of redemption. The plaintiff executed contemporaneous only a deed of redemption to the defendant and the plaintiff had no interest in it by entering into the deed that as the original deed was not stamped, and as the effect of it was controlled by the Stamp Act, the plaintiff was estopped from requiring a separate stamp on the document requiring a separate stamp. *HAS COOMAR SINGH v. JAM SINGH*

[11 W. 12

— s. 15.

See STAMP ACT, 1872 s. 34

[I. L. R., 14 Mad. 23

— s. 15, sub s. (2) — Application for remission of stamp duty in paper suit — Held that the duty of a Civil Court for extension of time for filing an application for remission of stamp duty is not a matter of course, but it is a matter of discretion. *GOVIND GUTTOOR v. KIRAN MOHAN CHANDRAN*

[10 W. R. 23

— ss. 15 and 17.

See APPELLATE COURT — EVIDENCE — ADMISSIBILITY OF EVIDENCE — DOCUMENTS — STAMPED DOCUMENTS.

[3 B. L. R., A. C., 129, 20

5 B. L. R., Ap. 10

7 B. L. R., 241

I. L. R., 5 Bom., 42

3 Mad. 32

3 Mad. 2

— s. 17.

See APPEAL — NOTES — STAMP ACT 1862 [3 Bom., A. C., 129

1. — Intention to stamp — s. 17 of Act X of 1862 only applied to the proper documents under a 15 which had been stamped, not to documents on which there was no stamp. Such documents would not be received at all. *LALJI SINGH v. ABRAHAM*

[3 B. L. R., A. C., 235 12 W. R., 47

2. — Intention to stamp — A bond, executed between a plaintiff and a defendant, and the defendant contained the following clause: "And inasmuch as we (the defendant) are urgently in want of money and are unable to procure a stamp at the moment we have executed the bond on plain paper, shall it be necessary for you (plaintiff), to bring a suit against us, whatever plaintiff

**PACT (X OF 1862)—continued.**

have to pay shall be made good by us, with  
The Small Cause Court Judge, before  
the case was tried, considered the above clause  
and to be evidence of an intention between  
the parties to avoid the stamp laws, and refused to  
admit the evidence to the contrary. He also refused to  
admit the bond in evidence. *Held*, on reference to  
the High Court, that the clause in question did not  
amount to an agreement to evade the stamp laws.  
The Judge might have inferred from it that it was  
an intention of the parties to evade the stamp laws,  
but that case he should have heard evidence to the  
contrary. **SASHI BHUSHAN BANERJEE v. TARA-**  
**KAR**

[3 B. L. R., A. C., 329; 11 W. R., 553]

*Intention to evade payment of duty.*—A Court to which a document is tendered  
in evidence under this section ought not to reject it,  
if it clearly appears that there was an intention  
to evade the payment of stamp duty. **ROYAL BANK**  
**OF INDIA v. HORMASJI KHARSEDJI**

[3 Bom., O. C., 153]

*Permission to pay penalty if document is lost.*—*Quere*—Whether permis-  
sion to pay the stamp duty and penalty can be given  
in the case of a lost instrument. **ARUNACHELLUM**  
**SETTY v. OLAGAPPAH CHETTY** . 4 Mad., 312

*Hundi—Inadmissibility in evidence for want of stamp.*—The plaintiff brought a  
suit against three defendants under the following  
circumstances: The third defendant was the tenant  
of a village under the second defendant, the first  
defendant being the agent and manager of the second  
defendant. The third defendant owed the second  
defendant a sum of money on account of rent, and  
gave a hundi on the plaintiff for Rs. 1,000 to be paid  
to the first defendant on order, and containing these  
words: "For which amount I shall deliver over to  
you grain in that village and its hamlets, and for  
which the Dewan (first defendant) will issue an  
order to the above effect." The hundi was upon a  
renewed stamp. Plaintiff, on receipt of this hundi,  
gave upon the back of it another hundi upon his  
mother-in-law in the following terms: "On demand  
I shall pay to Mahomed Radhamatulla Shaib, Dewan  
of Venkatagiri (first defendant), or to his order, the  
within-mentioned amount for grain to be supplied me  
by Mr. Ward (third defendant) on the order of the  
said Mahomed Radhamatulla Shaib, the Dewan of  
Venkatagiri." This was signed by the plaintiff,  
and beneath his signature was that of the first  
defendant. The amount mentioned in the hundi was  
paid to the first defendant; the second hundi was  
not stamped. The plaintiff's case was, that the first  
defendant entered upon a binding engagement with  
him to deliver or permit the delivery, of grain of the  
value of Rs. 1,000, and that he failed to fulfil his  
engagement. The Civil Judge decreed for the plaintiff.  
On appeal.—*Held* by the High Court, reversing the  
decision of the Civil Court, that the second hundi  
was not admissible in evidence, not being stamped,  
and that there was no evidence of such an agreement  
as that relied on by the plaintiff. **MAHOMED RAHA-**  
**KATULLA v. WARD**

5 Mad., 391

**STAMP ACT (X OF 1862)—continued.**

6. ———— and s. 15—*Intention to evade payment of duty—Jurisdiction.*—In a suit  
brought in a Small Cause Court to recover money,  
being a debt secured by a *hissab* entered on a leaf of  
a *khatta* book, where the defendant objected to the  
admission of the leaf as evidence, because it did not  
bear a proper stamp.—*Held* that under ss. 15 and 17,  
Act X of 1862, it was competent to the Judge to  
find, on the facts before him, whether the absence  
of the stamp was owing to an intention to evade pay-  
ment of the stamp duty, and that no question arose  
for reference to the High Court. **RAJ CHUNDER**  
**SHAH v. GOBIND CHUNDER KOOLAL**

[13 W. R., 102]

7. ———— *Insufficiently-stamped document—Procedure—Admissibility in evidence.*—  
The plaintiff sued his elder brother for a share in  
certain family property. The defendant raised a  
question of family custom, and relied on a certain  
deed of release which he said the plaintiff had given  
him, but the existence of which the plaintiff denied.  
That document was not stamped, though, on the face  
of it, it stated that it was to be stamped. No objec-  
tion was taken on that score to the document before  
the first and lower Appellate Courts, who considered  
that the document was a genuine document executed  
by the plaintiff. After its production, it had an in-  
sufficient stamp of two annas put upon it. The  
High Court, on appeal, left the deed as part of the  
evidence in the case, but qualified its effect and the  
extent of its operation by making it a deed of release  
releasing so much of that which the plaintiff might  
otherwise claim as would be covered by the insuffi-  
cient stamp of two annas. *Held* that the High  
Court might either have refused to admit the docu-  
ment for want of a stamp, or—which would be more  
correct—it might have required it to be properly  
stamped and the penalty paid into Court; but the  
course taken was entirely without precedent, without  
principle and without authority. **MANTAPPA NAD-**  
**GOWDA v. BASWANTRAO NADGOWDA**

[15 W. R., P. C., 33; 14 Moore's I. A., 24]

1. ———— s. 22—*Promissory note—Interest.*—  
A promissory note is sufficiently stamped if the  
stamp covers the principal sum named in the note  
without reference to the interest. **GOMEZ v. YOUNG**  
[2 B. L. R., O. C., 165; 12 W. R., O. C., 1]

2. ———— *Promissory note—Admissibility in evidence.*—*A B*, by an instrument  
in writing, dated 6th August, promised to pay *C D*,  
"on demand," Rs. 310 13-3. In the margin of the  
instrument was written due "30th August," and an-  
nexed to *A B*'s signature was the following memo:  
"The sum of Rs. 310 12 6 only, forty five days from  
the 5th of August." *Held* that the instrument was  
properly stamped as a promissory note payable on  
demand, and ought to have been admitted in evidence.  
*Per PEACOCK, C.J.*—A promissory note payable on  
demand ought to be stamped as such, notwithstanding  
there may be a collateral agreement between the  
parties that the holder will not present it for a given  
time, or if paid on demand that the maker shall be

## STAMP ACT (X OF 1862)—continued.

entitled to discount. CHANDRAKANT MOOKERJEE  
v. KARTICHARA CHAHLI  
[5 B. L. R., 103; 14 W. R., O. C., 38]

3 ——— Promissory note—Ambi-  
guity. Where the wording of a promissory note bear-  
ing a one anna stamp appears to be ambiguous as to  
whether it is payable on demand, the Court will take  
the evidence of the parties as to the intention, and  
will then decide whether it is properly stamped.  
Under such circumstances, the Court will take evi-  
dence of usage. HANK v. HINDUSTAN, CHITA, AND  
JAPAN S. BEDOWICE 1 Ind. Jur., N. S., 107

s. 28.

see COMPROMISE—COMPROMISE OF DEBTS  
UNDER CIVIL PROCEDURE CODE

(1 Mad., 217  
13 W. R., 378)

Refund of a stamp duty—Com-  
mencement of suit—Held that, for the purpose of  
refund of half stamp duty under s. 23 of Act X  
of 1862, the hearing of a suit in a small Cause Court  
commenced when proof of the service of the sum-  
mons was taken on the day appointed for the hear-  
ing, and where proof of the service of the summons  
had been previously taken, it must be considered as  
taken at the commencement of the proceedings on  
the day appointed for hearing. AMIRCHAND JAM-  
NADAR v. MALJOY ANTHE 4 Bom., A. C., 178

s. 27—Right to recover on contract only  
amount covered by stamp where stamp is optional—  
Where a written contract falls to an optional stamp  
is put in evidence by the defendants, the plaintiffs  
cannot recover a larger amount under it than (if  
stated) the optional stamp upon the instrument  
would have been sufficient to cover. In a suit for  
the recovery of money due under a written contract  
the defendants admitted that a sum of Rs. 300-4-0  
was due to the plaintiffs, subject to certain deductions  
which they claimed to be entitled to set off against  
the plaintiffs' claim. The defendants put in evidence  
the written contract, the stamp upon which was only  
sufficient to cover the sum of Rs. 1000. Held that,  
notwithstanding the admission of the defendant, the  
plaintiffs could only recover Rs. 1000 in the suit.  
KISTNASAMY PILLAY v. MCH CHAL COMMISSIONERS  
FOR THE TOWN OF MADRAS 4 Mad., 120

s. 32—Appeal on valuation of claim.—  
Under s. 32, Act X of 1862, an appeal relating to  
the valuation of a claim can be entertained by the  
High Court. BASOO MAD PUNOON v. HURRI  
FADDEY 11 W. R., 478

s. 50, sub s. (2)—Jurisdiction of Col-  
lector—Offence under Criminal Procedure Code  
(Act XXI of 1861) ss. 119, 171—An application  
was made to a Collector under s. 10 sub-s. (2), Act X  
of 1862 to replace a damaged stamp by a new one.  
As it appeared that the stamp had been tampered  
with for fraudulent purposes, the Collector made  
over the papers to the Magistrate for trial. Held  
that, the document not having been given in evidence  
in any proceeding in Court, the Collector was not

## STAMP ACT (X OF 1862)—continued.

bound to proceed under ss. 169, 171 of the Criminal  
Procedure Code. QUEEN v. GOWD MOHAY SIV  
[3 B. L. R., A. C., 8; 11 W. R., Cr., 48]

sch. A, art. 1—Promissory note for  
payment of grain.—An instrument in the form of a  
promissory note for grain should be stamped, under  
art. 1 of sch. A of Act X of 1862, with a stamp of  
the value of one rupee. LACHIRAM JAYASWAMI v.  
RAMJI BISH SHIVALLI 6 Bom., A. C., 107

art. 3—Petition for a lease—  
In a suit for payment of rent for use and occupation  
of land, where the basis of plaintiff's claim was for a  
kabuliat, the agreement produced as evidence of the  
contract, not being the deed of contract itself was  
held to be not liable to be stamped under art. 3,  
sch. A, Act X of 1862. CHOOBER MENON v. CHEN-  
DER LALL PARS 14 W. R., 334

Affirming on review S. C. 14 W. R., 178

1 ——— art. 4—Agreement—Breach—  
In a suit for breach of contract to cultivate and  
deliver Indigo for recovery of the amount specified  
in the contract, Held that the stamp duty depended on  
the amount of consideration for the undertaking.  
DOYLE v. MENDARER MENDEL 15 W. R., R. C. C. Ref., 10

2 ——— and art. 15—Agreement to supply  
cotton in consideration of a sum of money received  
should be stamped under art. 4 and not under art. 15,  
sch. A, Act X of 1862. BANSTON v. CHITRA v.  
RAMJI BHAKA 6 Bom., A. C., 151

1 ——— art. 10—Promissory note  
—Bond—A promissory note, attested by a witness,  
does not require to be stamped as a bond under Act  
X of 1862, sch. A, art. 10. The words in that clause  
"not being a bond, instrument, or writing bearing the  
attestation of one or more witnesses," referred only  
to the preceding words, "other order or obligation  
for the payment of money." Also the words "bearing  
the attestation of one or more witnesses" apply only  
to the words "instrument or writing," and not to the  
word "bond." GLADSTONE v. SADOO CHAND HERR  
[2 Ind. Jur., N. S., 303]

2 ——— Promissory note—In  
a suit brought by a joint stock company in liquidation  
against a former director of the company for Rs. 20,000 on a promissory note, dated the 1st of  
March, and purporting to be paid on demand but  
with the words in pencil "due 4th June" put on it  
the same day it was signed, in accordance with an  
understanding between the defendant and the other  
directors that they would not press him for payments  
before the latter date and signed by the defendant  
some days after the day it bore date. Held that a  
one-anna stamp was not sufficient under sch. A,  
art. 10, of Act X of 1862. LAKSHMI FINANCIAL  
ASSOCIATION v. PASTANJI CHRETHI 3 Bom., O. C., 9

3 ——— Written duty not by  
master to servant for payment of money.—A written  
direction given by a master to a servant for the pay-  
ment of money belonging to the former in the hands

**STAMP ACT (X OF 1862)—continued.**

of the latter was held to be not an order for the payment of money within the scope of the terms used in art. 10, sch. A, Act X of 1862, as amended by Act XXVI of 1867. **POTBULWANT RAO v. FUTEHOODDEEN** . . . 1 N. W., Ed. 1873, 143

1. ——— art. 12.—*Security bonds for costs of appeal to Privy Council.*—Security bonds for costs of appeal to the Privy Council come within art. 12, sch. A, Act X of 1862, and ought to be executed on a stamp as therein specified. **SOONJHAREE KOONWUR v. RAMESSUR PANDEY** . . . [5 W. R., 255. 47

2. ——— *Solehnamah admitting satisfaction of decree — Petition — Agreement — Act XXVI of 1867, art. 10.*—In a suit upon a bond for R40 with interest, the defendant filed a solehnamah admitting that the amount due from him was R25 and agreeing to pay that sum by instalments. *Held* that the solehnamah was not a petition within the meaning of art. 10, Act XXVI of 1867, but within the meaning of sch. A of Act X of 1862, and was liable to a stamp duty of 2 annas as for an instalment bond. **MANICK CHUNDER ROY v. LALLMON SHEIKH. PUNCHANUN SINGAR v. GUNESH MENDUL** . . . 8 W. R., 214

art. 18.—*Penalty—Obligation for payment of money.*—Where the parties to an agreement added to the stipulations which it contained a provision whereby a sum of money was made payable by way of fine or penalty, in the event of the non-performance, at the appointed time, of the work contracted to be done, such a provision was held to be in the nature of an obligation for the payment of money, and for the due execution of work within the meaning of art. 18 of sch. A of the Stamp Act, X of 1862, and required an optional stamp. **COLLINS v. DEWAN SINGH** . . . 2 N. W., 465

art. 42.—*Lease—Instrument purporting to create relation of landlord and tenant.*—Where a written instrument purported to create the relation of landlord and tenant for five years, the plaintiff's (lessor's) tenure being that of a mirasidar, that is, an hereditary tenancy under Government, determinable on default in payment of the proportion of the Mothee Faisal assessment payable for the land, —*Held* that the written instrument was a lease, and was not liable to be stamped, by virtue of the exemption of art. 42, sch. A of Act X of 1862. **SAMINATHAIYAN v. SAMINATHAIYAN** . . . 4 Mad., 153

1. ——— art. 43.—*Sanad to gomashita to collect rents.*—A sanad, which authorized a gomashita to collect rents, and to sue for them, requires to be stamped. Such a sanad required a four-rupee stamp under art. 43, sch. A of Act X of 1862. **RAGHU NANDAN THAKUR v. RAMCHARAN KAPALI** [1 B. L. R., F. B., 55: 10 W. R., F. B., 39

2. ——— *Instrument operating as power-of-attorney.*—J M executed in favour of P an instrument authorizing P to recover, by suit or otherwise, from Messrs. W and N, a sum of R22,500 (or thereabouts) which contained this clause: "From whatever sum P may recover from W and N he is to

**STAMP ACT (X OF 1862)—concluded.**

pay himself the sum of R3,640 which is due to himself, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me." *Held* that the above instrument operated as a power-of-attorney, and not as an assignment, and was properly stamped under Act X of 1862, sch. A, art. 43, with a stamp of R4. **PESTANJI MANCHARJI WADIA v. MATCHETT** . . . 7 Bom., A. C., 10

art. 54.—*Deed of partition—Each sharer's copy of an instrument.*—Under Act X of 1862, sch. A, art. 54, each sharer's copy meant each sharer's part as exemplification of an instrument executed in duplicate, triplicate, etc. Where a document, bearing the date June 1863 and purporting to be a deed of partition between two brothers, was unstamped, —*Held* that it should be stamped as each sharer's copy of an instrument under Act X of 1862, sch. A, art. 54. **NARAYAN RAGHUNATH v. KASHI-NATH** . . . I. L. R., 8 Bom., 299

1. ——— sch. B, art. 11.—*Suit for declaration of title to portion of land paying revenue to Government—Interest in land.*—A suit for the declaration of title to a fractional share in a zamindari paying revenue to Government is not a suit "for lands forming one entire mehal or a specific portion thereof with a defined jumma:" such share being "an interest in land" should be valued according to the provisions of note (e), art. 11, sch. B, Act X of 1862. **RAJ CHUNDER ROY v. CHUNDEE CHURN NAIR** [8 W. R., 437

2. ——— *Time for obtaining copy of decree.*—The rule of circular No. 31, dated 3rd October 1864, that the time allowed for obtaining a copy of judgment or decree shall not begin to count till the whole of the requisite pieces of stamp paper are put in, was held to extend also to plain paper filed under the general rule at end of sch. B, Act X of 1862, when the copy cannot be comprised within the stamp paper put in. **CHUMUN CHOWDHRY v. ALI AZIM** . . . 9 W. R., 138

3. ——— *Suit for resumption—"Revenue."*—A suit to resume lands as lakhiraj fell in respect of stamp duty under cl. (d), art. 11, sch. B of Act X of 1862. The term "revenue" in cl. (d) must be read as meaning revenue or rent, whether to Government or to a zamindar. **GOREE MOHUN MOJOOMDAR v. MACKINTOSH** 9 W. R., 395

**STAMP ACT (XXVI OF 1867)**

See UNDER COURT FEES ACT, XXVI OF 1867.

**STAMP ACT (XVIII OF 1869).**

See GENERAL CLAUSES CONSOLIDATION ACT (I OF 1869), s. 3. 7 Mad., Ap., 9.

1. ——— *Insufficiency of stamp.*—The Civil Court is authorized, under Act XVIII of 1869, to receive the proper amount of stamp which should have been affixed on the plaintiff's pottah under the law in force when it was executed. **MAHOMED RIJAZ v. COLLECTOR OF CHITTAGONG** [6 B. L. R., Ap., 117: 15 W. R., 116

## STAMP ACT (XVIII OF 1869)—continued

2. — Agreement executed both in England and India.—Liability to stamp duty.—Admissibility in evidence.—An agreement was first executed in England by D and E, and by A, the senior partner in the firm, and stamped with the stamp required by English law for agreements executed in England, and it was subsequently executed in India by B and C, the other two partners, but not stamped with an Indian stamp. Held that the agreement was liable to Indian stamp duty, and was not admissible in evidence unless and until the proper stamp duty and penalty under Act XVIII of 1869 were paid. *OAKES v. JACKSON*

[I. L. R., 1 Mad., 134]

3. — Orders on tenants to pay rent to person to whom landlord has executed release.—Orders upon tenants to hold themselves responsible to a particular person to whom a release has been made by their landlord are not documents which the law requires to be stamped, and ought not to be rejected as evidence on the ground of their not being stamped. *BRISKEE KUNTER LALL v. THAKKOR SATH SAI*

25 W. R., 80

1. — s. 5, sub-s. (5).—Bond.—Definition of bond.—The definition of the word "bond" in the Stamp Act of 1869 is not exhaustive, the word "includes" in sub-s. 5 of s. 2 has an extending force, and does not limit the meaning of the term to the substance of the definition. IN THE MATTER OF THE PETITION OF NARAYAN NARAYAN v. PROSECUTOR GENERAL . . . I. L. R., 8 Cal., 534

2. — Entry of loan in account books.—Entries of loans in account books cannot be treated as bonds within the meaning of sub-s. (5) of s. 3 of Act XVIII of 1869. *QUEEN v. BUDRO* . . . 2 N. W., 453

1. — sub-s. (11).—Conveyance.—An instrument, which purports to convey two or more properties for a sum of money, composed of items described in the instrument as the values of those properties, is simply a deed of sale coming under the definition of "conveyance" in Act XVIII of 1869, s. 3. The stamp duty, properly leviable upon such an instrument, should therefore be calculated upon the aggregate sum specified therein, and not upon the various items composing that sum. *IN RE TIKKARAM HARI ATRE*

10 Bom., 354

2. — Sale certificates.—Mad. Act VIII of 1865, ss. 35 and 40.—Certificates of sale issued under ss. 35 and 40 of Madras Act VIII of 1865 are not conveyances subject to stamp duty. *ANONIMOUS* 5 Mad., 112

1. — sub-s. (15).—Lease.—Contract to pay sum of money in consideration of a grant.—An engagement by a proprietor of land to pay to a superior a sum of money in consideration of a grant of the right to farm dues, in the nature of revenue, is a "lease" within the meaning of the General Stamp Act, 1869. *COLLECTOR OF TANJORE v. RAMASWAMI* . . . I. L. R., 3 Mad., 342

## STAMP ACT (XVIII OF 1869)—continued

2. — Second lease altering first stamped and registered.—After a complete lease has been executed, stamped, and registered, if another document is prepared and executed with a view to alter the first and substitute new terms as far as the rent is concerned, it requires, under the Stamp Act, to be itself stamped with the stamp provided for a lease. *BRISATH DUTT JHA v. PUTTANAH DOLLAH*

[20 W. R., 38]

sub-ss. (18) and (23) and sch. I, art. 10.—Mortgage.—Pledge by letters of assignment of property not in use.—M, the manager of an indigo concern, appointed under s. 243 of Act VIII of 1859 without communicating with A and B, mortgagees of the concern, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April the plaintiffs wrote to M that they would make advances to the extent of ₹50,000 upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for M's signature which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a 2 rupee stamp. In September and October M obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, which also bore 2-rupee stamps. The indigo when manufactured, was claimed by A and B under their mortgage, and their claim being resisted by M, who set up against them the plaintiffs' rights under the letters of assignment, A and B brought a suit to enforce the provisions of their mortgage-deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued A, B, M, and the holders for sale to establish their first charge in respect of their advances to M upon 250 maunds of the indigo on the strength of their letters of assignment. Held per GARTH, C.J., and MACPHERSON, J., that the letters of assignment to the plaintiffs were not mortgages within the definition of the Stamp Act, XVIII of 1869, and that the proper stamp to be affixed to such document was a stamp of 8 annas. *MORAN v. VITTHAL BUSEE* . . . I. L. R., 2 Cal., 66

1. — sub-s. (25).—Promissory note insufficiently stamped.—Express contract.—A suit on a promissory note payable on demand which was not stamped was held to have been rightly dismissed, the note being inadmissible as evidence with reference to Act XVIII of 1869, s. 3, sub-s. 25. Held that in such a case the plaintiff, if he recovers at all, must do so on the contract actually made and not on any implied contract. *ANANT CHUNDER ROY CHOWDHURY v. MADHAT CHUNDER GHOSH* 21 W. R., 1

2. — Promissory note.—Bond.—The defendant, having borrowed ₹30 from the plaintiff, gave him, on the 9th November 1873, an instrument, which was in effect as follows: "I (defendant) write this 'rukha' in favour of A (plaintiff) for ₹30 cash received, to be repaid on the 13th November 1873, in the event of default, he shall pay interest at ₹1 per diem." Held (GARTH, C.J., dissenting) that such instrument was a "promissory note" within the meaning of the Stamp Act

**STAMP ACT (XVIII OF 1869)—continued.**

of 1869, and not a "bond" or "an agreement not otherwise provided for," within the meaning of that Act. **BANSIDHAR v. BU ALI KHAN**

[I. L. R., 3 All., 260

3. ————— and sch. II, art. 5—*Note or memorandum acknowledging debt—Promissory note—Insufficiently stamped document, Admissibility in evidence of.*—The plaintiff sold and delivered certain goods to the defendant. The defendant gave the plaintiff, in respect of the price of such goods, the following instrument "Agra, 14th November 1877. Due to K, cloth merchant, the sum of Rs200 only, to be paid next January 1878" This instrument was stamped with a one-anna adhesive stamp. The plaintiff claimed in the present suit from the defendant Rs200, and interest on that amount at 12 per cent per annum from the 14th November 1877 to the date of suit. *Held* by STUART, C.J., and PEARSON, J. and OLDRIED, J., and STRAIGHT, J., treating the suit as one for a debt, that although such instrument was not admissible in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgement of such debt. *Per SPANKIE, J.*, treating the suit as based upon a promissory note, that such instrument, being insufficiently stamped, was not admissible in evidence. **KANHAYA LAL v. STOWELL** . . . . . I. L. R., 3 All., 581

See **BENARSI DAS v. BHIKARI DASS**

[I. L. R., 3 All., 717

**GOPAL CHAND MARWARIE v. MOHOKOOM KODAREE** . . . . . I. L. R., 3 Calc., 314  
and **AKBAR v. KHAN** . . . . . I. L. R., 7 Calc., 256

— s. 4.—*Document executed in foreign territory.*—An unstamped instrument executed in foreign territory, and valid under the law of the place of execution, is admissible as evidence in Courts of British India, provided it does not affect any property situated in British India (Act XVIII of 1869, s. 4.) **NARAYAN SADASHIV v. BAPUJI BHALAL** . . . . . 7 Bom., A. C., 140

— s. 8.—*Account stated—Interest.*—Under Act XVIII of 1869, s. 9, a one-anna stamp is the proper stamp for a document containing an account stated, and stipulating for payment of interest. **GIRDHAR NARAN v. UMAR AJU**

[I. L. R., 4 Bom., 326

1. ————— s. 18.—*Admission in written statement and evidence.*—*Quere*—Although there have been decisions in the English Courts upon the Stamp Act which support the contention that a defendant's written statement and deposition may contain such an admission as renders it unnecessary for the plaintiff to put the written contract in evidence, yet do not the words of s. 18 of Act XVIII of 1869 prevent such a contention? **ANKUR CHUNDER ROY CHOWDHRY v. MADHUB CHUNDER GHOSE** . . . . . 21 W. R., 1

2. ————— and sch. I, art. 14, and sch. II, art. 36.—*Admissibility of unstamped document for collateral purpose.*—The plaintiff, as administrator of D, sued to recover from the defendants the sum of Rs3,000, alleging that, in February

**STAMP ACT (XVIII OF 1869)—continued.**

1878, the said sum had been entrusted to defendant Nos. 1 and 2 for investment on D's account, and had been advanced by them as a loan to defendant No. 3. The defendants alleged that the money was originally the property, not of D, but of the plaintiff himself, that he had made it over as a gift to his daughter P, by whom it had been lent to defendant No. 3, and that defendant No. 3 had duly repaid it to P. In the defendants' written statement it was alleged that the gift to P had been made in the month of February 1878, and evidence to this effect was given at the trial. At the trial, however, the defendants also alleged that in July 1878 the plaintiff had executed an instrument of gift of Rs3,000 to P and they produced a document, dated 3rd July 1878, purporting to be signed by the plaintiff, whereby he made over Rs3,000 to P, of which Rs1,000 was to be held by P, in trust for D during D's life, and to be paid back to plaintiff on D's death, and the remaining Rs2,000 were to be the property of P absolutely. When tendered in evidence, the document was objected to as being unstamped, and therefore inadmissible. *Held* that the document, though unstamped, was admissible in evidence, on the ground that the purpose for which it was tendered was collateral to the object of the document, and that its admission did not involve giving effect to it as operative between the parties to it. **KUSTOMJI EDULJEE CROOS v. CURSETJEE SORABJEE CROOS** . . . . . I. L. R., 4 Bom., 349

3. ————— *Document referred to as basis of suit inadmissible as being unstamped—Admissibility of other evidence.*—Even if a document is not admissible as being unstamped, the plaintiff might recover on such part of the case as he could make out by other evidence (provided it is recoverable with reference to the law of limitation), notwithstanding that he had in his plaint referred to such document as the basis of his suit. **NOOR BIBEE v. RUMZAN** . . . . . 4 W. R., 198

— s. 19.

See **STAMP ACT, 1879, s. 26**

[I. L. R., 3 Mad., 342

— s. 20.

See **APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW—UNSTAMPED DOCUMENTS.**

[I. L. R., 4 Calc., 213

See **SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—EVIDENCE, MODE OF DEALING WITH.**

[10 Bom., 406

1. ————— *Hundi—Insufficient stamp—Evidence—Penalty.*—Insufficiently-stamped hundi cannot be received in evidence even on payment of a penalty under s. 20 of Act XVIII of 1869. **MOTHOORA MOHUN ROY v. PEARY MOHUN SHAW**

[I. L. R., 4 Calc., 259  
2 C. L. R., 409

2. ————— *Bond written partly on one and partly on another paper—Deficiency in stamp.*—A bond written partly on one and partly on another

**STAMP ACT (XVIII OF 1869)—continued.**

stamp paper the two aggregating the proper stamp leviable, was tendered in evidence without the certificate required by s. 40 of the Stamp Act. *Held* that there was a deficiency in the stamp on the bond, and therefore a liability to the penalty under s. 20. The deficiency must be calculated to be equivalent to the difference between the value of the stamp on one of the papers and the whole value chargeable. *AYONMOIS* 7 Mad., Ap. 38

3 *Lost deed proved to be unstamped*—In cases where a lost deed is shown not to have been stamped, the Court should require the same money to be paid, as if the deed itself were produced. *HARAS CHUNDER BROOHER v. RUSSECK CHUNDER NEGOT* 20 W. R., 63

4 and s. 22—*Admission of unstamped document on payment of penalty*—Where a subordinate Judge admitted an unstamped document as payment of stamp duty and penalty under Act XVIII of 1869, s. 20 and endorsed on it a certificate that the proper stamp had been levied, but found out afterwards that the original omission was owing to a intention to evade payment of stamp duty—*Held* that the certificate was not such as was contemplated by s. 20, and did not make the document admissible and that the Judge ought, under s. 22 to have impounded the document and sent it to the Collector. *PROSUNO NATH LAHREE v. TRIPPOBA SOONDHREE DABEE* 24 W. R., 88

s. 24 and ss. 29 and 44—*Fraction of stamp law—Promissory note not duly stamped*—That which the Magistrate has to adjudicate upon on a prosecution coming before him under s. 24 of the Stamp Act is whether an offence against the Act has been committed and whether the prosecution has been brought before him by the proper officer. Any person who makes himself liable by committing an offence within the terms of s. 29 and the following sections and who is prosecuted by the Collector or other officer duly empowered may be convicted by the Magistrate under s. 44. If an instrument called a promissory note or other document of that kind and as such liable to the duty imposed by the Act is not duly stamped, the person subject to penalty is the person who makes it, and not the person in whose favour it is made. The Magistrate of the district should not himself try a case in which he instituted the prosecution as Collector. *QUEEN v. NADI CHAND PODDAR* 24 W. R., Cr., 1

1 s. 29—*Document requiring anna stamp—Stamp affixed subsequently to execution of document*—A document which by law requires a one-anna adhesive stamp to be affixed must be received in evidence, if at the time of its being tendered it bears the requisite stamp even though such stamp has been affixed subsequently to the execution of the document. *BHAIKAM MADAN GORAL v. RAMNARAYAN GORAL* 13 Bom., 208

*NOOR BIBEK v. RUMZAN* 24 W. R., 198

*KALI CHURN DAS v. NOBO KRISTO PAL*  
[9 C. L. R., 272]

**STAMP ACT (XVIII OF 1869)—continued**

2 *Power to receive in evidence unstamped note on payment of penalty*—Under s. 28 of Act XVIII of 1869, a Court has no power to admit in evidence an unstamped promissory note (payable on demand or otherwise) upon the payment of the stamp duty and the penalty laid down in s. 20 of that Act. *DOBABHAI KAVASJI v. KHEEBADJI HORMASJI* 7 Bom., O. C., 180

3 *Promise to pay money and grain—Promissory note*—A document which contains a promise to pay money and a certain quantity of grain is not a promissory note for the purpose of the General Stamp Act, 1869, s. 28. *MUTTA CHETTI v. MUTTA CHETTI* 1 L. L. R., 4 Mad., 296

4 *Promissory note—Admissibility in evidence*—In a suit brought on the following document, dated 25th October 1869: "Whereas I, defendant, have borrowed Rs. 500 from you without interest without a bond hence I declare that I shall repay, on or before 15th Falgun the whole amount as one sum and take back this chitta should I fail to repay the amount in question on the above date, I will pay interest on the same,"—it was objected that, the document being unstamped under s. 3, Act X of 1862, the Stamp Act in force at the date of its execution, it was inadmissible in evidence, and it was contended for the plaintiff that it was admissible on payment of the penalty. The Judge applied s. 28, Act XVIII of 1869, and held he had no power to receive it on payment of the penalty. *Held* the Judge was bound to comply with Act XVIII of 1869 and was therefore right in refusing to receive the document. *Held* also the document was a promissory note within s. 28 Act XVIII of 1869. *NAYDAN MISSE v. CHATTER BATT* [13 B. L. R., Ap., 33]

*S. C. NAYDAN MISSE v. CHITTER BUTTER*  
[21 W. R., 448]

5 *Promissory note—Inefficiency of stamp*—The following document bearing a one-anna stamp, was admitted by the Court of first instance and accepted by the lower Appellate Court as bearing a sufficient stamp: "My dear sister M—Be it known that Rs. 750 on account of the former note of hand and Rs. 25 of to-day's date amounting in all to Rs. 775, are due to you by me. I promise to pay you this sum in two months. I am already negotiating for a loan from another place. Rest assured no harm will come to your money, and for your satisfaction and security this note of hand is given to you. Keep this as a voucher and consider the former note of no use. At the time of payment this note is to be returned to me." *Held* that the document was a promissory note, and should have borne a stamp of 12 annas. The deficiency in the stamp could not have been supplied when the document was offered in evidence. *MAKREB AHMAD v. IFTIKHARUNNISSA BEGUM* 7 N. W., 124

6 *Document on one-anna stamp—Admissibility in evidence on payment of penalty*—A promissory note upon a one-anna stamp dated in August 1870 provided for the repayment

**STAMP ACT (XVIII OF 1869)—continued.**

of the amount mentioned in it on or before the 12th July 1871. In a suit upon the promissory note,—*Held* that it was not receivable in evidence upon payment of a penalty. **CHINNA PERUVAL NAICKER v. ANNAMMAL** . . . 7 Mad., 361

1. ——— s. 29—*Prosecution by Collector—Intention to evade payment of stamp duty.*—A Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider whether a person prosecuted under s. 29, Act XVIII of 1869, had any intention to defraud by evading payment of stamp duty. **EMPRESS v. DWARKANATH CHOWDHRY** I. L. R., 2 Cal., 399

2. ——— *Intention to evade payment of duty—Donor and donee of deed of gift.*—Intention to evade payment of stamp duty is not an essential ingredient in the offence described in s. 29 of Act XVIII of 1869. *Held* that the donor under a deed insufficiently stamped was properly convicted, but that the donee had committed no offence under the section **ANONYMOUS** . . . 6 Mad., Ap., 5

ss. 34 and 41 and sch. II, arts. 5 and 20—*Collateral instrument—Policy of Insurance—Assignment and re-transfer by endorsement.*—A policy of insurance bore three endorsements: the first, an assignment of all the right, title, and interest of the assured to the P Bank; the second, a retransfer from the P Bank to the assured, all claims having been satisfied; the third, an assignment by the assured similar to the first assignment to Messrs. **B R S & Co.** *Held* by **MARKEY and AINSLIE, JJ.**, that the first and third endorsements were liable, as collateral instruments under sch. II, art. 20, of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty. *Held* by **GARTH, C.J.**, that none of the endorsements were chargeable with duty. **IN THE MATTER OF THOMPSON'S POLICY** . . . I. L. R., 3 Cal., 347

ss. 39-40—*Promissory note.*—*Evidence.*—A promissory note, not payable on demand, executed on unstamped paper, was brought to a Collector, under s. 39 of Act XVIII of 1869, for adjudication as to the proper stamp, who, upon the payments provided in that section having been made, made the endorsement thereon provided in that section. *Held* that the irregularity of the Collector in making such endorsement did not render such promissory note inadmissible in evidence. **GRIDHARI DAS v. JAGAN NATH** . . . I. L. R., 3 All., 115

s. 43.

*See* **COLLECTOR** . . . I. L. R., 2 All., 806

*See* **MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—STAMP ACT, 1869,**

[I. L. R., 3 Cal., 622]

1. ——— sch. I and sch. II, art. II—*Bond for payment of money.*—The plaintiffs drafted the following letter, dated 5th June 1871, and sent it to the defendant for signature: "I have this day sold to you 500 to 700 cases of first quality of hogs' lard of my manufacture and mark, at Rs43 per case of eight tins of ten seers each, or two bazar maunds

**STAMP ACT (XVIII OF 1869)—continued.**

nett, as usual, delivery to be given and taken in all twelve months, as it is prepared, by instalments of forty to sixty cases at a time from my manufactory, commencing from this day. Cash on delivery of each lot. I engage not to sell any hogs' lard to any party besides yourselves, nor to make any shipments during the term of this contract without first obtaining your consent in writing, or I will render myself liable to yourselves to a penalty of Rs5,000 by way of liquidated damages, without prejudice to your other rights. Should I fail to deliver the hogs' lard to you according to this contract, and should you fail to take delivery in any month of any of the instalments of hogs' lard when ready and after I have given you notice in writing, you must render yourselves similarly liable to a penalty of Rs5,000 as and by way of liquidated damages." This letter was signed by the defendant, and, as the plaintiffs alleged, formed the contract between them. The letter bore a stamp of one anna. In an action for a breach of the contract, it was tendered in evidence by the plaintiffs, and objection was taken to it that it was insufficiently stamped, and that it required an *ad valorem* stamp as being a bond for the payment of money under Act XVIII of 1869, sch. I. *Held* it was a document which required an 8-anna stamp only under art. 11 of sch. II of the Act, and the document was admitted on payment of the stamp and penalty. **ROBERT AND CHARRIOL v. SHIRCORE**

[7 B. L. R., 510]

2. ——— *Letter assigning chose in action out of British India.*—A letter by which a chose in action (a debt) was equitably assigned does not require a stamp where the chose in action is not in British India at the time of the assignment. **MEGJI HANSRAJ v. RAMJI JOITA**

[8 Bom., O. C., 169]

1. ——— art. 15—*Conveyance—Shares in public company.*—"Amount."—No *ad valorem* stamp duty is payable under Act XVIII of 1869 upon a conveyance where the consideration consists of shares in a public company made over to the vendor. The word "amount" in art. 15, sch. I of that Act, signifies the sum total, or amount of money, forming the consideration, and the words "or secured" apply only to cases of mortgages and the like, not to an out-and-out conveyance. **IN THE MATTER OF PORT CANNING LAND COMPANY**

[16 W. R., 208]

2. ——— *Conveyance—Indemnity bond.*—Where a document, purporting to be a conveyance, and for only one consideration, contains words which merely express, though very informally, the usual covenants for title which every properly-drawn English conveyance contains, those words cannot be considered as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp duty to which it is liable as a conveyance. **ANONYMOUS**

[I. L. R., 1 Mad., 133]

1. ——— sch. II, art. 5—*Adjustment of account.*—An adjustment of account is not admissible



**STAMP ACT (XVIII OF 1869)—continued**

11 evidence unless stamped with a one-anna stamp.  
**TAKETRY CHURN NUNDT & ABDUR ROHMAN**  
 [ 3 C L R., 348 ]

2. — *Balance of running account*—In a running account a balance brought forward from the close of a previous year is not to be considered a new balance requiring a fresh stamp Act XVIII of 1869 sch. II art 5 providing for one stamp only to be affixed in such a case **INDRA CHAND ASWAL & KALEF DOSS MITRA**  
 [ 24 W R., 439 ]

3. — *Note or memorandum of balance on an account*—On the 4th October 1869 the book containing the accounts between the plaintiff and defendant kept by the plaintiff was examined by the parties and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. In a suit by the plaintiff for the amount of this balance on the basis of the account book—*Held* that the entry of the balance struck not being signed by the defendant was not a note or memorandum of the kind mentioned in art 5 sch. II of Act XVIII of 1869 and did not therefore require to be stamped **NAND BAY & RAM PHARAD**  
 [ 1 L R., 2 All., 841 ]

4. — *Hath chitta—Balance of accounts*—A hath chitta drawn up by only one of two parties to a money transaction and purporting to represent the balance of accounts between them but not assented to in any way by the other party is not such a document as is contemplated by art 5 sch. II of the General Stamp Act and does not require to be stamped **KOOVYO MOHNEY DOSS & KRISHNA CHUDDER SHABA**  
 [ 25 W R., 361 ]

5. — *Stamp on entry in hath chitta*—When an account in a hath chitta has two sides to it the one headed amount advanced and the other headed amount received and the amount actually due on such account varies from time to time and depends upon the relation of the amount advanced to the amount received and the signature or seal of the borrower is affixed to each entry showing an advance such an entry is not a note or memorandum whereby any debt is acknowledged to be due and does not require a stamp under art 5 sch. II of Act XVIII of 1869 **BROJENDER COOMAR & BROJMOYE CHOWDHURANI**  
 [ 1 L R., 4 Calc., 885 3 C L R., 520 ]

**PROJO GORIND SHABA & GOLUCK CHUDDER SHABA**  
 [ 1 L R., 9 Calc., 127 ]

art 5 and art. 11.

See APPELLATE COURT—1 OBJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW—UNSTAMPED DOCUMENTS **I L R., 4 Calc., 213**

art. 7.—*Bank memorandum*—Receipt.—A bank memorandum informing one of their customers that money has been paid to his account by a third person and has been credited to that account does not require to be stamped under art. 7 sch. II of Act XVIII of 1869 **IS THE**

**STAMP ACT (XVIII OF 1869)—continued**

**MATTER OF ACT XVIII OF 1869 AND OF THE UNCOVENANTED SERVICE BOND**  
 [ 1 L R., 4 Calc., 829 3 C L R., 597 ]

1. — *art. 11—Agreement to remunerate pleader for his services*—Where a pleader is to receive a remuneration under a special agreement contained in his vakalatnama, or in a separate document the document containing the agreement must bear a stamp of adequate value **MUSOO LALL & HEDDER PERSHAD**  
 [ 3 Agra, 288 ]

2. — *and s. 14—Agreement—Bond*—When an instrument consisted of two parts, the first containing a promise to repay with interest a sum of Rs 12 8-0 and the second a further promise to give a quantity of grain,—*Held* that, as an agreement the instrument required a stamp of 8 annas under s. 14 of Act XVIII of 1869 and sch. II art. 11; but that as a simple money bond, it was properly stamped with a stamp of 2 annas and that if the promisee abandoned his claim for grain he could recover upon it the principal sum advanced with interest **CHIMTAJ & NANU**  
 [ 1 L R., 4 Bom., 19 ]

3. — *Bond—Agreement with covenant sound in damages*—An instrument containing a covenant to do a particular act the breach of which is to be compensated in damages is not a bond and requires an 8 annas stamp only *Kemudie on such an instrument and on a bond discussed* **GIMBORNE & Co & SUBAL BOWRY**  
 [ 1 L R., 8 Calc., 284 10 C L R., 219 ]

4. — *and sch. I, art 5—Bonds for performance of contracts of public works*—A contract taken by the Department of Public Works for the execution of works falls within art. 11 sch. II Act XVIII of 1869 and must bear a stamp of 8 annas. Where a contractor's surety gives bonds for the performance by him of his agreement the bonds are chargeable with duty under art. 5 sch. I **ANONIMOUS**  
 [ 13 W R., 353 ]

5. — *Agreement*—A promisor to a document contained a stipulation that the defendant should return two promissory notes dated with him when a certain house was given back to him in good order *Held* that the document required a stamp of 8 annas under Act XVIII of 1869 sch. II art. 11 **MOTILAL & MENKHOOS AURAMCHAND**  
 [ 1 L R., 4 Bom., 328 ]

6. — *Receipt for money and stipulating payment of interest*—An instrument which acknowledged receipt of a sum of money and provided for the payment of interest at a specified rate per mensem was held to be an agreement falling within Act XVIII of 1869 sch. II art. 11 **FERRIER & PAM KALPA GHOSH**  
 [ 23 W R., 403 ]

art. 13.—*Power of attorney under Registration Act 1871 s. 53*—For a power of attorney executed under the provisions of s. 53 (a) of the Registration Act of 1871 Act (VIII of 1871) a stamp of 8 annas is sufficient under art. 13 sch. II of the General Stamp Act (XVIII of 1869) **IS KH KESHAY KASINATH**  
 [ 9 Bom., 43 ]

**STAMP ACT (XVIII OF 1869)—concluded.**

art. 15.—*Schedule appended to deed of sale—Collateral instrument.*—A schedule appended to a deed of sale does not require to be stamped under the provisions of Act XVIII of 1869. ANONYMOUS . 6 Mad., Ap., 36

1. art. 32.—*Power-of-attorney.*—An instrument authorizing a person to receive on behalf of another such sums as should become due in the course of the execution of a certain work is not an assignment of money, but a power-of-attorney, and is covered by a stamp of RS, whatever may be the amount recoverable under it. BHAGYANDAS KISHORDAS v. ABDUL HUSEIN MAHOMED ALI

[I. L. R., 3 Bom., 49]

2. — *Vakalatnama.*—A vakalatnama authorizing a pleader to receive, during the course of a suit which he has been empowered to conduct, money or documents receivable by his client in the ordinary course of such suit or in consequence of the order or decree of the Court in such suit, does not require a stamp under Act XVIII of 1869. ANONYMOUS . I. L. R., 3 Calc., 767

S. C. IN THE MATTER OF ACT XXIII OF 1869

[3 C. L. R., 13]

art. 38.—*Instrument of transfer.*—The accused was prosecuted under Act XVIII of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas A and B have sold to me 2 gundas 3 cowries of land under a kobala, dated the 9th of Jyest 1283, in lieu of a consideration of Rs 95, and whereas I have returned to the vendors in all 4 cottahs of land worth about Rs 25, and whereas in lieu of the said land the said vendors have given me 4 cottahs of zeraif land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me, the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange which may be of service when required." This document bore a stamp of 8 annas, and it was executed only by the accused and presented by him for registration. Held that the document was an instrument of transfer within the meaning of art. 38, sch. II, Act XVIII of 1869. EMPRESS v. DWARKANATH CHOWDHRY. I. L. R., 2 Calc., 399

**STAMP ACT (I OF 1879).**

s. 2, cl. 13.—*Specified property.*—An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. Held that the fund intended to be created under the agreement was not "specified property" within the meaning of s. 2, cl. 13, of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46 . I. L. R., 11 Mad., 216

s. 3.

See PROMISSORY NOTES, FORM OF.

[I. L. R., 18 Mad., 283]

**STAMP ACT (I OF 1879)—continued.**

1. — *Hundi stamped with adhesive stamps—Admissibility in evidence—"Duly stamped."*—The words "duly stamped" in s. 3 of the Stamp Act signify "stamped or written upon paper bearing an impressed stamp." GIBBORNE & Co. v. SUDAL BOWER

[I. L. R., 8 Calc., 284; 10 C. L. R., 219]

2. — sub s. (4)—*Bond—Promissory note.*—Where an instrument bearing date the 24th September 1881, stamped with an adhesive stamp of 1 anna, and attested, recited that an account was made up of the principal and interest due on a former bond executed by the defendant to the plaintiff, and that a certain sum was found due at the date of the instrument, the defendant promising to pay interest at a certain rate on the sum thus found due and pay the principal on demand.—Held that the instrument was a bond within the definition given in Act I of 1879, and should be stamped accordingly. BALKRISHNA TIMBAK v. GOVIND PAND NAIK . I. L. R., 8 Bom., 297

3. — *Agreement—Bond—Loan of grain in consideration of repaying a larger measure of grain.*—An attested instrument, in which the obligor states that he borrowed a certain quantity of grain from the obligee and agreed to repay it at a future time in greater quantity, is a bond within the meaning of s. 3 (4) (b) of Act I of 1879, although the instrument is silent as to the money value of the grain. Where the value of such an instrument was ascertained to be less than Rs 10, it was held to be properly stamped as a bond with a stamp of 2 annas. MAGANDAS KHEMOCHAND v. RAMCHANDRA HIRAJI

[I. L. R., 7 Bom., 137]

4. — *Bond.*—A executed a document, by which he promised to pay on demand Rs 10 to B. The writer of the document signed the document as writer, for the purpose of attesting A's signature. Held that the document was liable to stamp duty as a bond. REFERENCE UNDER STAMP ACT, s. 46 . I. L. R., 10 Mad., 158

5. — *Bond—Contract for personal service.*—The defendant signed an agreement in England with a Railway Company whereby he contracted to serve the Company exclusively for four years in India under a penalty of £100. The defendant, having come to India at the expense of the Company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent. Held that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond. MADRAS RAILWAY CO. v. RU T

[I. L. R., 14 Mad., 18]

6. — *Bond.*—E executed a document, by which he promised to pay on demand Rs 10-12-0 with interest to S R. The writer of the document and some others signed the document as witnesses. Held that the document was a bond and liable to stamp duty as such. REFERENCE UNDER STAMP ACT, s. 49 . I. L. R., 13 Mad., 147

## STAMP ACT (I OF 1879)—continued

7 ———— *Khatas in the name of the debtor but in the handwriting of another—Bond—Acknowledgment*—A *khat* in the name of a debtor acknowledging the receipt of the amount advanced and bearing the signature of the writer of the *khat* as writer of it merely, *held* to be an acknowledgment only, and not a bond, within the meaning of s. 3 sub-s. 4 (b), of the Stamp Act (I of 1879). *DULAB V. ANMALI v. PERMAN JAMAL* [I. L. R., 14 Bom., 511]

8 ———— and s. 61—*Acknowledgment of debt in writing—Attestation by witnesses—Bond*—Documents which are in form acknowledgments only are not converted into bonds, as defined in s. 3, sub-s. 4 (b), of the Stamp Act (I of 1879), merely because they contain memoranda as to the rate of interest at which the loan is made and are attested by witnesses. No document can be a bond within the above section, unless it is one which by itself creates an obligation to pay the money. *HIRA LAL SINGH v. QUEEN EMPRESS*

[I. L. R., 23 Cal., 757]

9 ———— *Bond—Promissory note—Attestation by witness*—A document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest is not "attested by a witness" within the meaning of cl. (b) of sub-s. 4 of s. 3 of Act I of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document, that the document was correct and was written by his pen. *REFERENCE UNDER STAMP ACT, s. 49*

[I. L. R., 17 All., 211]

10 ———— and sch. I, art. 5—*Court Fees Act, sch. II, art. 1 (b)—Petition to withdraw suit—Agreement—Bond*—A petition, stamped as an agreement, having been presented to a District Court by the parties to a suit, informing the Court that they had entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector. Upon a reference made by the Board of Revenue at the instance of the Collector, *held* that the instrument was not a bond, but a petition to the Court, requiring a Court fee stamp. *REFERENCE UNDER STAMP ACT, 1879*

[I. L. R., 8 Mad., 15]

11 ———— and sch. I, art. 11—*Promissory note—Bond—Impressed label—Impressed sheet—Rule 9 (a) of the Rules of Government of India of 26th February 1881*—By a document dated 6th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed label of 2 annas, A promised to pay B before a certain date Rs 135. *Held* that the document was a bond and must be treated as unstamped for the purposes of s. 34 of the Stamp Act, 1879. By a document, dated 23rd June 1883, stamped with an adhesive stamp of 1 anna, purporting to be a promissory note attested by two witnesses, A

## STAMP ACT (I OF 1879)—continued

promised to pay Rs 66 to B on order, on demand. *Held* that the document was not a bond, but a promissory note. *REFERENCE UNDER STAMP ACT, 1879* [I. L. R., 8 Mad., 87]

12. ———— and sub-s. (13)—*Bond—Mortgage—Stamp Act, 1879, ss. 7, 20, and s. 4, arts. 13, 41*—A grower of sugarcane executed a deed whereby he borrowed a sum of Rs 25 as "earnest money" and covenanted to deliver to the lender on a certain date 21 maunds of raw (unrefined sugar) upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows: "If the supply of the raw be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profit, shall be paid at the rate of Rs 1 per maund, that in case of my not supplying the raw at all or selling it at some other place, I will pay the whole amount at once, including the said profit." As collateral security, he hypothecated the produce of a field of sugarcane, the value of which was not stated. *Held* by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3, sub-s. (13), and art. 41 (b) of sch. I of the Stamp Act (I of 1879). *Held* by STUART, C.J., STRAIGHT, J., and BRODIE, J., that it was also a "bond" within the meaning of s. 3, sub-s. 4 (c) and art. 13 of sch. I and with reference to the provisions of s. 7 was chargeable with stamp duty solely as a bond under art. 13, the contract being a single one. *Held* by the Full Bench that the proper stamp duty payable on the instrument was four annas. *Held* by STUART, C.J., and STRAIGHT, J., that in estimating the stamp-duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the raw must be taken into account. *Reference by Board of Revenue, N.W.P., I. L. R., 2 All., 604*, *Quitted*, and *Gisborne v. Dubal Bouri, I. L. R., 8 Cal., 284* referred to by STRAIGHT, J. Per STUART, C.J., that for the purpose of estimating the stamp duty, the amount secured by the instrument was Rs 25, the amount borrowed, plus Rs 13, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i.e.*, the price net at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp duty. Per OLDFIELD, J., that the amount secured or limited, to be ultimately recoverable under the instrument, was Rs 25, the amount borrowed, plus Rs 13, the sum recoverable at Rs 1 per maund, in the event of the borrower's non-delivery of the 21 maunds, and stamp-duty was payable on this amount. *IN THE MATTER OF GURJIT SINGH*

[I. L. R., 9 All., 585]

13. ———— and s. 23—*Bond—Interest*—A bond for a loan of Rs 100 stipulated that the obligor should "pay twice the amount, including Rs 100 for interest, total Rs 200, in eight years from 1301 to 1308, according to *kists* given in the schedule." *Held* that the amount secured by the

**STAMP ACT (I OF 1879)—continued.**

bond was Rs20, and the bond must be stamped accordingly. S. 23 of the Stamp Act (I of 1879) did not apply to the instrument. **SAMBHU CHANDBA BEPARI v. KRISHNA CHARAN BEPARI**

[I. L. R., 28 Cal., 179]

14. ——— and sch. I, art. 13

—**Bond—Attestation.**—A company agreed to pay £220,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the company on each payment being made, and that, in the event of the other party failing to perform his liabilities as to the construction of the railway, the company should be entitled to sell the debentures, and also to recover damages, and also to discontinue payments of the above instalments. It was also provided that the company should be at liberty to retain £40,000 as compensation for risk, expenses, etc. The agreement was sealed with the seal of the company in the presence of two Directors and the Secretary. *Held* that the instrument was liable to stamp duty as a bond for £220,000 under Act I of 1879. REFERENCE UNDER STAMP ACT, s. 46.

[I. L. R., 15 Mad., 193]

——— s. 3, sub-s. (6)—**Order for payment of money on a person not a banker.**—The plaintiff agreed to lend money to the defendant for payment of his trade debts, etc. In pursuance of the agreement, the defendant gave his creditors "chits" for certain sums. These "chits" were addressed to the plaintiff, and requested him to pay the amounts mentioned therein. He did so, and then sued for the amount advanced. It was contended by the defendant that the "chits," being cheques or bills of exchange, were inadmissible in the evidence, because unstamped. The Court found that by the agreement the plaintiff was not constituted the defendant's banker within the meaning of sub-s. 6, s. 3 of the Stamp Act, 1879. *Held* that the "chits" did not require a stamp. **RATULAL RANGILDAS v. VRIJBUKHAN PARABHURAM**

[I. L. R., 17 Bom., 684]

1. ——— s. 3, sub-s. (8)—**Conveyance—Transfer by trustee to cestui que trust—Release.**—Where three executors of a will purported to convey by deed to one of them, in consideration of a sum of Rs10, a house to which the latter was entitled under the will, —*Held* that the deed, having been drawn in the form of a conveyance, was liable to stamp duty as such. REFERENCE UNDER STAMP ACT, 1879

[I. L. R., 7 Mad., 350]

2. ——— and sub ss. (11) and (19)—**Deed of family arrangement.**—By a deed of family arrangement, one brother conveyed a pergunnah and the sum of two-and-a-half lakhs of rupees to a younger brother, on condition that the latter should release certain family property on which he had claims. *Held* that the deed was neither a conveyance or a settlement, nor an instrument of partition, within the meaning of Act I of 1879. IN THE MATTER OF THE MAHARAJAH OF DURBHUNGAH

[I. L. R., 7 Cal., 21]

**STAMP ACT (I OF 1879)—continued.**

3. ——— **Conveyance—Transfer of land in pursuance of compromise.**—A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance, and must be stamped accordingly. REFERENCE UNDER STAMP ACT, s. 46 . . . I. L. R., 21 Mad., 422

1. ——— s. 3, sub-s. (10)—**Unduly stamped—Rule 5 (e) of the Government of India, 3rd March 1882 (attestations of plain sheets subjoined to stamped documents), ultra vires.**—Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act, 1879, rule 5 (e) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to the document. *Held* by KERNAN, MUTTUSAMI AYYAR, and BRANDT, J.J. (TURNER, C.J., dissenting), that the rule is *ultra vires* and inoperative for the purpose of declaring an instrument, written contrary to the provisions thereof, unduly stamped within the meaning of s. 3 (10) of the Act. *Per* TURNER, C.J.—An instrument not written in accordance with the directions in rule 5 (e) is not duly stamped. REFERENCE UNDER STAMP ACT, 1879 . . . I. L. R., 8 Mad., 532

2. ——— **Duly stamped—Document issued without endorsement required by rules passed and published under ss. 55 and 57.**—The omission of a stamp vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of s. 3 (10) of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46 . . . I. L. R., 11 Mad., 377

3. ——— **Instrument professing to effect a partition ultra vires of the executors—Instrument of partition.**—Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents. *Held* that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879

[I. L. R., 12 Mad., 198]

4. ——— **Instruments "duly stamped"—Rule 5 (b) of the rules made by the Governor-General in Council under Notification No. 1288 of 3rd March 1882.**—The absence of the certificate required by rule 5 (b) of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act (I of 1879), does not make the document in question not "duly stamped" within the intention of the Stamp Act. **QUEEN-EMPRESS v. TRAILAKYA NATH BARAL** I. L. R., 18 Cal., 39

5. ——— **Promissory note not chargeable with duty of 6, 10, or 12 annas—Such promissory note written on impressed sheet of proper value bearing the word "hund."**—Note duly stamped—Rules by Governor-General in

## STAMP ACT (I OF 1879)—continued

Council under s. 9 of Stamp Act—Notification No. 1288 of 3rd March 1882, rules 3, 4, 8—Notification No. 2455 of 1st December 1882, rule 6A—The effect of Notification No. 255 of the 1st December 1882 amending the rules made by the Governor (General) in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No. 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of Rs. 10, or 12 annas being written on impressed sheets bearing the word "hundi." A rule which says that certain promissory notes shall be written on impressed sheets bearing the word "hundi" cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "hundi." A promissory note for an amount not exceeding Rs. 200 payable otherwise than on demand, but not more than one year after date and requiring a stamp of two annas is duly stamped if, written on an impressed sheet of the value of two annas though that impressed sheet bears the word "hundi." **RADHA BAI v. NATHU RAM** I. L. R. 13 All. 68

6 and s. 34—Rules 4 and 6 of rules made under s. 9 of the Stamp Act—Promissory note—Hundi stamp—In a suit on a promissory note for Rs. 300 which was executed on an impressed sheet bearing an impressed stamp with the word "hundi" at the top and the words "three rupees" at the bottom of the impression.—**Held** that, with reference to rules 4 and 6 of the rules made under s. 9 of the Stamp Act and dated 3rd March 1882 and the 1st December 1882, the instrument was "duly stamped" as to the amount of duty, and was admissible in evidence. **BANK OF MADRAS v. SUBBAYYALU** I. L. R. 14 Mad. 32

1. s. 3, sub-s. (11)—Partition deed—Last of divided property—Agreement to divide outstanding—In a document signed by the members of a Hindu family and attested by witnesses, which purported to be an account or list of the share of one member of the family in the family property, it was recited that the parents of the family were to enjoy certain lands and that the outstanding debts should be divided at a future date. **Held** that this document was not liable to stamp duty as a partition deed. **REFERENCE UNDER STAMP ACT 1879**

[I. L. R. 7 Mad. 385]

3 — — — Award of arbitrators for division of family property—Written agreement to effect division according to the terms of the award—Effect of—Division of the property in severalty—Partition deed—The co-sharers in an undivided Hindu family having under a written instrument agreed to divide the family property according to the terms of the award passed by the arbitrators, **Held** that the instrument was an agreement to divide the property in severalty and was therefore a partition deed within the definition in sub-s. (11) of s. 3 of the General Stamp Act (I of 1879). **IN RE VASANJI HARIDHAI**

[I. L. R. 15 Bom. 877]

## STAMP ACT (I OF 1879)—continued

3. — — — and s. 29, and sch. I, art. 37—Instrument of partition—Competitive of value of property—**Held** that the words "the final order" used in the definition of an "instrument of partition" in Act I of 1879 mean not the order authorizing a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also, that the stamp duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that, for the purposes of that Act, the value of the property is to be computed with reference to its market value, and not with reference to the Court Fees Act, 1870. **REFERENCE BY BOARD OF REVENUE** I. L. R. 2 All. 684

4. — — — and s. 29 (e)—Instrument of partition—Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family.—**Held** that the documents should be stamped as instruments of partition, each member paying according to the share taken by him under the partition. **REFERENCE UNDER STAMP ACT, s. 46**

[I. L. R. 15 Mad. 164]

1. s. 3, sub-s. (13)—Definition of "mortgage"—Transfer of Property Act (IV of 1932)—For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act, not as defined in the Transfer of Property Act. **QUEEN EMPEROR v. DEWENDRA KRISHNA MITTAR**

[I. L. R. 37 Cal. 597  
4 C. W. N. 524]

2. — — — Mortgage—Indemnity bond—An agreement entered into by the Secretary of State and a salt contractor recited that the contractor had deposited certain promissory notes to secure the due fulfilment of the contract, and provided that the promissory notes should be returned on the due fulfilment of the contract. **Held** that the agreement was a mortgage as defined by the Stamp Act. **REFERENCE UNDER STAMP ACT, s. 46**

[I. L. R. 11 Mad. 39]

3. — — — Lease—Mortgage—An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees and it provided that the party paying that sum should remain in possession of certain land for twelve years, but contained no provision for repayment of that sum or for the payment of rent. **Held** that the instrument was a usufructuary mortgage, and not a lease. **REFERENCE UNDER STAMP ACT, s. 46**

[I. L. R. 21 Mad. 358]

## STAMP ACT (I OF 1879)—continued.

**8. 5.**

See POWER-OF-ATTORNEY.

ATTORNEY.  
[I. L. R., 23 Cal., 187~

s. 6—Endorsement of consent of relative and co-sharer on deed of conveyance—Document completing transaction—The document marked A was a document on a three-rupee stamp paper executed by H to one V purporting to convey to him certain immovable property absolutely for the consideration of Rs275. On the same deed of sale R, the undivided nephew of the executant, endorsed his consent to the sale. Held that the endorsement of consent and the conveyance were several instruments employed to complete a transaction within the contemplation of s. 6 of the Stamp Act (I of 1879), and the consent ought to have been written on a separate stamp paper of the value of one rupee. IN THE MATTER OF HANMATA I. L. R., 13 Bom., 281

2 and s. 25—Policy of insurance—Uncovenanted Service Family Pension Fund, Stamp on entrance certificate of.—An entrance certificate granted under the rules of the Uncovenanted Service Family Pension Fund is a life-policy within s. 3 (5) of the Stamp Act for an amount not exceeding Rs. 1,000, and is therefore chargeable with a duty of 6 annas. Such an instrument is not within the scope of s. 25 (c) of the Stamp Act. REFERENCE UNDER STAMP ACT, 1879, s. 16. C. L. R., 19 Cal., 499

P. ACT, 1879, s. 16  
[L. L. R., 19 Cal., 499]

--- s. 3, sub-s. (17) — Receipt — Memorandum of payment — Document containing no acknowledgment of payment. — A made a payment of R22 to B. At A's request, C made a memorandum in writing to the following effect: "B has received R22," but advised no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum. Held (reversing the conviction) that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (17) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received. IN RE JAMNADAS HABIBKHAN . . . I. L. R., 23 Bom., 54

I. L. R., 23 Bom., 54

1. \_\_\_\_\_ s. 3, sub-s. 19 (b)—*Settlement—Gift.*—The word "settlement," as defined in s. 3 of the Stamp Act, suggests the creation of a separate interest in favour of several persons who may have a legal or moral claim on the settlor or for whom he may desire to make a provision. *Held* therefore that where, because of natural affection, a person bestowed upon his sister and her son certain land, the document was liable to stamp duty as a gift and not as a settlement. REFERENCE UNDER STAMP ACT, 1879. I. L. R., 7 Mad., 349

I. L. R., 7 Mad., 349

2. \_\_\_\_\_ *Settlement—Gift.*  
An instrument whereby a life-interest in land is created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46  
[T. L. R., 21 *Mad.*, 422]

P. Act, s. 46  
[I. L. R., 21 Mad., 422

1. —————s. 7, and s. 3, sub-s. (4), sch. I, art. 5.—*Bond—Agreement with penalty in case of breach.*—One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of the instrument, to pay the other party thereto a penalty of Rs.5,000, being regarded as a “bond,” within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp duty of 8 annas,—*Held* (STUART, C.J., dissenting) that the instrument was chargeable, under s. 7 of that Act, with the stamp duty leviable on a bond for Rs.5,000. *Per* STUART, C.J.—That, for the purposes of that Act, the penal clause in the instrument should not be regarded separately as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp duty of 8 annas. REFERENCE BY BOARD OF REVENUE. J. J. P. 2 All. 854

REVENUE  
[I. L. R., 2 All., 854

2. *Contracts for several loans of rice on a single bond.*—Construction.—Sixteen persons borrowed a quantity of rice from the plaintiff, and executed to him a bond for the debt, showing how much rice had been borrowed by each of them. They did not bind themselves to repay the entire debt jointly and severally. *Held* that the instrument should be regarded as comprising sixteen distinct contracts, so as to fall within the purview of s. 7 of the Stamp Act (I of 1879), and should be stamped accordingly. **SHABUDIN MAHOMED v. HIR-NAK RAJNAK** . . . **I. L. R., 10 Bom.. 47**

L. L. R., 10 Bom., 47

3. ————— para. 2—*Stamp duty—Lease—Pottah—Mortgage.*—By an instrument which recited that *A* was indebted to *B* in the sum of two lakhs of rupees, and that *A* had taken a fresh loan of Rs.25,59,000 from *B*, the former leased certain mouzabs to the latter for a term of twenty years, at a yearly rental of Rs.1,40,000. It was provided that, from the rent of each year, a portion should be deducted in payment of *A's* debt to *B* so that in this way the whole debt should be paid by a series of instalments extending over the term of the lease. The instrument also contained the usual clauses found

## STAMP ACT (I OF 1879)—continued

in pottahs. On the question what was the proper amount of stamp duty leviable on the documents.—*Held* that, though the arrangement intended to be effected was partly a lease and partly an usufructuary mortgage, yet the instrument came within the provisions of s. 7 para 2 of the Stamp Act and should be stamped as a mortgage only. IN THE MATTER OF A REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE GENERAL STAMP ACT. *PER JUDGE HILL*.

[I. L. R., 8 Calc., 254 10 C. L. R., 33]

4. ———— *Lease and mortgage combined and used as a mortgage*—Stamp Act (I of 1879), s. 3 sub-s. (13).—A zamindar leased certain land in his village to some cultivators at a rent of Rs 360 per annum in cash and of certain cart loads of straw and grass, by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent, and for the performance of the obligations for the delivery of the other articles. *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, sub-s. (13) of Act I of 1879 and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte H. H. I. L. P., 8 Calc. 234* referred to. REFERENCE UNDER STAMP ACT s. 49. I. L. R., 17 All., 55

5. ———— and art 54—*Release—Debt Annulment*—J and S passed to their brother E an instrument which set forth (1) that J and S relinquished their right to certain property in favour of E (2) that E was to discharge certain debts, and (3) that E was to pay to J and S an annuity. *Held* that the provisions in favour of J and S were a mere recital of the consideration moving from E, that no interest was created in favour of J and S, and that therefore the instrument should be stamped as a release only. *KENNETH S. GOWDER & JAGGAS NATH & GOWDER*. I. L. R., 9 All., 417

6. ———— s. 10—*Hundi*.—A hundi for a sum of Rs 300 payable otherwise than on demand, cannot be stamped with an adhesive stamp. The words "drawn or made out of British India" in cl. (b) of s. 10 of the Stamp Act of 1879 apply to the entire clause. *DEVILAL & RAMAKRISHNAH*. [I. L. R., 2 Mad., 173]

7. ———— s. 11 and ss. 61, 62—*Instrument requiring to be stamped before or at time of execution*—Non-cancellation of adhesive stamp—Sanction to prosecution.—The first paragraph of s. 11 of the General Stamp Act (I of 1879) applies to cases in which the instrument chargeable with duty may be stamped after execution. A bill for the monthly salary of a Government official was sent to the treasury for payment, when it was discovered that the one-anna receipt stamp affixed thereto was not cancelled, and a prosecution was thereupon instituted by the Collector against the official in question who had executed the instrument, under s. 62 of the General Stamp Act. The accused was convicted under that section by the Deputy Magistrate and the District

## STAMP ACT (I OF 1879)—continued

Magistrate on appeal, holding that, upon the evidence the conviction should have been for a contempt and not for the principal offence, altered the finding accordingly to a conviction under s. 103 of the Penal Code read with ss. 11 and 62 of the General Stamp Act. *Held* that the receipt to the salary bill in question was an instrument which was required to be stamped before or at the time of execution and was not of the kind contemplated by the first paragraph of s. 11 of the General Stamp Act, that consequently there was no abatement of any offence under ss. 11 and 62 of the Act; that the offence which appeared to have been committed was one under the second paragraph of s. 61; but that no sanction having been given by the Collector under s. 63 for a prosecution under s. 61, it was not advisable to interfere further than by setting aside the conviction and sentence. *QUEEN-EMERALD & RAHAT ALI KHAN*. I. L. R., 9 All., 210

8. ———— s. 12 and s. 7—*Contract by principal and surety on same stamp paper but separately written*—Writing on the reverse of stamp paper—Government notifications under the Stamp Act Force of.—In a bond engrossed on a Rs 7 paper of sufficient value, and dated the 19th April 1899 the contract of the principal was written first and after his signature followed the contract of the surety, signed by the latter. The document commenced on the side other than that on which the stamp was impressed, and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again. *Held* that a bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13, and 14 of the Stamp Act, 1872. The construction of the words "on the face of the instrument," used in s. 12 of Act I of 1879, considered. *Queere*—Whether certain Government notifications—to the effect that an instrument, commenced on the side of the paper other than that on which the stamp is impressed and completed on the side on which the stamp is impressed, is, under s. 12 of Act I of 1879 to be treated as unstamped, and prohibiting writing on the reverse of an impressed stamped paper, *et ultra vires* as being more stringent than, and therefore inconsistent with that Act? *DOWLATRAH HAJI & VITHO EADHONI*. [I. L. R., 5 Bom., 183]

9. ———— s. 13—*Suit on bond*—Stamp, &c.—every of.—A bond stipulated that for the consideration of a loan of Rs 20 the borrower should deliver to the creditor on a future day "800 annas of grain valued at Rs 10 per 100 annas." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 annas at 4 annas per pice or its price Rs 20.—*Held* that the bond was adequately stamped. *SHANMUKH CHUNDRA CHOWDHURY & ALAK JAY*. I. L. R., 13 Calc., 285

10. ———— s. 34—*Assignment—Endorsement of transfer*—The endorsement of transfer written on a simple money bond duly stamped requires a stamp, and can be stamped under s. 34 of the Stamp Act. *PRALHAD LAKSHMANRAY & VITHU*. I. L. R., 17 Bom., 667

## STAMP ACT (I OF 1879)—continued.

s. 16 and ss. 11 and 34.—*Hundi—Execution—Stamp affixed at time of execution and subsequently cancelled on delivery of hundi—Evidence. Admissibility of.*—Where a hundi was written by the defendant and stamped by him with a one-anna stamp which was left uncanceled, and the hundi was subsequently taken by him to the plaintiff's son who received it from him and at the time of receiving it cancelled the stamp by writing the date across it,—*Held* that the hundi was duly stamped under ss. 10 and 16 of the Stamp Act (I of 1879) and was admissible in evidence. If at the time of delivery, which completed its legal character, the hundi was stamped, and if the cancellation took place at that time as part of the same transaction, it was sufficient. A deed is duly stamped if the stamp is affixed and cancelled at the time of execution, or if, having been at any time previously affixed, it is cancelled at the time of execution. When applied to a document, the term "execution" means the last act or series of acts which completes it. It might be defined as formal completion. The contract on a negotiable instrument until delivery is incomplete and revocable. Until delivery, a hundi is not clothed with the essential characteristics of a negotiable instrument. *BHAWANJI HARIBHUM v. DEVI PUJJA*

[I L. R., 19 Bom., 685]

1. — s. 24.—*Conveyance—Consideration—Agreement to pay assessment until transfer is made in Collector's books—Relinquishment of title by mortgagor in favour of mortgagee.*—Where under an instrument a mortgagor relinquished his title to the mortgaged property in favour of the mortgagee and also agreed to pay the Government assessment until the transfer of the land to the name of the mortgagee-purchaser in the Collector's books,—*Held* that such an instrument was a conveyance of which the amount of the consideration calculated according to s. 24 of the General Stamp Act (I of 1879) was the original mortgage amount, plus the amount mentioned in the instrument. *Held* also that the instrument was an agreement to pay assessment until the land conveyed was transferred in the Collector's books, and as such should bear the additional stamp for an agreement namely, eight annas. *SINAPAYA v. SHIVAPA*

[I L. R., 15 Bom., 675]

2. — and sch. I, art. 16.—*Certificate of sale.*—The stamp duty payable on a certificate of sale is governed, not by s. 21, but by art. 16, sch. I of the Stamp Act, 1879. *Semble*—That when property is merely sold subject to a mortgage, it is not sold "subject to the payment" of the mortgage debt within the meaning of s. 24 of that Act. *REFERENCE UNDER STAMP ACT, 1879*

[I L. R., 5 Mad., 18]

3. — *Stamp on sale certificate—Property sold subject to a mortgage—Interest—Transfer of Property Act (IV of 1882), sub-s. 5 (d), s. 55.*—Where property is sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration-money for the purchase. The stamp duty payable on a document

## STAMP ACT (I OF 1879)—continued.

conveying such a property is an *ad valorem* duty on the amount of the money paid as consideration for the sale. *IN THE MATTER OF ACT I OF 1879. IN THE MATTER OF A REFERENCE TO THE BOARD OF REVENUE.* I. L. R., 10 Calc., 92; 13 C. L. R., 164

4. — *Certificate of sale—Purchase-money.*—Claims on property admitted by the parties or established by a decree of a Court should be entered in the certificate of sale and be computed as part of the purchase-money in ascertaining the amount of the stamp duty leviable on the certificate of sale. Other claims should neither be entered in the certificate of sale nor computed as part of the purchase-money. It is the duty of the purchaser to provide the stamp. *IN RE RAKERISHNA*

[I. L. R., 9 Bom., 47]

5. — and sch. I, arts. 16 and 21.—*Certificate of sale of property sold by public auction under order of Court—Sale subject to mortgage or lien—Mortgage debt—Interest—Consideration.*—Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court, has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty" under s. 21 of the Stamp Act; so that the whole consideration in respect of which such sale is, under arts. 16 and 21 of sch. I of that Act, liable to stamp duty is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage. *Semble*—It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale. Arrears of interest due on the mortgage are to be excluded from such calculation, since s. 23 of the Stamp Act—which enacts that "where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest. *NAGINDAS JEYCHAND v. HALALKHORE NATHWA GHEESLA*

[I L. R., 5 Bom., 470]

6. — *Mortgage lien—Certificate of sale—Sale in execution of decree.*—Where property is sold at a Court-sale subject to a mortgage lien, the stamp upon the certificate of sale should cover the amount for which the property was sold, as well as the amount of the mortgage lien reserved. *Nagindas Jeychand v. Halalkhore Nathwa Gheesla, I. L. R., 5 Bom., 470, followed.* *KAISUR KHAN MUSAID KHAN v. EDBAHIM KHAN MUSA KHAN*

[I. L. R., 15 Bom., 532.]



**-STAMP ACT (I OF 1879)—continued**

7 ——— and sch I, art. 63—*Sale of leasehold property—Rent reserved not liable to ad valorem duty—Stamp duty leviable only on the actual consideration money—Stamp Act (I of 1879), ss 21 23 sch I art 63—* Certain leasehold property devised by the Secretary of State for India to the original lessee for a term of 999 years at the yearly rent of Rs 11-0 was assigned to the trustees of a charity for the sum of Rs 102,000 the trustees covenanted on their part to pay the rent reserved by the original lease. The deed bore a stamp of the value of Rs 1020 Rs 102,000 having been assumed to be the consideration for the transfer. The Collector of Loo Bay referred to the High Court the question whether, under s 21 of the Stamp Act (II of 1899) the payment of the rent reserved by the deed should not be taken as part of the consideration in respect whereof the transfer was chargeable with ad valorem duty. Held that the ad valorem duty was only payable on the consideration actually mentioned in the conveyance (i.e. the amount of the purchase money). **1 REFERENCE UNDER STAMP ACT 1899** I L R., 24 Bom., 257

8 ——— s 28—*Lease—Amount of rent for first year unascertainable—Stamp Act 1869 s 19—* When the amount of rent payable for the first year cannot be ascertained in order to determine the proper stamp under sch. 1, s 19 (b) of the General Stamp Act 1869, for a lease and more rent is recovered than the stamp affixed warrants the right to recover the rent due for the subsequent years is not affected. In such a case sufficient effect is given to s. 20 of the Stamp Act 1873, by limiting the amount recoverable for the first year to the amount which the stamp will cover. **COLLECTOR OF TANJORE v RAMASAMIR** I L R., 3 Mad., 342

**s. 31.***See DEBTOR AND CREDITOR.*

I L R., 16 Mad., 85

**s. 34.***See PROMISSORY NOTES FORM OR*

I L R., 8 Calc., 845

1. ——— *Unstamped "promissory note" executed when Stamp Act 1869 was in force—Admissibility of as a "bond" on payment of penalty—* An instrument which comes within the definition of a promissory note in the General Stamp Act 1869 and is not duly stamped according to that Act (which was in force at the date of its execution) cannot be admitted in evidence upon payment of penalty under s. 34 of the Stamp Act 1879, on the ground that it falls within the definition of a bond in the latter Act. The levy of a penalty authorized under proviso (1) of s. 34 of the Stamp Act, 1879, implies a punishment for neglect in failing to affix the proper stamp at the time of execution. The word "chargeable" in the above proviso means chargeable under the Act in force at the date of the execution of the instrument. **NARAYAN v CHETTI v KANUPATHAN** I L R., 3 Mad., 251

2. ——— *Unstamped transfer of mortgagee's interest—Effect of—Re-transfer of interest—Award, Effect of, on transfer—Unstamped*

**STAMP ACT (I OF 1879)—continued**

*instrument, Admissibility of, in evidence—Fact as of fact based on conjecture—Fraud—* On the 17th September 1860 G gave Z an usufructuary mortgage of certain immovable property to secure the repayment of Rs 7,101 purporting to be advanced by Z. As a fact, only Rs 301 of that amount were actually advanced by Z, the balance Rs 6,800, being advanced by R. In 1868 Z sold the mortgagee's interest in the deed of mortgage to R for Rs 301 the transfer being by endorsement and not being stamped. In April 1869 G transferred a portion of the mortgaged property to J. In September 1870 R sued to have the transfer set aside, claiming in virtue of the deed of mortgage and the transfer endorsed thereon. On the 23rd September 1871 the Court of first instance refused to receive the transfer by endorsement as evidence and to proceed with the suit, because such transfer was not stamped. On the 20th April 1872 Z executed a stamped transfer of the mortgagee's interest in the deed of mortgage in favour of R. R treating the order of the 23rd September 1871 as an interlocutory one, presented the instrument of the 20th April 1872 to the Court, and prayed that it would proceed with the suit. The Court proceeded with the suit, and gave R a decree. This decree was reversed by the Court of first appeal on the ground that that instrument did not cure the defect of the transfer by endorsement, and that the order of the 23rd September 1871 was final. The decree of the Court of first appeal was affirmed by the High Court in June 1873. Thereupon R made a criminal charge against Z of cheating in respect of the transfer by endorsement. This charge was eventually dropped, and was followed by a reference to arbitration by R and Z. According to the agreement to refer which was dated the 17th August 1873, the dispute between the parties was whether R should return the deed of mortgage to Z, and Z return the Rs 301 to R or not. The arbitrators made an award which was dated the 18th August 1874 which directed, *inter alia* that R should return the deed of mortgage to Z and Z return the Rs 301 to R. The deed was returned to Z, but the money was not returned to R. In 1875 Z applied under Regulation XVII of 1860, to foreclose the mortgage. In 1880 the mortgage having been foreclosed, S as Z's representative sued for proprietary possession of the mortgaged property. The lower Courts held that all the acts of R and Z subsequent to the disposal of R's suit of 1869 were fraudulent and collusive and done with a view to evade the stamp law and the person actually interested in the deed of mortgage was R and not S and on this ground as well as on other grounds dismissed S's suit. *Per TRIGUNY J.*—That the transfer by endorsement of the deed of mortgage notwithstanding such transfer was not stamped, transferred to R the mortgagee's interest in the deed; that such interest could not be re-transferred to Z except by a formal instrument stamped according to law inasmuch as any other mode of re-transfer would leave Z under the same disabilities as regard the stamp law as R, as any suit instituted by Z would, a strictly speaking, be based, not on the deed of mortgage, but on the re-transfer; and that therefore under these circumstances, and having regard to the fact that Z had not returned the Rs 301 to R S

**STAMP ACT (I OF 1879)—continued.**

actually, though not ostensibly, based his suit upon a re-transfer of the mortgagee's interest in the deed of mortgage, which was not stamped, and for which he had not given any consideration, and consequently his suit was not maintainable. Also that the award could not alter the effect of the transfer by endorsement. *Per MAHMOOD, J.*—That the lower Courts were not justified in their findings as to the fraudulent and collusive nature of the acts of *R* and *Z* after the disposal of *R*'s suit of 1869, or in finding that the person actually interested in the deed of mortgage was *R*, and not *Z*, such findings being based upon pure conjectures. That the unstamped transfer by endorsement was inadmissible to show that *Z* had transferred his interest in the deed of mortgage to *R*, whether *R* or the mortgagor wished to use it in order to show that fact, and consequently *Z* must be still regarded as the person interested in the deed, and *S* was therefore entitled to maintain the suit. **SHANKAR LAL v. SUKHRAN**. I. L. R., 4 All., 462

3. ——— *Promissory note—Acknowledgment.*—The plaintiff sued on two documents, signed by the defendant, each bearing a one-anna stamp, in one of which a sum of Rs 203 was stated to be "due to you, and payable on the 16th July;" and in the other a sum of Rs 15 was mentioned "for which I give you this writing, the whole amount of which will be paid up in full on the 3rd August." *Held* that the documents were not mere acknowledgments, but promissory notes, and being payable otherwise than on demand, were not sufficiently stamped, and consequently not admissible in evidence under s. 34, Act I of 1879. **MANICK CHUND v. JOMONA DASS**. I. L. R., 8 Cal., 645

**S. C. MANICK CHUND v. JOMONA DASS**  
[7 C. L. R., 88]

4. ——— *Admissibility in evidence—Evidence as to time when stamped.*—When a document, which under the stamp laws requires to be stamped, is tendered in evidence, the only question for the Court is whether it bears a proper stamp at the time when it is tendered. The Court is not bound, nor is it at liberty, to allow the parties to go into evidence to show at what time the document was stamped. **KALI CHURN DAS v. NOBO KRISTO PAL**  
[9 C. L. R., 272]

**NOOR BIBEE v. RUMZAN**. 24 W. R., 198  
**BHAUBHAM MADAN GOPAL v. RAMNARAYAN GOPAL**  
[12 Bom., 208]

5. ——— *Suit on an unstamped promissory note—Evidence Act (I of 1872), ss. 65, cl. (b), and 91.*—The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for the consideration of Rs 88. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note, and the receipt of Rs 87 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note, being unstamped, could not be admitted in evidence. The plaintiff contended

**STAMP ACT (I OF 1879)—continued.**

that the note was a bond, and could be admitted on payment of the stamp-duty and the penalty, under s. 34 of the Stamp Act (I of 1879), which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court,—*Held per JARDINE, J.*, that the document sued on was a promissory note, and that, the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp. *Held per BIRWOOD, J.*, that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (b), of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected. **DAMODAR JAGANNATH v. ATVARAM BABAJI**  
[I. L. R., 12 Bom., 443]

6. ——— *Suit on unstamped hundi—Admission of liability by defendant.*—In a suit brought upon two hundis, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admission in their written statement rendered it unnecessary to put the hundis in evidence. *Held*, reversing the decree, that a hundi is "acted upon" within the meaning of s. 34 of the Stamp Act where a decree is passed on it, whether proved or admitted, and that the Court cannot give effect to it in either case. **CHENBASAPA v. LAKSHMAN RAMCHANDRA**  
[I. L. R., 18 Bom., 389]

7. ——— *Unstamped balance of account—Evidence—Acknowledgment of liability—Limitation Act, 1877, s. 19.*—Though an unstamped acknowledgment cannot be, within the meaning of s. 34 of the Stamp Act, "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. **FATECHAND HARCHAND v. KISAN**. I. L. R., 18 Bom., 614

*Contra*, **MULJI LALA v. LINGU MAKAJI**  
[I. L. R., 21 Bom., 201]

8. ——— and ss. 17 and 33—*Act XXXVI of 1860, s. 13—Act X of 1862, s. 15—Unstamped document executed in 1862 out of British India—Penalty.*—A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney, was executed on

## STAMP ACT (I OF 1879)—cont. sued

9th May 1880 in Australia and was received in Madras on 2nd June 1880 when the Stamp Act (No. 18 of 1879) was in force which contained no provision for a stamp in a document executed out of British India. It was sought in 1880 to use the document in Madras but it was not stamped. Held that no party could be relieved upon it under the Stamp Act of 1879. *REFERENCE UNDER STAMP ACT s. 40.*

[I. L. R., 14 Mad., 255]

9 ——— and ss 35 and 39—*Admission of unstamped document in evidence on payment of penalty—Necessity for production of original document*—Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under a 34 and the following sections of Act I of 1879 it is necessary that the original instrument should be before the Court. *KAILU v HALEKI* I. L. R., 13 All., 295

10 ——— *Penalty chargeable only on the original unstamped or insufficiently stamped instrument—Document tendered as secondary evidence not to be taken into account and not admissible*—By the terms of the Indian Stamp Act 1879 the provisions of s. 34 which apply to documents either unstamped or insufficiently stamped have no application when the original instrument, which ought to have been properly stamped, but was not, has not been produced. The clauses of the section deal with and exclusively refer to the admission in evidence of original documents which have been either not stamped at all or have been insufficiently stamped. *PLA v BOBILI VENKATA SWETA v JUDGANTH CHINA*

[I. L. R., 23 Mad., 49  
I. L. R., 26 I. A. 262]

VENKATA SWETA CHALAPATI v JUDGANTH BHAVAY  
YAMANI GART 4 C. W. N., 117

11. ——— *Notice of allotment of shares not stamped—Evidence of notice of allotment*—A notice of allotment of shares in a Company though not stamped is admissible in evidence to establish the fact that notice of allotment had been given. *In re F. B. H. Stale's Case* 49 L. J. Ch., 176 and *Swara v Mahopadhyay v Protap Narayan Mahopadhyay* I. L. R., 26 Cal., 935 p. 939 followed. *Per STANLEY J.* in Original Court and appeal. *St. J.* and *MACPHERSON* and *HILL, JJ.*, on *MILLS CO. v LILL v SRI GONGADI COTTON* 4 C. W. N., 369

12. ——— *Admission of document as a bond on a stamped promissory note admitted—Subsequent payment of stamp duty and penalty to recover the action too late*—The plaintiff sued defendant objected to due on three khatsas. The stamped. The Court the khatas were not duly instrument's were before Judge held that the in evidence on payment and as such admitted them and penalty under s. 14 the proper stamp duty Act (I of 1879). At a previous I of the stamp suit his successor in office, present stage of the same khatas in question were present of opinion that the such they could be stamped on every notes that as execution, and that they had to be the date of their legally admitted

## STAMP ACT (I OF 1879)—cont. sued

in evidence under s. 34, proviso I. He accordingly dismissed the suit. On appeal the District Judge agreed with the Subordinate Judge that the instrument sued on were promissory notes, but held that after they had once been admitted in evidence on payment of the stamp duty and penalty the question of the inadmissibility could not be subsequently raised in the suit under proviso III to s. 34 of the Stamp Act. He therefore reversed the decree of the Subordinate Judge and remanded the case for trial on the merits. Against the order of remand defendants appealed to the High Court. Held that the promissory notes having been once admitted in evidence, could not afterwards be rejected on the ground of their not being duly stamped. *DIVA CHAND v HIRACHAND KAMARAJI*

[I. L. R., 13 Bom., 448]

13 ——— *Inadmissibility of stamped document stamped after execution—Document not duly stamped—A receipt (dated 1887) stamped subsequently to execution but before production in Court was tendered in evidence. Held that the document was inadmissible. S. 34 of Act I of 1879 requires instruments chargeable with duty to be "duly stamped," which in this case meant "stamped before or at the time of execution" as laid down by s. 10 of the Act. *JETHIBAI v PANCHANABAI**

I. L. R., 13 Bom., 494

14. ——— *Instrument admitted as duly stamped—Appellate Court's power to question the admission—Bom. Reg. XVIII of 1927 s. 10*—Where a Court of first instance has admitted a document in evidence as duly stamped, s. 34 cl. 3, of the Stamp Act (I of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act. S. 34 of Act I of 1879 applies to instruments whenever executed, and must therefore be held to override the special provision of s. 10 of Bombay Regulation XVIII of 1827 according to which no instrument requiring a stamp thereunder was valid unless duly stamped. *CHUTAPADA BIVIRAPAT NARAYANIRAI KILKARNI* I. L. R., 13 Bom., 483

15 ——— *Document proposing to borrow on certain conditions—Promissory note—Proposal—Contract Act (IX of 1872) s. 4*—A letter containing a request to borrow a certain sum of money promising that the same should be repaid with interest on a certain day is not liable to stamp duty. It is not a promissory note but a mere proposal under s. 4 of the Contract Act (IX of 1872). *DHONDRAI NARHARPAT v ATMARAM MORESHWAR* [I. L. R., 13 Bom., 669]

16 ——— *"Chargeable with duty"*—*Promissory note executed out of British India—Insufficient stamp—Stamp Act ss 6 and 19*—A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence on payment of the duty chargeable under s. 34 of the Indian

**STAMP ACT (I OF 1879)—continued.**

**Stamp Act** On a petition being preferred for the revision of the order of dismissal,—*Held* that s. 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in ss. 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen. **MAHOMED ROWTHAN v. MAHOMED HUSIN ROWTHAN** [I. L. R., 22 Mad., 337]

1. — s. 37 and s. 40—*Arbitration—Award—Evading payment of stamp duty.*—Six persons acted as arbitrators in a dispute between two of their fellow-villagers, and delivered their award in writing. Subsequently the award was filed in evidence by one of the disputants in the civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate, to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them ₹25 each. On a reference to the High Court by the District Magistrate,—*Held* that the conviction was illegal, and should be set aside. *Held* also that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 43, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper duty. **EMPRESS v. SODDANUND MAHANTY**

[I. L. R., 8 Calc., 859; 10 C. L. R., 365]

2. — *Duty and penalty on document insufficiently stamped, Determination of*—Under the provisions of the Stamp Act, 1879, the duty chargeable on an insufficiently-stamped document must be decided with reference to the Act in force at the date of the execution of the document, but the penalty leviable is determined in all cases by s. 37 (b) of the Stamp Act, 1879. **REFERENCE UNDER STAMP ACT, 1879** . I. L. R., 5 Mad., 394

3. — and ss. 33, 34, 35, 45, and 50—*Collector's decision that an instrument is chargeable with duty—Duty of Civil Court—Practice—Procedure.*—The decision of the Collector under cl (b) of s. 37 of the Stamp Act (I of 1879), that a particular instrument is chargeable with duty and is not duly stamped, is not final and conclusive. If his decision under that clause is not obeyed, and the duty and penalty are not paid, any Civil Court before which the document may come has the duty cast upon it under s. 33 of examining it and of determining for itself whether it is duly stamped or not, and, if not, of taking the steps laid down in ss. 33, 34, and 35, that decision being subject to revision under s. 50. **HARIBAI v. KRISHNARAY GOPAL** [I. L. R., 22 Bom., 632]

1. — s. 39—*Deed of release—Endorsement on conveyance—Payment of deficient duty.*—

**STAMP ACT (I OF 1879)—continued.**

A deed of release was endorsed on a deed of conveyance for ₹100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped. *Held* that the conveyance was valid, and that the release could be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act. **REFERENCE UNDER STAMP ACT, s. 46** . I. L. R., 11 Mad., 40

2. — *Lost document which is unstamped—Payment of penalty—Secondary evidence of lost document.*—In the case of a lost document no penalty can be levied and secondary evidence admitted, for s. 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. **Kopasan v. Shamu, I. L. R., 7 Mad., 440**, followed. **RANGA RAU v. BHATY-AMMI** . I. L. R., 17 Mad., 473

s. 41—*Fresh suit—Costs—Civil Procedure Code, 1882, ss. 13, 43*—The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to s. 41 of the Stamp Act, 1879, sued the defendant to recover such amount. *Held* that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable. **ISHAR DAS v. MASUD KHAN**

[I. L. R., 6 All., 70]

s. 49—*Power of reference to High Court.*—A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court. *Held* that the District Judge was not authorized to make the reference. **REFERENCE UNDER STAMP ACT, s. 49** I. L. R., 11 Mad., 38

1. — s. 50—*Power of Appellate Court as to insufficiently-stamped documents admitted in lower Court.*—Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under s. 50 of the Stamp Act. **REFERENCE UNDER STAMP ACT, 1879** . I. L. R., 8 Mad., 564

2. — and s. 3, cl. 1—*Unstamped document admitted by original Court on payment of duty and penalty—Power of Appellate Court to review such admission.*—Where the Court of first instance has, on payment of the prescribed duty and penalty, admitted an unstamped document as evidence, under s. 3, proviso 1, of Act I of 1879, a superior Court sitting in appeal has no jurisdiction to review the lower Court's proceedings, in so far as they concern such admission, except in the case provided for by s. 50 of that Act. **PUNCHANUND DASS CHOWDHRY v. TARAMONI CHOWDRAI**

[I. L. R., 12 Calc., 64]

3. — *Collector, Power of—Reference to High Court—Decision of Provincial Small Cause Court admitting insufficiently stamped document in evidence.—Semble*—A Collector is entitled

## STAMP ACT (I OF 1879)—continued

under s 50 of the Stamp Act to refer to the High Court the decision of a Provincial Small Cause Court admitting in evidence an insufficiently stamped instrument on payment of duty and a penalty. REFERENCE UNDER STAMP ACT, s 50

[I. L. R., 15 Mad., 259]

1. — s 51—Application for allowance for spoiled stamps—Power of Collector as to inquiry—Transfer of duty to Deputy Collector—Charge of false evidence Penal Code, ss 131, 193—s 51, Ch VI of Act I of 1879, enacts that, "subject to such rules as may be made by the Governor General in Council as to the evidence which the Collector may require allowance shall be made by the Collector for impressed stamps spoiled in the cases hereinafter mentioned, etc." According to a rule made with reference to that section, "the Collector may require every person claiming a refund under Ch. VI of the said Act, or his duly authorized agent, to make an oral deposition on oath etc." Held therefore, that the Collector himself is the officer and no other to whom power is given by law to make inquiries into applications for allowances for spoiled stamps to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter. Held therefore where a person had applied for a refund under Ch. VI of Act I of 1879 and the Collector made over the application for enquiry to a Deputy Collector that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths and consequently, in reference to the statements of such witnesses, no charge under s 131 or s 193 of the Penal Code was sustainable. EXPRESS & NIAZ ALI I. L. R., 5 All., 17

2. — Mortgage-deed stamped, but not used—A mortgage-deed which provided for the transfer of possession of the mortgaged premises, was executed to secure the repayment of money to be advanced for the discharge of certain debts owing by the executants. The instrument was stamped but not registered, and on it appearing that the amount of the debts in question exceeded the sum named, the intended mortgagee refused to carry out the transaction, and the executants executed a deed of conditional sale of the same premises in favour of another. Held that the stamp duty paid on the mortgage could be refunded under Stamp Act (I of 1879), s 5 (1) (6). REFERENCE UNDER STAMP ACT s 46

[I. L. R., 18 Mad., 459]

3. — Allowance for spoiled stamps—Mistake made when using stamped paper—S. 51 (a) of the Stamp Act which permits an allowance being made for spoiled stamps, applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases of the use of the paper in an ordinary way, in which a mistake has been made. NARASIMHA CHARYTHU & APPA PAI

[I. L. R., 18 Mad., 123]

4. — Spoiled stamp—Accidental injury to stamp—The purchaser at a Court sale presented a stamped paper for the engrossment of the sale certificate. The stamp was inadvertently punched

## STAMP ACT (I OF 1879)—continued.

by some officer of the Court, but the paper was used as intended and delivered to the purchaser. Subsequently a Deputy Collector, treating the certificate as unstamped, levied the stamp duty together with a penalty. Held that the document was duly stamped, and that the amount levied should be refunded. REFERENCE UNDER STAMP ACT s 46

[I. L. R., 18 Mad., 235]

5. — and ss. 3, 31—Allowance for spoiled stamps—Allowance for spoiled stamps may be made under s 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s 31. REFERENCE UNDER STAMP ACT s 46 I. L. R., 11 Mad., 37

s 61

See ABETMENT I. L. R., 8 All., 18

1. — and ss. 3 (10) and 57—Rules of Governor General, 3rd March 1852 s (c)—Construction—Stamped paper—Written as reverse side, Effect of.—In exercise of the powers conferred by ss. 3, 15, 17, 32, 51, and 55 of the Stamp Act, 1879 the Governor-General in Council made, and published by a notification, dated the 3rd March 1852, certain rules and, *inter alia*, rule 5 (c), which was as follows: "When a single sheet used under this rule is found insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument, provided that in every such case the side of the sheet which bears the stamp must be covered by a substantial part of the instrument before any part of the latter can be written on the plain paper joined to such sheet. Provided, further, that the part of the instrument written on the plain paper must be attested by the signatures or marks of all the persons executing the document and the witnesses to the same." Held that this rule was an enabling rule, and did not make it obligatory on parties not to write on the reverse side of an impressed stamp paper so as to make it an offence under s 61 if they did so write. REFERENCE UNDER STAMP ACT, 1879

[I. L. R., 7 Mad., 178]

2. — Promissory note—Insufficient stamp—"Accepting"—The term "accepting" used in s 61 of the Stamp Act, 1879 does not mean "receiving" but "executing as acceptor." To execute a promissory note not duly stamped and which is in suit does not constitute an offence under s 61 of the Stamp Act, 1879. QUEEN & GULAM HUSSAIN

[I. L. R., 7 Mad., 178]

3. — and s 64—Receipt—Acknowledgment by letter.—Where the receipt exceeding Rs 20, in satisfaction of a debt, is acknowledged by letter without a receipt stamp affixed, the writer is liable to punishment under s 61 of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 I. L. R., 8 Mad., 123

4. — Person receiving under-stamped promissory note—Person receiving note—Under s 61 of Act I of 1879, the "accepting" a promissory

**STAMP ACT (I OF 1879)—continued.**

person who executes such note as acceptor, not a person who merely receives the note. The mere receiver of an unstamped or insufficiently stamped promissory note is not as such liable to any penalty under this section either as principal or abettor. *Queen v. Gulam Husain, I. L. R., 7 Mad., 71*; *Queen v. Nadi Chant Poddar, 21 W. R., Cr., 1*; *Empress v. Janki, I. L. R., 7 Bom., 82*; and *Empress v. Gopal Das, Weekly Notes, All., 1883, p. 145*, referred to. *QUEEN-EMPRESS v. Nihal Chand* [I. L. R., 20 All., 440]

**5. — Memorandum of payment**

—Document containing no acknowledgment of payment not a receipt—Stamp Act (I of 1879), s. 3 (17).—A made a payment of Rs 22 to B. At A's request, C made a memorandum in writing to the following effect: "B has received Rs 22," but affixed no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum. *Held* (reversing the conviction) that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (17) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received. *IN RE JAMNADAS HARINARAN*

[I. L. R., 23 Bom., 54]

**6. — and ss. 37 and 40—Offence against stamp law—Sanction to prosecute—Intention to defraud.**—A Collector is not bound to take a formal enquiry, or to record proceeding, before directing a prosecution under s. 40 of the Stamp Act, 1879, for an offence against the stamp law. The law does not require intention to be proved as part of such offence. *QUEEN-EMPRESS v. PALANI*

[I. L. R., 7 Mad., 537]

**7. — and ss. 37, 40, and 69—Offence under Stamp Act—Execution of unstamped document—Sanction by Collector to prosecute—Procedure—Abetment.**—A executed to B on plain paper an instrument which should have been executed on a paper bearing a 4-anna stamp. B filed a suit against A in the Civil Court and produced the instrument in evidence. The Civil Court called upon B to pay the duty and penalty, and, on B's refusal to pay, impounded the instrument and sent it to the Collector. The Collector, concurring with the opinion of the Civil Court, sanctioned the prosecution in the Criminal Court of both A and B, but without requiring the payment of the duty and penalty. The prosecution resulted in the conviction of A under s. 61 of the Stamp Act (I of 1879) and of B of abetment of A's offence. *Held* that the convictions were illegal, inasmuch as the Collector failed to allow an opportunity of paying the duty and penalty. *Held* further that mere receipt of an unstamped instrument did not constitute the offence of abetment of the execution of such an instrument. *EMPRESS v. JANKI*. I. L. R., 7 Bom., 82

**8. — Offence under Stamp Act—Omission of treasury officer to give certificate required by rule 5 (b) of the rules made by the Governor-General in Council under Notification**

**STAMP ACT (I OF 1879)—continued.**

1238 of 3rd March 1892.—The non-compliance by the treasury officer or the stamp vendor with the direction to give the certificate required by rule 5 (b) of the rules dated 3rd March 1882 issued by the Governor-General in Council under ss. 9, 15, 17, 32, 51, and 53 of the Stamp Act is not an act for which the person purchasing the stamp from him can be punished, by the invalidation of the stamp innocently bought by him or under s. 61 of the Stamp Act. *QUEEN-EMPRESS v. TRILAKYA NATH BARAL* I. L. R., 18 Calc., 39

**9. — Acknowledgment and sch. II, arts. 52 and 58—Acknowledgment of receipt of cheque by letter not stamped.**—M acknowledged receipt of a cheque for Rs 100 by letter. The letter was not stamped. *Held* that M was properly convicted under s. 61 of the Stamp Act, 1879. *QUEEN-EMPRESS v. MUTTIBULANDI* I. L. R., 11 Mad., 329

**10. — and ss. 64 and 58—“Signing otherwise than as a witness, etc.” Meaning of—Liability of agent authorized to sign on behalf of principal—Granting of unstamped receipt—Refusal to grant stamped receipt by firm—Liability of members of such firm—“Person,” Meaning of—Proof of demand of receipt.**—The expression “signing otherwise than as a witness, etc.,” as used in s. 61 of the Stamp Act, means the writing of a person's name by himself or by his authority, with the intent of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently within the purview of the section. Where, therefore, a person signed a firm's name to certain letters under the authority of the firm, the circumstance that the body of the letters were written at the dictation of the manager of the firm was held not to be sufficient to distinguish his case from that of any other agent. The term “person” in ss. 61 and 64 of the Stamp Act includes the members of a trading partnership. So where certain persons, members of a firm carrying on business in Calcutta as general dealers (which firm had acknowledged the receipt of certain sums of money from one L and had refused to grant him a stamped receipt), were charged under s. 61 of the Stamp Act with having granted an unstamped receipt, and under s. 64 of that Act with having refused to grant a duly stamped receipt, it was held that their liability depended on whether they were in contemplation of law the persons who signed the letters of acknowledgment or refusal to give the receipt, and not on whether they were present at the writing of the letters, or knew of the writing of them, provided that it was established by evidence that a requisition for a receipt had been made under s. 58 of that Act. *QUEEN-EMPRESS v. KHETTER MOHUN CHOWDHRY*

[I. L. R., 27 Calc., 324  
4 C. W. N., 440]

— s. 63 and ss. 37 (b), 40, 61—Prosecution for attempt to defraud Government by unde stating the value of property in a partition-decree—

STAMP ACT (I OF 1879)—*cont. and*

A District Judge impounded a partition-deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act 1879 being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sent the deed to the resident on of the executant who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 35 (b) or s. 40 of the Act. *Held* that the acquittal was wrong. *Empress v. Dwarkanath Chakrabarti* I L R. 2 Cal. 399. *Empress v. Suddanand Mahanvi* I L R. 8 Cal. 269. *Empress v. Janki* I L R. 2 Bom. 82 considered. *QUEEN EMPRESS v. VENKATRAYADU* [I L R., 12 Mad., 231]

s. 64 and s. 69.—*Refusal to receive Stamp on of Collector necessary before prosecution on Jurisdiction Want of*—Prosecution for an offence committed in contravention of s. 64 of the Stamp Act (I of 1879) cannot be instituted unless with the previous sanction of the Collector under s. 69 of the same Act. *QUEEN EMPRESS v. JITHMAL* [I L R., 9 Bom., 27]

1. — s. 67 Document executed with intent to defraud revenue.—The second clause of s. 67 of the Stamp Act, 1879 is not controlled by the first clause of the section which refers only to bills of exchange and promissory notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty. *PREFERENCE UNDER STAMP ACT 1879* I L R., 9 Mad., 138

2. — and s. 61.—*Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for*—Receipt of unstamped document. *Shetment of an offence under s. 61 of Stamp Act 1879*—*Penal Code (Act XLV of 1860) s. 40* Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums if lent in case of default on the part of the borrowers. The loans were made by petitioner who kept the letters. A prosecution having been subsequently commenced against petitioner under s. 61 of the Stamp Act, 1879 for defrauding Government of stamp revenue by an illegal device and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty—*Held* that the execution of a document which on its face required to be and was not, stamped, could not be said to be "an act, contrivance or device not specially provided for by the Act or any other law for the time being in force" and that punishment for the act of the executant of such a document, if it were punishable at all was provided for under s. 61 of the Stamp Act 1879 and it could not therefore be dealt with under s. 6. Also that the act of a person receiving an unstamped document might amount to shetment of an offence having regard to s. 61 of the Stamp Act, 1879 and to the definition of an "offence" in s. 40 of the Penal Code and, if so, would be an act provided for by "any

STAMP ACT (I OF 1879)—*cont. and*

other law for the time being in force" and so no within the terms of s. 6 of the Stamp Act, 1879. *QUEEN EMPRESS v. SOMASUNDARAW CHETTI* [I L R., 23 Mad., 155]

s. 68.—*Court fee stamps—Sale by an interested person*—Stamp Act (XVIII of 1869) s. 43—*Act VII of 1870 (Court Fees Act) s. 24*—The sale of Court-fee stamps without a license was not an offence under the Stamp Act (XVIII of 1869), but is now specially made so by s. 68 of Act I of 1879. *EMPRESS OF INDIA v. JALLU* I L R., 4 All., 215

s. 69

*See* COLLECTOR I L R., 2 All., 608

*See* COURT FEES ACT 1870 *see* I ART. 8. [I L R., 11 Bom., 598]

*See* EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS. [I L R., 18 Bom., 614]

[I L R., 21 Bom., 201]

*See* LIMITATION ACT s. 13—ACKNOWLEDGMENT OF DEBTS [I L R., 18 Bom., 614]

[I L R., 21 Bom., 201]

*see* I ART. 1.

*See* CASES UNDER STAMP ACT 1869 *see* II ART. 5.

1. — *Acknowledgment—Hath-chitta*—Whether an account signed by a debtor in the books of his creditor amounts to an acknowledgment within the meaning of the Stamp Act (I of 1879) *see* I ART. 1 is a question depending in each case upon the form and intention of the entry. *DESI RAM v. PAJMOHUN ROY* I L R., 8 Cal., 289

2. — *Stamp duty—Hath-chitta—Evidence—Acknowledgment*—An account in a hath-chitta, showing advances of money made to, and part-payment made by the defendant, the whole amount being in the handwriting and signed by the defendant is admissible in evidence without being stamped. *Breynder Coomars Bromomoy Chowdhury* I L R., 4 Cal., 850 followed. *BHOJO GOHIND SRAHA v. GOLUCK CHUNDER SRAHA* [I L R., 9 Cal., 127]

3. — *Acknowledgment—Promise in writing—Contract—Contract Act (IX of 1872) s. 25 c. 3 and s. 62, ill (a)*—A kham or account stated, bearing a stamp of one anna, but containing no promise in writing, *held* to be a mere acknowledgment sufficiently stamped, and not a contract within the meaning of s. 25 cl. 3 of Act IX of 1872. *CHOWKEE HIMUTLAL v. CHOWKEE ACHUTLAL* [I L R., 8 Bom., 194]

4. — *Acknowledgment—Balance-sheet—Yaksh*—A nikash or balance-sheet made out and signed by a gomastha of a business showing a balance due by him to the owner of the business is not an acknowledgment of a debt within the meaning of art. 1 *see* I of the Stamp Act, and is admissible in evidence without being stamped. *Brey*

**STAMP ACT (I OF 1879)—continued.**

*Gobind Shaha v. Goluck Chunder Shaha*, I. L. R., 9 Cal., 127, followed. *NUND KUMAR SHAHA v. SHUN-NOMOYE DASI* . . . I. L. R., 15 Cal., 162

5. ———— *Acknowledgment of debt—Limitation Act (XV of 1877), s. 19—Intention.*—The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of art. 1, sch. I of the Stamp Act, 1879, is a question in each case of the intention of the writer. Hence, where such a letter, written *ante litem motam*, before limitation in respect of the debt had expired, and at a time when other evidence of the debt was subsisting, was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of the Limitation Act, 1877, —Held that the said letter was not inadmissible in evidence by reason of its not having been stamped. *BISHAMBHAR NATH v. NAND KISHORE*

[I. L. R., 15 All., 56]

6. ———— and art. 5 ———— *Acknowledgment—Admissibility in evidence.*—The defendant, in two letters to the plaintiff in respect of certain contracts to sell Government securities, acknowledged his inability to give delivery, and after calculating the amount of the differences between the contract prices and the market prices on the dates of delivery, stated that the amount in respect of the first contract "is due to you, and payable on the 16th July," and that the amount in respect of the other contract was Rs15, "the whole amount of which will be paid up in full on the 3rd and 4th August." Both letters were stamped with a one-anna stamp. Held that they were insufficiently stamped and inadmissible in evidence. *MANICK CHUND v. JOMONA DASS*

[7 C. L. R., 88]

*S. C. MANICK CHUND v. JOMONA DASS*

[I. L. R., 8 Cal., 645]

1. ———— sch. I, art. 4 ———— *Agreement to lease—Correspondence containing agreement to lease—Complete agreement.*—Certain correspondence passed between the plaintiff and defendant relating to the lease of a flat in premises in occupation of the plaintiff, which admittedly contained an agreement for a lease for one year, with an option of renewal for another year. The terms in which the option was given were as follows: The defendant in one letter wrote: "so I expect you will give me the option of renewal for another year, respectively five months on the same terms." To which the plaintiff replied: "You may have the option of retaining it (the flat) for another year on the same terms, but not for a shorter period." In pursuance of an arrangement, the defendant had a draft lease prepared embodying the terms agreed on, which he sent to the plaintiff for approval, and which was in due course returned by him "approved." The defendant then had the lease engrossed and properly stamped, but the plaintiff eventually refused to execute it, and it was never signed by the defendant. The option of renewal was given in the unexecuted lease in the following terms: "Also with option to renew for another twelve months certain." The defendant having

**STAMP ACT (I OF 1879)—continued.**

entered into possession and disputes having arisen, the plaintiff gave him notice to quit, and sued to eject him, alleging that at the most he was a mere monthly tenant. The defendant pleaded that under the lease he was entitled to hold for a year. The year expired before the suit came on to be heard, and the defendant, not having exercised the option to renew, vacated the premises. At the hearing the defendant, in support of his case, tendered the correspondence and the stamped unexecuted lease. It was objected that the correspondence was inadmissible in evidence because it was unstamped, and on behalf of the defendant it was argued that the stamped unexecuted lease must be treated as part of the correspondence, and as it was properly stamped, no further stamp was necessary. Held that, as the correspondence contained a complete agreement independently of the draft and engrossed lease, the latter could not be treated as part of the correspondence, and that consequently the correspondence must be stamped and the penalty paid before it could be admitted in evidence. *BOYD v. KREIG*. I. L. R., 17 Cal., 548

2. ———— "Agreement to lease."

—An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment after obtaining a certificate from the Court under s. 305 of the Civil Procedure Code is an "agreement to lease" under art. 4, sch. I of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46

[I. L. R., 17 Mad., 280]

1. ———— sch. I, art. 5 ———— *Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.*—Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped. Held that the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or a memorandum of agreement. *RAINIER v. GOULD* . . . I. L. R., 13 Mad., 255

2. ———— *Agreement—Document acknowledging receipt of money for future sale of shares of a company and promising to execute a pukka document of sale.*—A document whereby the party executing it purported to sell his right, title, and interest in certain receipts for shares, and to execute in future a pukka document of sale thereof, and acknowledged the receipt of Rs10,000, held to be an agreement, and, as such, liable to stamp duty of eight annas under sch. I, art. 5, of the Stamp Act (I of 1879), the property in the receipt not being intended to pass forthwith. *HEPTULA SHEIKH ADAM & Co. v. ESAFALI ABDULAH* . . . I. L. R., 14 Bom., 316

3. ———— *Letters submitting to arbitration.*—Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped, as forming an "agreement" within the meaning of art. 5, sch. I of the Stamp Act.



## STAMP ACT (I OF 1878)—continued

GANGARAM KUSHABA BANGOLU v. NARAYAN BAPATI PAN ONE I. L. R., 19 Bom., 33

4 ——— and art. 28.—*Indemnity note given to railway company by consignee—Agreement*—An indemnity note issued to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is liable to produce the railway receipt by which note they undertake to hold the railway company its agents, and servants, harmless and indemnified in respect of all claims to the said goods—is not an “indemnity bond” falling under art. 28, sch. I of the Stamp Act (I of 1878) but is an agreement falling under cl. (c) art. 5, sch. I of that Act and consequently chargeable only with a stamp duty of 8 annas. **ANONYMOUS**

[I. L. R., 5 Bom., 478]

5 ——— *Document—Agreement to pay*—A document was executed in these terms: “This document a hand note is executed by me for the purpose of purchasing a plot. I take from you P7 I will pay interest on the sum at a half anna per rupee per mensem. Having received the P7 in cash this hand-note is executed.” *Held* that the document was not a promissory note nor a bond but was an agreement to pay, and as such was chargeable with duty under cl. 5 sch. I of the Stamp Act. **FERREIR v. RAM KALPA GHOSH 23 B. R. 403, referred to. MURARI MORTY FOY v. KHETTER NATH MITTICK I. L. R., 15 Cal., 150**

6 ——— and art. 44 (a).—*Agreement—Mortgage*—In a contract for work to be performed entered into by a contractor with the Executive Engineer of a district it was stipulated that payments should be made from time to time to the contractor as the work progressed, and that the Engineer must retain 10 per cent. on the value of the work done to cover compensation for default on the part of the contractor and as security for the proper performance of the contract. *Held* that this contract was chargeable with stamp duty as an agreement under art. 5 (c) and not as a mortgage under art. 44 (a) of sch. I of the Stamp Act 1878. **REFERENCE UNDER STAMP ACT 1878**

[I. L. R., 7 Mad., 209]

7 ——— and art. 44.—*Mortgage—“Agreement not otherwise provided for”*—A license issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months’ rental as a security for the due performance of the contract. The licensee executed a muchalka, stating that he agreed to all the terms and conditions mentioned in the license. *Held* that the muchalka ought to be stamped with an eight anna stamp. **REFERENCE UNDER STAMP ACT 1878**

[I. L. R., 15 Mad., 134]

8 ——— and sch. II, cl. 2 (a).—*Agreement to rent pasture ground—General Clauses Act (I of 1855), s. 2—Growing grass—Lease—Immovable property*—By a rent-note dated the 24th July 1855, the executant B agreed to take for five months from the executant H

## STAMP ACT (I OF 1878)—continued

a certain pasture ground attached to the military cantonment at Poona. The note recited that B was to graze thirteen she-buffaloes, at Rs. 10 per head, on the pasture ground, for a consideration of Rs. 20 to be paid to B by two instalments; in default of payment of one instalment, the whole sum was to become payable at once. It further recited that, in case the debt remained unpaid beyond the fixed period, B was to pay on the amount interest at the rate of 2 per cent. per month. The Collector of Poona was of opinion that the rent-note in question was a lease and sufficiently stamped with four annas. The Inspector-General of Registration held the document to be an agreement falling under art. 5 cl. (c), sch. I of the Stamp Act, and chargeable with a stamp duty of eight annas. On reference by the Commissioner to the High Court, *Held per BIRDWOOD and PARSONS JJ. (NARAYAN HARIDAS J., dissenting)*, that the rent note in question was an agreement, and as such chargeable with a stamp duty of eight annas under cl. (c) of art. 5, sch. I of the Stamp Act (I of 1878). *Held per NARAYAN HARIDAS J.*, that the instrument was a lease and sufficiently stamped with four annas, growing grass being immovable property within the definition of s. 2 of the General Clauses Act (I of 1855). “Should, however, growing grass be not regarded as immovable property, the instrument was an agreement for or relating to the sale of goods, the price being fixed with reference to the quantity to be consumed by the cattle, and, as such, was exempt from stamp duty under sch. II, art. (a), of the Stamp Act. **IS AN HORMASSI IRANI I. L. R., 13 Bom., 67**

9 ——— and sch. II, art. 2.—*Interest in land—Agreement to sell and of trees*—A document bearing a stamp of one rupee stated (*inter alia*) “I have sold to you the standard trees of the two villages for Rs. 1500 on condition that those young trees whose trunks do not exceed 2 feet in circumference should not be cut by you, and that I will give you written information to cut the trees of the said villages when you shall have to cut the trees and remove them within two years, etc.” *Held* that the document was sufficiently stamped. **JOHNA MAHAMADALI v. RANCHANDRA I. L. R., 23 Bom., 755**

sch. I, art. 8.—*Articles of Association—Special resolution—Resolution superseding Articles of Association—Companies Act (VI of 1852), ss. 76, 79*—A company limited by shares and already possessing Articles of Association proceeded to pass a special resolution in virtue of which a document was drawn up entitled “Articles of Association” in supersession of the Articles theretofore in force. The record of this special resolution was under the provisions of s. 79 of the Indian Companies Act, 1852, sent to the Registrar of Joint Stock Companies to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as Articles of Association, and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of s. 48 of the Indian Stamp Act, 1872, as to whether the document in

STAMP ACT (I OF 1879)—*continued*.

question required to be stamped. *Held* that the Indian Companies Act did not contemplate any such thing as new Articles of Association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped. *IN THE MATTER OF THE NEW EGERTON WOOLLEN MILLS*

[I. L. R., 22 All., 131]

1. ——— sch. I, art. 11—*Bill of exchange otherwise than on demand—Impressed stamp*—A bill of exchange for Rs500 payable otherwise than on demand must, under art. 11 of sch. I of the Act, be stamped with an impressed stamp of the value of six annas *RADHAKANT SHARMA v. ABHOYCHURN MITTER* . . . . . I. L. R., 8 Calc., 721

S C *RADHAKANT SHUBA v. ABHOY CHURN MITTER* . . . . . 11 C. L. R., 310

2. ——— and art. 19—*Cheque—Bill of exchange—Admissibility in evidence—Post-dated cheque—Stamp Act, 1879, s. 67—Penalty*.—In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at. *Bull v. O'Sullivan, L. R., 6 Q. B., 209, Gattu v. Fry, L. R., 2 Ex. D., 265; and Chundra Kant Mookerjee v. Kartik Charan Chavle, 5 B. L. R., 103*, referred to. Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped. *Held*, in a suit to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence. *RAMEN CHETTY v. MAHOMED GHOUSE* . . . . . I. L. R., 16 Calc., 432

——— sch. I, art. 13—*Security bond for costs of appeal—Court Fees Act (VII of 1870), sch. II, No. 6*.—*Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(a) an *ad valorem* stamp under the Stamp Act, art. 13, sch. I; (b) a Court-fee of eight annas under the Court Fees Act, art. 6, sch. II. *KULWANTA v. MAHABIR PRASAD*

[I. L. R., 10 All., 16]

1. ——— sch. I, art. 16—*Certificate of sale*.—The stamp duty payable on a certificate of sale is governed not by s. 24, but by sch. I, art. 16, of the Stamp Act, 1879. *REFERENCE FROM DISTRICT JUDGE UNDER s. 49 OF STAMP ACT*

[I. L. R., 5 Mad., 18]

2. ——— *Certificate of sale—Purchase of equity of redemption—Duty*.—Where the equity of redemption of an estate is sold in execution of a decree, the stamp duty leviable upon the certificate of sale must be calculated upon the amount of the purchase-money only. *REFERENCE UNDER STAMP ACT, 1879* . . . . . I. L. R., 7 Mad., 421

STAMP ACT (I OF 1879)—*continued*.

3. ——— *Certificate of sale—Practice—Ad valorem stamp duty—Sale, subject to mortgage lien, of property in several lots—Stamp duty payable by purchaser of one lot, how calculated*.—In execution of a decree, certain immoveable property was attached and sold in eight lots to different persons, subject to a mortgage. The applicant was one of the purchasers, and applied for a sale-certificate. A question arose whether, in computing stamp duty, the whole amount of the principal mortgage-debt, or only a proportionate amount of it, was to be deemed a part of the consideration. On reference to the High Court,—*Held* that the whole amount of the principal mortgage-debt, and not merely a proportionate amount of it, was to be added to the price, and the total amount to form the consideration upon which an *ad valorem* stamp duty was to be calculated, each purchaser obtaining a separate sale-certificate. *IN RE THE APPLICATION OF VISHNU KESHAY SATHE*

[I. L. R., 10 Bom., 58]

4. ——— *Sale-certificate—Sale subject to incumbrance*.—Where property subject to an incumbrance is sold by auction in execution of a decree, the sale-certificate should be stamped according to the amount of the purchase-money, and not according to the amount of the purchase-money together with the incumbrance. *JWALA PRASAD v. RAM NARAIN* . . . . . I. L. R., 15 All., 107

5. ——— *Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code (1882), ss. 282 and 287*.—Mortgages noted in the proclamation of sale as claims upon the property sold should not be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civil Procedure Code (Act XIV of 1882), to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have been thus admitted or established, or if they have been declared under s. 282 of the Civil Procedure Code, and the sale has been held subject to them. Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an inquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civil Procedure Code. *SHANTAPPA CHEDAM-BABAYA v. SUBRAO RAMCHANDRA YELLAPURE*

[I. L. R., 18 Bom., 175]

1. ——— sch. I, art. 21—*Conveyance by vendors under one denomination to the same person's purchasers under another denomination*.—Eight persons, the owners of a tea estate, purported to convey their rights in the estate to a company; the consideration expressed in the deed of conveyance being £43,320, payable in shares and debentures of the company taken at par. The only shareholders

## STAMP ACT (I OF 1879)—continued

or debenture-holders of the company were the eight persons who purported to sell the estate to the company. *Held* that although the conveying parties were the shareholders of the company there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons, and that the proper duty payable on the conveyance was therefore that mentioned in art. 21 sch. I of the Stamp Act. **IN RE KONDOLI TEA COMPANY**

[I. L. R., 13 Calc., 43]

2. —

and art. 60, cl. (b) —

*Transfer of lease—Transfer of a share of a partnership*—Where a transaction is in substance a sale of a share in a partnership and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets the transaction should be regarded not as the transfer of a lease but as the sale of a share in a partnership, and the duty payable in respect of it should be that falling under sch. I art. 21, of act I of 1879. **IN RE MINOLIS TEA ESTATE**

[I. L. R., 12 Calc., 383]

3. —

Company—Wind-

*ing up—Transfer of property by old to new company—Conveyance*—An instrument, which is in terms a conveyance of property at an agreed value, is a sale of such property at that price, and is governed by art. 21 sch. I of the Stamp Act (I of 1879). The circumstance that the transaction is a part of a larger transaction cannot affect the character of the instrument. **REFERENCE UNDER STAMP ACT, s. 46**

[I. L. R., 20 Bom., 432]

4. —

Conveyance—

*Transfer of lease*—When by one and the same deed there is a conveyance of freehold lands and goodwill and a transfer of interest secured by lease, the deed should be stamped under art. 21 of sch. I of the Stamp Act (I of 1879) with an *ad valorem* duty on the conveyance of the freehold property, goodwill, buildings, and erections, and under art. 60 of the schedule with a duty of RS on the transfer of each of the interests secured by the lease. **REFERENCE UNDER STAMP ACT, s. 46**

[I. L. R., 23 Calc., 283]

5. —

Conveyance—The

amount payable on a conveyance under the Stamp Act, sch. I art. 21 is properly calculated on the consideration set forth therein, and not on the intrinsic value of the property conveyed. **REFERENCE UNDER STAMP ACT, s. 45**

I. L. R., 20 Mad., 27

1. —

sch. I, art. 22—Civil Procedure

*Code (Act XIV of 1882), s. 62—Copy of a document filed with the plaintiff—Attestation by the Court or its officer*—Art. 22 of sch. I of the General Stamp Act (I of 1879) does not apply to a copy contemplated by s. 62 of the Civil Procedure Code (Act XIV of 1882), the attestation of which copy by the Court or its officer being not made on the application of the owner of the copy, but solely in consequence of the express direction of the Code, with a view to its being filed for the purpose of identifying

## STAMP ACT (I OF 1879)—continued.

the book entry when produced at the hearing. **KRISHNA SADASHIV BANADE v. DILAKH**

[I. L. R., 15 Bom., 687]

2. —

*Copy of order of Municipal Board certified by the Secretary—Fa's officer—Evidence Act (I of 1872), s. 74 75, and 76.*—*Held* that a copy of an order passed by a Municipal Board on a petition presented to it, and certified as a true copy by the Secretary to the Board, came within art. 22 of the first schedule to the Indian Stamp Act, 1879, and required to be stamped. The Secretary of a Municipal Board is a "public officer" within the meaning of art. 22 of the first schedule to the Stamp Act, 1879, for the purposes included therein. **REFERENCE UNDER STAMP ACT, s. 45**

[I. L. R., 19 All., 233]

—sch. I, art. 25, and art. 5—*Declaration of trust—Agreement*—An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. *Held* that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, sch. I, art. 25, and as an agreement under art. 5 (c). **REFERENCE UNDER STAMP ACT, s. 45**

I. L. R., 11 Mad., 216

—sch. I, art. 29—*Instrument evidencing an agreement to secure repayment of loan executed at time of loan—Assignment by way of mortgage of valuable security to secure pre-existing debt*—Art. 29 of sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan. **QUEST-EXPRESS v. DEEVEDRA KRISHNA MITTAR**

I. L. R., 27 Calc., 187

[4 C. W. N., 524]

1. —sch. I, art. 36—*Instrument of gift—Endowment of school of dharma*—On the 1st of April 1878, on which date the Stamp Act (XVIII of 1869) was in force, A passed to B a document on plain paper granting B an annuity charged on the revenues of a village. On the 24th of April 1879 the Stamp Act (I of 1879) being then in force, A adopted C as her son, and C three days afterwards made the following endorsement upon the document "I consent to act according to this deed." *Held* that the instrument should be stamped with a single stamp as an instrument of gift, under art. 36, sch. I of Act I of 1879. **IN RE BHAVANTRAI**

I. L. R., 7 Bom., 184

2. —sch. I, art. 25—*Declaration of trust—Gift*—Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land, *Held* that the instrument was liable to stamp duty as a gift, and not as a declaration of trust. **REFERENCE UNDER STAMP ACT, s. 46**

I. L. R., 12 Mad., 89

## STAMP ACT (I OF 1879)—continued.

sch. I, art. 37—*Partition, Instrument of—Arbitration—Award.*—An award directing partition of property, if signed by the parties interested by way of assent to the award, becomes thereby an instrument of partition, and should be stamped accordingly. *AMARSI v. DAFAL*

[I. L. R., 9 Bom., 50]

1. ——— sch. I, art. 38—*Deed acknowledging former adoption and investing the person adopted with powers of son.*—A, who was a childless Hindu widow, acknowledged the fact of the due adoption of B by a deed which recited that she having been childless had asked the father of the executee to give the executee in adoption, and he having consented, the executee was adopted with due ceremonies on the 1st August 1837. It further recited that the original name of the executee was changed, and the executee was thenceforth to bear the changed name, and to get all the powers which usually vested in a son. The Commissioner, C D, feeling doubt as to whether it could be treated as a deed of adoption, referred it for the opinion of the High Court. *Held* that the document was distinct from an adoption deed or authority to adopt so as to be liable to stamp duty under Act I of 1879, art. 38, sch. I, and that it was not liable to any stamp duty. *IN THE MATTER OF ANBAI*

[I. L. R., 13 Bom., 280]

2. ——— *Deed confirming adoption.*—A document was written on a ten-rupee stamp paper executed by the executant M to one D, whereby M, after reciting the fact of his having adopted D, constituted him the heir to his interest in the undivided family property, and declared him to be the sole owner thereof as the executant's adopted son. On the same document C, the mother of D, and his father P endorsed separately their consent to the adoption. *Held* that the document was not an instrument conferring an authority to adopt, and therefore not chargeable under art. 38 of sch. I of Act I of 1879 or under any other article. The endorsements therefore were not chargeable with any stamp duty. *IN THE MATTER OF HANUAPA*

[I. L. R., 13 Bom., 281]

1. ——— sch. I, art. 39 (b)—*Lease—Rent.*—A mittidar executed a perpetual lease of certain villages for Rs. 954 per annum. Of this, Rs. 554-10-7, representing the Government peshkash, the lessor directed the lessee to pay to Government and the balance Rs. 400 to himself. The lease was written on a 20-rupee stamp paper. *Held* that the sum of Rs. 954 represented the rent and that the stamp duty was to be calculated thereupon. *REFERENCE FROM BOARD OF REVENUE*

[I. L. R., 7 Mad., 155]

2. ——— sch. I, art. 39 (c), (d)—*Rent—Premium—Mortgage—Lease.*—By a document purporting to be a lease, certain land was leased for four years at a rent of Rs. 15 per annum. Out of the total rent it was stipulated that Rs. 50 should be paid in advance and the balance Rs. 10 at the end of the term. *Held* that the payment of Rs. 50 in advance was not payment of a premium or fine within the meaning of art. 39 (c)

## STAMP ACT (I OF 1879)—continued

of the Stamp Act, 1879. B, a document purporting to be a rent agreement, the lessee took a shop for five years, agreeing to pay Rs. 30 per annum as rent, depositing one year's rent with the lessor, which was to be credited to the rent of the last year of the term. *Held* that the deposit of one year's rent with the lessor was not a fine or premium within the meaning of art. 39 (c) of the Stamp Act, 1879. By a document purporting to be an instrument of mortgage, the owner of certain land, being indebted in a certain sum, conveyed the land to his creditor for nine years in liquidation of the principal and interest of the debt. The creditor was to take the produce of the land, enjoy the profits or suffer the loss, and pay Rs. 35 per annum as rent. *Held* further that the document was a lease with a premium liable to duty under art. 39 (d) of sch. I of the Stamp Act, 1879. *REFERENCE UNDER STAMP ACT, 1879*

[I. L. R., 7 Mad., 203]

3. ——— and sch. II, art. 13, cl. (b)—*Kabuliat or lease of immovable property for any purpose other than that of cultivation—Stamp duty, Exemption from, of such lease.*—A kabuliat or lease relating to immovable property let to a tenant for any purpose other than that of cultivation is not such a lease as is contemplated by art. 13, cl. (b), of the Stamp Act I of 1879 so as to be exempt from stamp duty, but is chargeable with such duty under sch. I, art. 39, of that Act. *NARAYAN RAMCHANDRA v. DHONDU RAGHU*

[I. L. R., 10 Bom., 173]

1. ——— sch. I, art. 44, cls (a) and (b)—*Mortgage-deeds—Covenants for quiet enjoyment—Per Curiam.*—Cl. (a) of art. 44 of sch. I of the Stamp Act, 1879, applies only to those deeds in which possession of the mortgaged property is given, or agreed to be given, at the time of the execution of the deed, or, in other words, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagees. *PER GARTH, C.J.*—The principle of the distinction between the two classes of mortgages named in art. 44 is that, where the title to the land and the possession or immediate right to possession both pass to the mortgagee, the same duty is charged as upon a conveyance by way of sale, but when the title only passes, and possession, or the right to possession, does not, the lower duty is chargeable. *PER MITTER, J.*—The word "given" in cl. (a) of art. 44 points out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security for the mortgage money; but where the mortgagee becomes entitled to enter upon possession irrespective of the consent of the mortgagor to make over possession, cl. (a) will not apply. *PER FIELD, J.*—The Stamp Act is a Revenue Act, and the rule of construction of such Acts is, that in case of a doubt, the construction most beneficial to the subject is to be adopted. The words "agreed to be given" in art. 44, cl. (a), can only apply where there is an express or implied agreement to give possession, they will not apply where there is no such agreement, express or implied,

**STAMP ACT (I OF 1879)—continued.**

but the effect of the document is such that a mortgagee has merely a right which he can enforce in a Court of law to obtain possession. **ANONYMOUS**

[I. L. R., 10 Calc., 274]

2. **Construction.**—A mortgage deed dated the 4th August 1883, stipulated that possession was to be given to the mortgagee after the 31st May 1818 if the mortgage loan was not entirely repaid by that date. On the question being referred to the High Court, whether cl (a) or cl (b) of art. 44, sch. I, Stamp Act I of 1879 applied to the case—**Held** that cl (b) applied. The intention of cl (a) is to cover cases of mortgage with possession, and the words "agreed to be given" are to be read as if the words "at the time of execution" immediately followed and qualified the word "given." Cl (a) should be read as if it were worded "when possession of the property" is given by the mortgagor at the time of execution, or is agreed to be then given and not is then agreed to be given."

**HINGANGHAT MILL COMPANY v. L. K. CHAND**

[I. L. R., 8 Bom., 310]

3. **Stipulations not creating fresh obligations.**—Under the ordinary law of mortgage, the mortgagor is bound so long as the equity of redemption remains with him to indemnify the estate against expenses incurred in protecting the title. So that where a mortgage-bond contains stipulations under which the mortgagor engages to repay to the mortgagee any costs he may incur in suits brought against him by the mortgagor's co-sharers and also any debts charged upon the mortgaged property which the mortgagee may pay, the stipulations do not create any fresh obligation, and require no additional stamp duty. **DAMODAR GREGGABHU v. NAMASWAMY LAKSHMAN**

[I. L. R., 9 Bom., 435]

4. **Bond—Mortgage.**—**Stamp Act, 1879 s. 3 cl. 4 (c) and 13, ss. 7, 26, sch. I, art. 13.**—A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as "earnest money," and covenanted to deliver to the lender on a certain date 21 maunds of raw (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows: "If the supply of the raw be less than the fixed quantity and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Rs. 1 per maund, that in case of my not supplying the raw at all or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security, he hypothecated the produce of a field of sugarcane, the value of which was not stated. **Held** by the Full Bench that the instrument was a mortgage deed "within the meaning of s. 3 (13) and art. 44 (b) of sch. I of the Stamp Act (I of 1879)." **Held** by STUART C. J., STRAIGHT, J., and BROOKHURST, J., that it was also a "bond" within the meaning of s. 3 (4) (c) and art. 13 of sch. I, and with reference to the provisions of s. 7 was chargeable with stamp duty solely as a bond under art. 13, the contract being a

**STAMP ACT (I OF 1879)—continued**

single one. **Held** by the Full Bench that the proper stamp duty payable on the instrument was four annas. **Held** by STUART, C. J., and STRAIGHT, J., that in estimating the stamp duty payable on the instrument the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the raw must not be taken into account. **Reference** by Board of Revenue, A. W. P. L. L. R., 2 All., 654 doubted; and **Gubhara Babai Boro, I. L. R., 8 Calc., 254**, referred to by STUART, J. Per STUART, C. J., that, for the purpose of estimating the stamp duty, the amount secured by the instrument was Rs. 25 the amount borrowed, plus Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, i. e., the price fixed at the meeting of growers not having been ascertainable at the time of execution on fell within the provision of s. 26 of the Stamp Act and could not have the effect of adding to the stamp duty. Per ODFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument was Rs. 25, the amount borrowed, plus Rs. 21, the sum recoverable at Rs. 1 per maund in the event of the borrower's non-delivery of the 21 maunds and stamp duty was payable on this amount. **IN THE MATTER OF GAIKATI DESH**

[I. L. R., 9 All., 685]

**See SAMEHU CHANDRA BEPARI v. KRISHNA CHARAN BEPARI** . . . I. L. R., 26 Calc., 179

5. **Assignment by way of mortgage of valuable security to secure pre-existing debt.**—**Stamp Act (I of 1879), s. 3, sub-s. (13).**—Art. 29 of sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan. Where an instrument was an assignment by way of mortgage of valuable securities to secure a pre-existing debt, it was held to come under art. 44 of sch. I of the Stamp Act. For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act. **QUEEN EXPRESS v. DEBENDRA KRISHNA MITTAR**

[I. L. R., 27 Calc., 587  
4 C. W. N., 524]

6. **and s. 3 (13), sch. I, art. 29, and art. 5 (c).**—**Mortgage—Assignment of growing coffee.**—By an agreement made the first day of September 1884, A, in consideration of Rs. 1,000 to be advanced to him by B, assigned to B the whole crop of coffee then growing upon a certain estate, upon trust, *inter alia*, to secure the repayment of the sum advanced. It was stipulated that A should cultivate the crop till maturity and deliver it to B. **Held** that this document was a mortgage liable to duty under art. 44 (b) of sch. I of the Stamp Act, 1879. **REVEREND UNDER STAMP ACT, 1879**

[I. L. R., 8 Mad., 104]

**STAMP ACT (I OF 1879)—continued.**

7. ——— and art. 29—*Mortgage advance payable on demand—Power of sale in default of repayment of advance—Pledge.*—In consideration of an advance of Rs. 1,450, on interest, repayable on demand, certain boat-owners assigned to S & Co. their paddy boats, the boat-owners retaining working and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S & Co. and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S & Co. On failure to make repayment on demand, S & Co. were empowered to take possession and to sell the boats. *Held* that the document was a mortgage, and not a pledge, and as such should be stamped under art. 41 (b) of Sch. I of the Stamp Act of 1879. **IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL & CO**  
[I. L. R., 21 Cal., 241]

8. ——— *Mortgage—Consideration.*—A *kanom* deed is liable to a stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming of the outgoing tenant must be included. **REFERENCE UNDER STAMP ACT, s. 46**  
[I. L. R., 22 Mad., 164]

9. ——— *"Mortgage-deed."*—By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed. *Held* that the clause constituted the document a "mortgage-deed" within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being, by the said document secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 of second debentures, and the remaining £5,000 of the first debenture, stamp duty was payable on the new security, though a portion of the debt secured was included in the previous document on which duty had been paid; that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document, and was therefore in effect an actual transfer; that the "mortgage-deed" was one with possession within art. 44 (a) of sch. I of the Stamp Act, 1879, by which this document was governed, and that, in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for."  
**REFERENCE UNDER STAMP ACT, s. 46**  
[I. L. R., 23 Mad., 207]

sch. I, art. 46, and s. 34, and  
sch. II, cl. 2—*Agreements for sale of goods—*

**STAMP ACT (I OF 1879)—continued.**

*Broker's bought and sold notes—Note or memorandum of sale.*—The plaintiffs sued to recover damages for the non-acceptance of wheat which the defendant on the 16th May 1889 by two contracts agreed to purchase. At the hearing, in order to prove the terms of the contracts, the plaintiffs tendered two notes, or memoranda of the contracts, which purported to be signed by the broker and also by the defendant. These notes were, in fact, the sold notes which the broker had given to the plaintiffs. Each of these notes had been stamped with an anna stamp, but the stamp on one of them had not been cancelled at all, and the stamp on the other was without any mark of cancellation except a small part of the first letter of the defendant's signature, consisting of a slightly curved line. On these notes being tendered in evidence, it was objected that they were inadmissible, being unstamped, having regard to ss. 11 and 34 of the Stamp Act. The Court allowed the objection, and rejected the notes. The plaintiffs then contended that the documents were only memoranda of *pyrol* contracts and might be regarded as agreements for the sale of goods, and exempt from stamp duty, under cl. 2, sch. II, or at all events admissible on payment of a penalty—ss. 7 and 34. *Held* that the documents in question were documents of the nature of a note or memorandum chargeable under art. 46 of sch. I, and were not exempt from duty under cl. 2 of sch. II. **RALLI v. CARAMALLI FAZAL**  
[I. L. R., 14 Bom., 102]

sch. I, art. 49—*Policy of insurance—Life policy—Beng. Reg. X of 1829.*—**PER BROUGHTON, J.**—*Held* that, inasmuch as Regulation X of 1829 was not recognized by the Supreme Court, life policies of insurance issued before 1860 did not require a stamp. **RAJNARAIN BOSE v. UNIVERSAL LIFE ASSURANCE COMPANY**  
[I. L. R., 7 Cal., 594; 10 C. L. R., 561]

1. ——— sch. I, art. 50—*Court Fees Act, sch. II, art. 10 (a)—Power to call to obtain copies from Collector's office—Stamp.*—A document authorizing a *vakil* to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under art. 10 (a) of sch. II of the Court Fees Act, 1870, and does not require to be stamped as a power-of-attorney under art. 50 (b) of sch. I of the Stamp Act, 1879. **REFERENCE UNDER STAMP ACT, 1879**  
I. L. R., 9 Mad., 146

2. ——— cl. (b)—*Court Fees Act, sch. II, art. 10 (a)—Fakalatnama—Power-of-attorney.*—A document was given to P by thirty-six persons jointly interested in a certain sum of money authorizing him to appear before a certain officer and receive payment thereof. *Held* that the document was a power-of-attorney, and that consequently the proper stamp duty was one rupee, leviable under the Stamp Act, 1879, sch. I, art. 50 (b). **REFERENCE UNDER STAMP ACT, 1879**  
I. L. R., 9 Mad., 358

3. ——— and s. 3, cl. 18, and  
s. 7—*Power-of-attorney—Instrument of trust.*—Ten *mirasidars* of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the *perquisites* and

## STAMP ACT (I OF 1879)—continued

other communal income appertaining to their miras rights, to cultivate their manikins to distribute to them proportionately their shares the profits of certain communal land, etc. *Held* that the instrument was a power of attorney and should bear a stamp of Rs. 1. REFERENCE UNDER STAMP ACT, s. 46

[I. L. R., 15 Mad., 386]

1. sch. I, art. 52—*Tax—Receipt for money paid as taxes—Municipality, Receipt for a tax exceeding twenty rupees*—A receipt by a Municipality acknowledging payment of house tax exceeding twenty rupees requires a receipt stamp under sch. I, art. 52, of Act I of 1879. IN RE KARACHI MUNICIPALITY. I. L. R., 12 Bom., 103

2. — and art. 3, cl. 17—*"Sarkhat"*—*Receipt*—The defendant in a suit on a bond set up as a defence that the bond had been paid in part in sugarcane juice and as evidence of this fact produced a document called a "sarkhat," alleged to be signed by the plaintiff acknowledging the receipt of sugarcane juice the price of which exceeded Rs. 20. There was nothing in this document which showed that the sugarcane juice had been received in part as satisfaction of the bond. *Held* that the document was not a receipt within the meaning of the Stamp Act 1879 but a memorandum of sugarcane juice supplied and required no stamp. IN RE PRASAD & RUET. I. L. R., 8 All., 253

3. — *Receipt—Entry signed by creditor in debtor's book discharging debt*—An entry made by a creditor in the khatta-book of the debtor, and signed by him for the payment of a sum of money in discharge of a debt, is a "receipt" within the meaning of s. 3, cl. 17, of the Stamp Act, and as such must be stamped under art. 52, sch. I of that Act. QUEEN EMPRESS v. JAGGERATH. [I. L. R., 11 Cal., 267]

1. — sch. I, art. 54—*Release—One-anna adhesive stamp—Full stamp duty leviable*—A release chargeable with four annas set up duty was executed on paper bearing a one-anna adhesive receipt stamp. *Held* that in calculating the stamp due the one-anna stamp ought not to be taken into consideration. REFERENCE UNDER STAMP ACT, s. 46. I. L. R., 15 Mad., 259

2. — *Release—Partitions, Deed of*—A Hindu executed in favour of his father as representing the interest of the other members of his family an instrument by which he relinquished his rights over the general property of the family in consideration of certain lands being allotted to him for life, and certain debts incurred by him being paid. The instrument further provided that the lands allotted to the executant for life should go towards the shares of his sons at any partition effected after his death. *Held* that the instrument was not a deed of partition, but a release and should be stamped accordingly. REFERENCE UNDER STAMP ACT, s. 46. [I. L. R., 18 Mad., 233]

1. — sch. I, art. 57—*Settlement—Stamp duty*—Under art. 57 of sch. I of the Stamp Act, 1879, stamp duty on a settlement is to be calculated

## STAMP ACT (I OF 1879)—continued.

on the value of the property settled as set forth in such settlement. *Held* that these terms do not mean the value of the interest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by the Legislature, should be set forth in the settlement. REFERENCE UNDER STAMP ACT, 1879. I. L. R., 8 Mad., 433

2. — and art. 54 and s. 3 (19)—*Settlement—Testamentary document—Trust deed*—An instrument called a trust deed by the party executing it was intended to have immediate operation. It vested the property in the trustees at once, and the provisions as to the management and the ultimate beneficial interest in the property showed that it was contemplated that its operation might extend beyond the lifetime of the owner. *Held* that the instrument fell under the definition of a settlement in the Stamp Act (I of 1879) and should be stamped accordingly. REFERENCE BY THE COMMISSIONER AND SUPERINTENDENT OF STAMPS, BOMBAY. [I. L. R., 20 Bom., 210]

sch. I, art. 60—*Transfer of estate and mining rights held under lease*—In execution of a sum of Rs. 1,50,000, two office crates, opened out on land held under a lease for fifty years, together with the mining rights therein, also held under lease for a term of forty-eight years, were transferred by deed for the residue of those terms. *Held* that the stamp duty payable on the transfer deed was to be regulated by the provisions of cl. 63 of sch. I of the Stamp Act, 1879. REFERENCE FROM BOARD OF REVENUE UNDER STAMP ACT, 1879. [I. L. R., 5 Mad., 15]

— sch. II, art. 1 (b)—*Affidavit*—S. being desirous of obtaining copies of certain records in a suit in the Court of the subordinate Judge of Darsi, appeared before the nain and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative of one of the defendants in that suit, and needed the copies for the purpose of producing them in a suit filed against her in the Court at Karwar. The affidavit, together with a duly stamped application, was presented by her pleader to the District Judge, who, being of opinion that the affidavit should be on a stamped paper, referred the case to the High Court. *Held* that the affidavit was exempt from stamp duty under sch. II, art. 1 (b), of the Stamp Act (I of 1879). IN RE APPLICATION OF DHESHAMMA. [I. L. R., 12 Bom., 276]

1. — sch. II, art. 2 (a)—*Agreement for, or relating to, the sale of goods*—By an agreement in writing the vendor agreed to sell, and the purchaser to buy, certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to, and become the property of, the vendor. *Held* that this document was exempt from duty under sch. II, art. 2 (a) of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46. [I. L. R., 10 Mad., 26]

## STAMP ACT (I OF 1879)—continued.

2. ———— *Exemption—Agreement for the sale of goods.*—An agreement for the sale of goods does not require stamp under the Indian Stamp Act, although it contains provisions as to the warehousing and insurance of the goods previous to delivery. *KYD v. MAHOMED*. I. L. R., 15 Mad., 150

sch. II, art. 11, and sch. I, art. 27 ———— *Vakil—Entry on roll of advocates—Exemption from duty.*—By art. 11 (a) of sch. II of the Stamp Act, 1879 (which exempts from duty the entry of an advocate, vakil, or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by Royal Charter), a vakil on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by art. 27 of sch. I of the said Act. *IN RE PARTHASARADI*. I. L. R., 8 Mad., 14

sch. II, art. 12 (b)—*Security bond for due accounting for "property" received by virtue of office.*—The question was whether a bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by him of public moneys, deposits, notes, stamp paper, postage labels, or other property "of Government committed to his charge was or was not exempted from stamp duty by the provisions of art. 12 (b) of sch. II of Act I of 1879, regard being had to the words "other property." *PER STUART, C.J.*, that such bond was one to secure the "due execution of an office" and the "due accounting for money received by virtue thereof," and nothing more, as the words "or other property" must be taken to mean property of the same kind as previously mentioned, and therefore "money" or the like of money, and such bond was therefore exempted from stamp duty by the provisions of art. 12 (b) of sch. II of Act I of 1879. *PER OLDFIELD, J.*, that, inasmuch as the words in art. 12 (b) of sch. II of Act I of 1879 "or the due accounting for money received by virtue thereof" should be regarded as mere surplusage, and the "due execution of an office" and the "due accounting for money received by virtue thereof" be considered one and the same thing, and as the due accounting for property received by him by virtue of his office was the "due execution of his office" by the officer in this case, such bond was one for the "due execution of an office," and was therefore exempted from stamp duty. *PER SPANKIE, J.*, and *STRAIGHT, J.*, that, inasmuch as the words in art. 12 (b) of sch. II of Act I of 1879 could not be regarded as mere surplusage, and there was a distinction drawn by the Legislature between the "due execution of an office" and the "due accounting for money received by virtue thereof," such bond was not one for the "due execution of an office," and being one for the due accounting for "property," it was not one for the due accounting for "money," and therefore it was not exempted from stamp duty. REFERENCE BY BOARD OF REVENUE, N. W. P.

[I. L. R., 3 All., 788

1. ———— sch. II, art. 13, cl. (b)—*Lease by a cultivator—Definite term—Annual rent.*—Cl. (b), art. 13 of sch. II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever

## STAMP ACT (I OF 1879)—continued.

the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed ₹100. *IN RE BHAVAN BADHAR*. I. L. R., 6 Bom., 691

2. ———— *Lease for planting cocoanut trees—Cultivator.*—A person whose occupation is that of a cultivator and who takes a lease of land for planting cocoanut trees is, in respect of that occupation, a "cultivator." A lease given by him is one exempt from stamp duty under art. 13 (b) of sch. II of the Stamp Act (I of 1879) if the annual rent reserved thereon does not exceed ₹100. *RAMCHANDRA VASUDEVSHEET v. BABAJI KUSAJI*

[I. L. R., 15 Bom., 73

3. ———— and cl. (c)—*Lease granted to a cultivator—Kabuliat—Exemption from stamp duty.*—By the term "cultivator" in art. 13, sch. II of the Stamp Act, 1879, only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant, not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease. *Held* therefore, where the land, the subject of a kabuliat (counterpart of a lease), was for a large part not cultivable or susceptible of being treated as a "cultivator's" holding in any legitimate sense of that word, that such kabuliat was not exempted from stamp duty under art. 13 (c), sch. II of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879. *IN THE MATTER OF LACHMAN PRASAD*

[I. L. R., 5 All., 360

4. ———— cl. (c)—*Counterpart of lease of salt-pans.*—A counterpart of a lease of salt-pans held not to be exempt from stamp duty, as it did not purport to be a counterpart of a lease granted to a cultivator. *MANJUNATH MANGESHAYIA BAIKUNDUR v. MANGESH SHESHAGIRIAPA GOKARNKAR*

[I. L. R., 18 Bom., 546

1. ———— sch. II, art. 15 (a)—*Receipt—Endorsement of payment of mortgage-deed.*—An endorsement on a mortgage acknowledging the receipt of the sum thereby secured is exempt from stamp-duty under sch. II, art. 15 (a), of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879. I. L. R., 10 Mad., 84

2. ———— *Receipt given by Secretary of Club to a member for Club bill.*—Where a receipt in writing is given by the Secretary or other manager of a club to a member acknowledging a payment above ₹20 on account of a club bill, it is liable to stamp duty. REFERENCE UNDER STAMP ACT, 1879. I. L. R., 10 Mad., 85

3. ———— and s. 3, cl. 17—*Receipt—Consideration—Barrister's fee. Honorarium not merces.*—A receipt given by a Barrister for a fee is exempted from stamp duty by art. 15 (b) of sch. II of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879. I. L. R., 9 Mad., 140



## STAMP ACT (I OF 1879) —concluded.

4. ———— *Payment of money without consideration—Except for Counsel's fees.*  
—A receipt given by Counsel for a sum above Rs20 paid to him as a fee for professional services is exempt from stamp duty. *REFERENCE FROM THE BOARD OF REVENUE N W P AND OCHH*  
[I. L. R., 18 All., 132]

## STAMP ACT (II OF 1899).

See STAMP ACT 1879, s. 24

[I. L. R., 24 Bom., 257]

## STAMP DUTY

## ——— Levy of—

See APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—SPECIAL CASES  
[I. L. R., 15 Mad., 29]

## ——— Payment of—

See PAUPER SUIT—APPEALS.

[I. L. R., 1 Bom., 78]

[I. L. R., 8 Mad., 214]

[I. L. R., 11 Calc., 735]

## ——— Right to recover—

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—AGREEMENT  
[I. L. R., 21 Bom., 126]

See PAUPER SUIT—SUITS.

[2 B. L. R., Ap., 23]

See SET-OFF—GENERAL CASES.

[I. L. R., 21 Bom., 123]

## STAMP DUTY, REFUND OF—

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE

[1 Ind. Jur., O S., 57, 1 Hyde, 149]

Marsh, 274

1 Mad., 127

12 W. R., 376

See STAMP ACT, 1879 s. 51

[I. L. R., 18 Mad., 459]

[I. L. R., 18 Mad., 235]

1. ———— Remanded case.—The stamp duty is refundable, and should not be charged to the respondent, in a case remanded. *MASSEY v JEGO*  
STAMP DUTY  
[1 W. R., Mla., 12]

2. ———— *Held by the majority of the Court (LOCH J., dissenting and CAMPBELL J., doubting), where an appeal is remanded in part, the appellant is entitled to a return of a proportionate part of the stamp duty paid by him. IN THE MATTER OF THE ESTATE OF DOORBA DAS DUTT*  
[B. L. R., Sup Vol., 511 6 W. R., Mla., 65]

1 Ind. Jur., N S., 401

IN RE PROSUNO CHUNDER ROY CHOWDARY

[11 B. L. R., 373 note]

## STAMP DUTY, REFUND OF—concluded

See C. PROSUNO CHUNDER ROY CHOWDARY v NERO KASITO CHATTERJEE . 18 W. R., 431

3. ———— Compromise—pending appeal.—No refund of stamp duty can be allowed when a suit is compromised pending the hearing of an appeal preferred. *LAND MORTGAGE BANK OF INDIA v. MERRITS*  
[4 B. L. R., Ap., 83]

IN RE ABDEL HAMEED CHOWDARY

[4 B. L. R., Ap., 86 note]

4. ———— Refund of excess of stamp duty.—*Court Fees Act (VII of 1879) ss. 13, 14 and 15*—The plaintiff brought a suit for declaration of his malik's right over a certain plot of land, and he alleged that the defendant had executed a title in his favour in consideration of a diamond ring worth Rs30,000. He valued his suit at Rs5,000, being twenty times the malikana of Rs250 to which the defendant alleged he was entitled. The Subordinate Judge held that the plaintiff was bound to value his suit at Rs10,000, the consideration mentioned in the habanama. The plaintiff paid the deficiency and his suit was ultimately decreed. The plaintiff appealed to the High Court, and valued his appeal at Rs 600, which valuation was accepted by the High Court. On an application by the plaintiff for a certificate authorising him to receive back from the collector the excess of stamp duty paid by him.—*Held* that the Court had no power to grant it, its power being limited to cases specified in ss. 13, 14, and 15 of the Court Fees Act; but that there is nothing in the law preventing the Government from refunding any amount which they may think the plaintiff was improperly ordered to pay. *IN THE MATTER OF THE ESTATE OF ZOYBOODDHY HOSEIN KHAN*  
[11 B. L. R., 370]

See C. ZOYBOODDHY HOSEIN KHAN v SECRETARY TO THE BOARD OF REVENUE . 20 W. R., 103

5. ———— Failure of portion of appeal.—Where an appeal to the High Court in a case involving property not exceeding Rs1,000 in value was filed, under Act X of 1-82, on a stamp paper worth Rs100 and the result was a remand in respect to a portion of the property of which the value was Rs1756, it was held that, as the appellant was successful in his appeal in respect of property representing a value which more of it he had requested a stamp duty of Rs100 that portion of his appeal in which he failed did not necessitate the payment of any further stamp duty, consequently the appellant was entitled to a refund of the stamp duty in full. *BRISCOE MOLLAR v RASH MOHAR DOHRE*  
[9 W. R., 357]

6. ———— Compromise of appeal before hearing.—Where an appeal had been compromised before a Bench of the Sudder Court, and in the presence of the parties, before it had been entered in the case list hung up in the Court-room.—*Held* that appellant was entitled to a refund of the full amount of stamp duty paid by him. *IN THE MATTER OF GUJENDRO NARAIN ROY*  
[11 W. R., 158]

## STATEMENTS MADE OUT OF COURT.

See MAGISTRATE JURISDICTION OF—GENERAL JURISDICTION.  
[I. L. R., 14 Bom., 572]

## STATUTE.

———— Promulgation of—

See ONUS OF PROOF—MORTGAGE  
[B. L. R., Sup. Vol., 415]

———— Repeal of, Effect of—

See CASES UNDER APPEAL—RIGHT OF APPEAL, EFFECT OF REPEAL ON.

See CASES UNDER CIVIL PROCEDURE CODE, 1882, s 3

See CASES UNDER EXCLUSION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION

See LIMITATION—STATUTES OF LIMITATION—LIMITATION ACT, 1871.  
[I. L. R., 1 Bom., 287]

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS ACT III OF 1865.  
[I. L. R., 1 Mad., 223]

See OFFENCE BEFORE PENAL CODE CAME INTO OPERATION.

[I. L. R., 1 All., 599  
I. L. R., 2 Calc., 225]

———— 5 & 6 Edw. III, c. 16.

See SALARY . 3 Moore's I. A., 435

———— 32 Hen. VIII, c. 34

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.  
[I. L. R., 14 Calc., 176]

———— 13 Eliz., c. 5.

See DEBTOR AND CREDITOR  
[1 Hyde, 178  
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1 W. R., 41  
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See INSOLVENT ACT, s. 26.  
[I. L. R., 3 Calc., 434]

See TRANSFER OF PROPERTY ACT, s 53.  
[I. L. R., 22 Calc., 185  
I. L. R., 23 Mad., 184]

———— Doctrine of fraudulent conveyance void against creditors—The doctrine of a fraudulent conveyance being void as against creditors held to be a principle of Hindu as it is of English law under 13 Elizabeth, c. 5. SHAMKISSORE SHAW v. COWIE . 2 Ind. Jur., O. S., 7

See SUDHREKEENA CHOWDHRAIN v. GOPEE MOHUN SEIN . 1 W. R., 41

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———— 27 Eliz., c. 4.

See DEBTOR AND CREDITOR 1 W. R., 41

See TRANSFER OF PROPERTY ACT, s 53  
[I. L. R., 22 Calc., 185]

See VOLUNTARY CONVEYANCE.  
[22 W. R., 60]

———— 43 Eliz., c. 4.

See BOMBAY MUNICIPAL ACT, 1888, ss. 143, 144 . I. L. R., 16 Bom., 217

See WILL—CONSTRUCTION.  
[14 B. L. R., 442]

———— 3 Jac. I, c. 7.

Stat 3 Jac. I, c 7, has not been extended to India. WILKINSON v. ABBAS SIKRAR  
[3 B. L. R., O. C., 96]

———— 21 Jac. I, c. 16.

See ENGLISH LAW—LIMITATION.  
[5 Moore's I. A., 43, 234]

See LIMITATION—STATUTES OF LIMITATION—STAT. 21 JAC. I, c. 16  
[5 Moore's I. A., 43]

See STATUTES, CONSTRUCTION OF.  
[5 Moore's I. A., 234]

———— 29 Car. II, c. 3.

See GUARANTEE . 5 B. L. R., 639  
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———— 29 Car. II, c. 7.

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See FOREIGNERS I. L. R., 18 Bom., 636

See HABEAS CORPUS . 6 B. L. R., 392

———— 2 & 3 Anne, c. 4, s. 1.

See VENDOR AND PURCHASER—NOTICE  
[I. L. R., 6 Bom., 168]

———— 6 Anne, c. 2, s. 4 (Ireland).

See VENDOR AND PURCHASER—NOTICE.  
[I. L. R., 6 Bom., 168]

———— 6 Anne, c. 35, s. 1.

See VENDOR AND PURCHASER—NOTICE.  
[I. L. R., 6 Bom., 168]

———— 7 Anne, c. 20,

See VENDOR AND PURCHASER—NOTICE  
[I. L. R., 6 Bom., 168]

———— 8 Anne, c. 14.

See LANDLORD AND TENANT—PAYMENT OF RENT—GENERALLY.  
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———— 7 Will. III, c. 3, s 2 .

See WAGING WAR AGAINST THE QUEEN.  
[7 B. L. R., 63]

———— 7 Geo. I, c. 21, s. 5

See BOTTOMRY BOND 5 Bom., O. C., 64

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8 Geo II, c. 6, s. 1

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[1 L. R., 6 Bom., 168]

14 Geo III, c. 48.

See CONTRACT—WAGERING CONTRACTS  
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and succession by the defendants *SARKIS v. PRO-*  
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4 Geo IV, c. 34, s. 3.

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4 Geo. IV, c. 71, s. 17.

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4 Geo IV, c. 81.

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6 Geo. IV, c. 18

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6 Geo. IV, c. 85.

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9 Geo. IV, c. 33 (Ferguson's  
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9 Geo IV, c. 73, s. 38.

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2 &amp; 3 Will IV, c. 34.

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2 &amp; 3 Will IV, c. 51.

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[2 Moore's I. A., 283

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## 3 &amp; 4 Will. IV, c. 123.

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1. ———— *Application of to*  
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tion? *RAM SAGUR DUTT v. NOBHOOPAT MOOKY*  
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of Frauds applies to cases in the case in which  
the defendant alone is a British born subject. *MUTTA*  
*PILLAI v. WESTERN* . . . . . 1 Mad., 275. ———— 21 Geo. III c. 70,  
s. 17.—*Hindu defendant.*—The 4th section of the  
Statute of Frauds does not apply to suits in which  
the defendant is a Hindu. *NEERAM JEMADAN v.*  
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[5 B. L. R., 643 14 W. R., 303]6. ———— *Hindu and Mahomedan*  
*defendants.*—Where a contract is proved to have  
been entered into, but no memorandum thereof in  
writing has been signed by the parties, a Hindu  
defendant is not entitled to plead the Statute of  
Frauds, that statute not being applicable to Hindu  
(or *smile*—Mahomedan) defendants. *BORRODABAI*  
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[1 Ind. Jur., O. R., 70 1 Hyd., 51]7. ———— 21 Geo. III c. 70,  
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the terms of s. 4 of 21 Geo. III c. 70, and  
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[I. L. R., 12 Calc., 583

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1. ——— Mode of construction.—The meaning of an Act is to be gathered solely by reference to the Act itself. MUDDOOSODEN UBY v. BAMACHURN MOOKERJEE . . . 1 Hyde, 100

2. ——— In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words

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are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company v. North British Railway Company*, L. R., 6 Ap. Cas., 114, referred to *QUEEN-EMPERESS v. HOB*  
[I. L. R., 21 All., 391

3. ——— *Duty of Court.*—Where the terms of an Act are clear and plain, it is the duty of the Court to give effect to it as it stands. *GUREEBULLAH SIKKAH v. MOHUN LALL SHANA* [I. L. R., 7 Calc., 127; 8 C. L. R., 409

4. ——— *Preamble.*—A rule of construction is that the enacting words of a statute may be carried beyond the preamble, if words be found in the former strong enough for the purpose. *CHINNA AIYAN v. MAHOMED FAKRUDIN SAIB*  
[2 Mad., 322

5. ——— *Act XIII of 1859, Preamble, and s. 2.*—Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down. *QUEEN-EMPERESS v. INDARJIT*  
[I. L. R., 11 All., 262

6. ——— *Pre-existing state of law.*—The pre-existing state of the law, as recognized by the tribunals, is one of the chief means of interpreting laws of procedure. *PRABHAKARBHAT v. VISHWAMBHAR* . . . I. L. R., 8 Bom., 313

7. ——— *Reasons for enacting law—Motives of parties.*—If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. *JODONATH BOSE v. SHUMSOONISSA BEGUM, BUZLOOR RUHEEM v. SHUMSOONISSA BEGUM*  
[8 W. R., P. C., 3; 11 Moore's I. A., 551

8. ——— *Intention of Legislature in framing Act.*—It is not for a Civil Court to speculate upon what was in the mind of the Legislature in passing a law, but the Court must be bound by the words of the law judicially construed. *MOHESH CHUNDER DOSS v. MADHUR CHUNDER SIRDAR*  
[13 W. R., 85

9. ——— *Madras Municipal Act (I of 1884)—Inaccuracy in Act.*—Where in an Act of the Legislature the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy, and to execute the true intention of the Legislature. *JENNINGS v. PRESIDENT, MUNICIPAL COMMISSION, MADRAS*  
[I. L. R., 11 Mad., 253

10. ——— *"Objects and reasons" of Act—Forms in which Bill came before Council.*—For the purpose of ascertaining the intention of the Legislature in passing an Act, where that intention, so far as can be gathered from the Act itself, appears doubtful, the "objects and reasons" may be referred to. It is not, however, permissible



## STATUTES, CONSTRUCTION OF

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to refer for this purpose to the various forms in which the Bill was brought before the Legislature.  
*Moss v. Easa* I L R., 8 Bom., 241

11. — *Specific Relief Act I of 1902* — *Objects and reasons for Bill* — *In enacting the Legislature* — *Quere* — Whether in enacting an Act the "objects and reasons" for the Bill are to be passed as and stating the intention of the Legislature can be referred to. *Moss v. Easa* I L R. 8 Bom. 241 referred to *Padu Jhalia v. Govt. Mohun Jhalia*

[I L R., 19 Cal., 544]

12. — *References to objects and reasons and report of Select Committee* — In construing a statute the Court cannot refer to the statement of objects and reasons attached to a Bill or to the report of a Select Committee or to the debates of the Legislature but can only look to the statute itself. *Que v. Empress v. Airtick Chauder Das* I L R. 14 Cal., 721 and *Romesh Chander Sen v. Harn Mond* I L R. 17 Cal. 452 dissenting on this point. *Kadir Bakhsh v. Bhawan Prasad*

[I L R., 14 All., 145]

13. — *Penal Code* s. 295 *Construction of Reference to report of Indian Law Commission and of Select Committee* — For the purpose of construing a section of an Act and ascertaining the intention of the Legislature the report of the Indian Law Commission or a Select Committee appointed to consider the Bill may be referred to. *Que v. Empress v. Airtick Chauder Das* I L R., 14 Cal. 721 followed. *Romesh Chander Sen v. Harn Mond*

[I L R., 17 Cal., 853]

Rama Chandra Joshi - Haz Kashim

[I L R., 18 Mad., 207]

14. — *Adm. v. strator-General's Act (II of 1874)* — *History of passing of Act* — *Object and reasons for Act* and *Report of Select Committee on Bill* — The course of legislation with reference to the creation of the office of Administrator-General and his duties and powers reviewed and considered in construing Act II of 1874. *Per FREEMAN J.* The history of the passing of an Act and the intention of the Legislature in introducing it, though not admissible in England to explain a statute have been in this country taken into consideration in construing Acts of the Legislature. *Per FREEMAN J.* — The objects and reasons given by the Legislature on the introduction of a Bill and the Report of the Select Committee on it, may be referred to in construing any Act to show the intention of the Legislature in passing it. *Que v. Empress v. Airtick Chauder Das* I L R. 14 Cal. 721, referred to. *ADMINISTRATOR GENERAL OF BENGAL v. FREEMAN L. MCLUCK*

[I L R., 21 Cal., 732]

Held by the Privy Council on appeal that it is not required that in a consolidating statute each enactment, which traced to its source, must be construed according to the state of things which existed

## STATUTES, CONSTRUCTION OF

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at a prior time when it first became law; the object being that the statutory law bearing on the subject should be collected and made applicable to the existing circumstances; nor can a positive enactment be annulled by indications of intention at a prior time gathered from previous legislation on the matter. *Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian as well as British statutes.* *ADMINISTRATOR-GENERAL OF BENGAL v. FREEMAN L. MCLUCK* I L R., 22 Cal., 788

[I L R., 22 L.A., 107]

15. — *Proved age of Legislature* — *Per PICT, J.* — Proceedings of the Legislature cannot be referred to as legislative aids to the construction of an Act. *ADMINISTRATOR-GENERAL OF BENGAL v. FREEMAN L. MCLUCK* I L R., 22 Cal. 788; L. R., 22 L.A., 107, followed. *QUEEN EMPRESS v. SHI CHUN CHENG*

[I L R., 23 Cal., 1017]

QUEEN EMPRESS v. BAL GANGADHAR TILAK

[I L R., 23 Bom., 113]

16. — *Kidn. Settlement Act (Bom. Act I of 1880)* — *Reference to debate on Bill in Legislative Council* — For the purpose of construing an Act the debate upon the Bill when before the Legislative Council is not to be referred to. *GOPAL KRISHNA PARACHOWE v. NAKHODIA*

[I L R., 18 Bom., 133]

17. — *Marginal notes to sections of Act* — Marginal notes are no part of an enactment. *DUKHI MOHAMMAD v. HALWAY*

[I L R., 23 Cal., 53]

18. — *Marginal notes to sections of Act* — Marginal notes to sections of an Act do not form part of the Act. *Saltum v. Saltum* L. R., 22 Cal. D. 511, and *Dubli. Mallat v. Holmes*, I L R. 23 Cal., 55 followed. *PUSANDEO NARAIN SINGH v. RAM SARTY FOR*

[I L R., 25 Cal., 858]

2 C. W. N. 577

19. — *Codifying of Object* — The object of codifying a particular branch of the law is that on any point specifically dealt with the law should therefor be ascertained by interpreting the language used in that enactment instead of as before searching in the authorities to discover what may be the law as laid down in prior decisions. The language of such an enactment must receive its natural meaning without any assumption as to its having previously been the intention to leave unaltered the law as it stood before. *Bank of England v. Pagnano*, L. R. 1891 A. C. 107 referred to. *DORENDRO NATH SIRCAR v. KAMALANATH DAS* I L R., 23 Cal., 883

[I L R., 23 L.A., 15]

20. — *Class of Vaggers Enumbered Estates Act (VI of 1856 and I of 1884)* — *Des Estates Act (IX of 1885)* — *Marginal notes to Acts* — The "State publication" of the Indian Acts being framed with marginal notes, such notes

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may be used for the purpose of interpreting an Act. **KAMESHAR PRASAD v. BHIKHAN NARAIN SINGH. BHIKHAN NARAIN SINGH v. KAMESHAR PRASAD**

[I. L. R., 20 Cal., 609]

21. — *Statutes of limitation.*—Statutes of limitation being in limitation of common right are not to be extended by construction to cases not clearly included within their terms. **PABASHRAM JETHMAL v. RAHMA**

[I. L. R., 15 Bom., 289]

22. — *Practice in construction of the law—Hardship.*—A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction be applied to an Act be influenced by extraneous considerations, such as questions of hardship. **BALKARAM KAT v. GOBIND NATH TIWARI**

[I. L. R., 12 All., 129]

23. — *Distinction between affirmative commands and negative prohibition—Irregularities and illegatities.*—As a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction. **RAM-SHUB SINGH v. SHEODIN SINGH**

[I. L. R., 12 All., 510]

24. — *Stamp duty, Charge of.* If the express words of an Act do not warrant or necessitate a demand of duty or charge, it is not competent to a Court or law to extend such enactment or to give to the words a meaning beyond their strict and literal signification, so as to include any case which may reasonably come within the spirit of the enactment. **IN THE MATTER OF THE PORT CANNING LAND COMPANY** . 16 W. R., 208

25. — *Special and general procedure.*—Inconvenience pointed out of introducing into Acts relating and intitled as relating to special jurisdiction only provisions affecting civil procedure generally. **JUDOW MULJI v. CHHAGAN RAICHAND** . . . I. L. R., 5 All., 308

26. — *Retrospective effect of Act.*—Statutes are *prima facie* deemed to be prospective only. "*Nova constitutio futuris formam imponere debet, non prateritis.*" **MOON v. DUDHIA, 2 Exch., 22**, approved of. **DOOLUBDASS PETTAMBERDASS v. RAMLOLL PRACKOORSEYDASS**

[5 Moore's I. A., 109]

**CHUTTERDHAREE MISSER v. NURSING DUTT SOOKOOL** . . . 3 Agra, 371  
[Agra, F. B., Ed: 1874, 163]

27. — *Alteration in procedure—Retrospective effect of Act.*—Alterations in

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forms of procedure are retrospective in effect, and apply to pending proceedings. **HAJBAT AKRAMISSA BEAM v. VALUENISSA BEGAM**

[I. L. R., 18 Bom., 429]

**BALKRISHNA PANDHABINATH v. BAPU YESAJI**  
[I. L. R., 19 Bom., 204]

28. — *Acts relating to procedure—Retrospective operation of Act—Dekkan Agriculturists' Relief Act (XVII of 1879), s. 73—Dekkan Agriculturists' Relief Act Amendment Act (VI of 1895).*—In this suit the Subordinate Judge of Karmala held that the defendant was an agriculturist, and that therefore the suit could not be maintained without a certificate under s. 47 of the Dekkan Agriculturists' Relief Act (XVII of 1879). Under s. 73 of that Act, the finding of the Subordinate Judge upon the point was final. The plaintiff appealed, the appeal including other points of objection to the decree as well as that with regard to the status of the defendant. Pending his appeal, Act VI of 1895 was passed, which repealed s. 73. At the hearing of the appeal the Judge considered the question of the statutes of the defendant, and held that he was not an agriculturist, overruling the decision of the Subordinate Judge upon that point. *Held* that the Judge in appeal was right in entertaining the question. The provisions of Act VI of 1895 altered the procedure, and were therefore applicable to proceedings already commenced at the time of their enactment. *Held* also that, even if the General Clauses Act (I of 1869), s. 6, applied to Acts not conferring rights, but simply concerning judicial procedure, it could not affect the present case, as the repeal is not one of Act itself, but only of a section in the same relating to procedure. **GANGARAM v. PUNAMCHAND NATHURAM** . I. L. R., 21 Bom., 822

29. — *Hereditary Offices Act Amendment Act (Bom. Act V of 1886), s. 2.*—S. 2 of the Hereditary Offices Act Amendment Act (Bombay Act V of 1886) is not retrospective. **RAHIMKHAN v. FATUBIBI BINTESABER KHAN**  
[I. L. R., 21 Bom., 118]

30. — *Retrospective effect of Acts, Principle as to—Mad. Act VIII of 1865.*—In a suit for rent for 1865, 1866, it was objected that pottahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on 1st January 1866. *Held* (reversing the decision of the Civil Judge) that Act VIII of 1865 was inapplicable to the case. The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are not exceptions, but the question here was not one of processual, but of material law. **MORRIS v. SAMDANUTHI RAYAR** . 6 Mad., 122

31. — *Penal provision in statute—Retrospective effect.*—Retrospective effect is not to be given to the penal provision of s. 2, Bengal Act VI of 1862. **NOBOKANTH DEY v. BORADAKANTH ROY** . . . 1 W. R., 100

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32. — *Penal statute—Bengal Excise Act (Beng Act VII of 1878).*—Penal statute must be construed strictly, i.e., nothing is to be regarded as within the meaning of the statute which is not within the letter and clearly and intelligibly described in the very words of the statute itself. *EMPEROR v. KORA LALANG* (I. L. R., 8 Calc., 214; 10 C. I. R., 155)

33. — *Penal statute—Act XXXI of 1-60.*—A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character. *REG v. BHISTA SIN MADANNA* (I. L. R., 1 Bom., 308)

34. — *Penal Code (Act XLV of 1860) s. 499—English law of defamation—Sembis.*—S. 499 of the Indian Penal Code should be construed without reference to the English law. *IN RE NAGARAJ TRIKAMJI* (I. L. R., 19 Bom., 340)

35. — *Repeal by implication.*—Statutes are not to be held to be repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable. *SHAPATHI NAYUDU v. QUEEN* (I. L. R., 6 Mad., 33)

36. — *Implied repeal—Civil Procedure Code 1859 s. 157—Act IX of 1850, s. 101.*—A special enactment is not impliedly repealed by a subsequent general enactment, if the two enactments are not so repugnant as to be incapable of standing together. *Act IX of 1850, s. 101, was not repealed by s. 187 of Act VIII of 1859.* *SABAPATI MUDALIYAR v. NARAYANJI MUDALIYAR* (1 Mad., 116)

37. — *Effect of repeal—Retrospective effect—Dekkan Agriculturists' Relief Act, 1879—General Clauses Consolidation Act, 1869, s. 6.*—The general rule is that a repealed statute cannot be acted on after it is repealed; but, as provided in s. 6 of the General Clauses Act 1869, all matters that have taken place under it before its repeal remain valid. But a new order of a Court, not ancillary or provisional but directing a further substantive step in the execution of a decree, is a new proceeding which should be governed by the law in force when the order is made, and not by the law which it repeals. An Act passed to promote some public important object, such as the protection of the property of the Dekkan agriculturists, may be given on that account a retro-active operation, if necessary as the rule against such operation rests itself on such a general public interest, which may, under the circumstances, be deemed of less importance than the one embodied in the Act. *SHIVRAM UDARAM v. KONDRAJI NUKTAJI* (I. L. R., 8 Bom., 340)

38. — *Law governing suit when law is changed pending suit.*—The law as it exists when a suit is commenced must decide the rights of the parties to the suit unless the Legislature has expressed a clear intention to vary the

## STATUTES, CONSTRUCTION OF

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relative rights of the parties to each other in the new law. Rule followed in the interpretation of Act X of 1859. *BHONGSHEDRA DASS v. MASOOD KHUTEL* (1 Hay, 308)

39. — *Alteration of law while suit is pending—Act XIX of 1857, s. 219—Repeal, Effect of.*—Where the law is altered while a suit is pending, the law as it exists when the action was commenced must decide the rights of the parties unless the Legislature, by the language used, shows a clear intention to vary the mutual relations of such parties. *GUJARAT TRADING COY. PANT v. TRIKAMJI VELJI* (3 Bom., O. C., 45)

40. — *Repeal, Effect of, on right of action.*—A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure. *FRANZI BOMANJI v. HOBBANJI BARMONJI* (3 Bom., O. C., 48)

41. — *Right of suit—Act XVI of 1842—Act VIII of 1869, s. 1—Act XIV of 1870, s. 1.*—On the 27th of June 1868 it was agreed by and between B, a zamindar, and D, a raiyat, that the latter should pay Rs 20 annually as the rent of his holding, and that for the future no further sum in excess should be demanded or suit brought for enhancement of rent. At the date of the agreement Act XVI of 1842 was in force. The settlement of the district, where the land in respect of which the agreement was made was situated, expired on the 1st of July 1870, before when Act XVI of 1842 was repealed by Act VIII of 1869 which Act was repealed by Act XIV of 1870, both Acts saving any right or title which had already accrued. *Held* that no right of action to avoid or right to repudiate the engagement of the 27th of June 1868 accrued to the zamindar before the passing of these Acts. *DROHET v. BHUGWANT* (8 N. W., 373)

42. — *Gujarat Talukdars' Act (Bom. Act VI of 1883), s. 31, cl. 2—Retrospective operation—Collector refusing to confirm sale without sanction under Act passed whilst decree was under execution.*—A decree upon a mortgage-bond passed against part of a talukdar's estate on the 16th August 1887 was transferred under a s. 32 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 6th August 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukdars Act (Bombay Act VI of 1883), which came into force on the 5th March 1889, had not been obtained. *Held* that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend

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to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself. *KALIAN MOYI v. PATHUBHAI TALJIBHAI* . I. L. R., 17 Bom., 289

43. — *Statutes making contracts void and those prohibiting actions on them.*—The distinction between enactments which declare contracts absolutely void and those which simply provide that no action shall be brought upon such contracts pointed out. *VISSAPPA v. RAMAJOGI* . . . . . 2 Mad., 341

44. — *Statute imposing duty—Action for failure to perform it.*—Where a statute imposes a duty, it, without express words, gives an action for the failing to perform that duty, and for wrongfully performing it. *PONNUSAMY TEVAR v. COLLECTOR OF MADURA* . . . 3 Mad., 35

45. — *Limitation Act, XIV of 1859, ss. 20, 21.*—In interpreting statutes, the words "must" and "shall" may, in some cases, be substituted for the word "may," but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word "may" should be taken as used in its natural, i.e., in a permissive, and not in an obligatory, sense. *DELHI AND LONDON BANK v. ORCHARD*

[I. L. R., 3 Calc., 47; I. L. R., 4 I. A., 127]

46. — *Hindu Wills Act.*—In construing an Act of the Government of India, passed in the form peculiar to the Hindu Wills Act, the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters so far as the latter do not contravene the full and natural meaning of the provisos. *ALANGAMONJORI DABEE v. SONAMONI DABEE*

[I. L. R., 8 Calc., 637; 10 C. L. R., 459]

47. — *Land Acquisition Acts.*—Acts relating to the acquisition of lands for public purposes must be construed strictly in favour of the subject. *SORABJI NASSARVANJI DUNDAS v. JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY*

[12 Bom., 250]

48. — *Statute of Limitations, 21 Jac. I, c. 16.*—Where words have been long used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction of statutes requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. The words in the Statute of Limitations, 21 Jac. I, c. 16, s. 7, "beyond the seas," are synonymous in legal import with the words "out of the realm" or "out of the land" or "out of the territories," and are not to be construed literally. *BUCKMAYOR v. LULLOORHOY MOTTICHROND* 5 Moore's I. A., 234

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49. — *Bengal Bent Act, X of 1859, s. 77—Meaning of "determined."*—The word "determined" meant "legally decided by a Court of competent jurisdiction." *GHALIB ALI v. KHILLOO*

[3 N. W., 51; Agra, F. B., Ed. 1874, 243]

50. — *Road Cess Act (Beng Act X of 1871)—Interpretation clause, Construction of.*—In a suit on a bond by which certain land, admittedly lakhiraj, was mortgaged, the purchaser of a portion of the mortgaged property at an auction-sale for arrears of road cess due under Bengal Act X of 1871 was added as a defendant, and the lower Courts, holding that the effect of such a sale was to pass the property to the defendants free of encumbrances, made a decree excluding that portion from libility in respect of the mortgage-bond. *Held* on the construction of Bengal Act X of 1871 that the sale had no such effect, and that the whole of the property was liable to be sold in satisfaction of the plaintiffs' claim. Although the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which may seem to be attached to it by any other Act of the Legislature. It does not follow therefore that, because lakhiraj property is defined in the Road Cess Act, 1871, to be a tenure, all the interests and consequences attached by other Acts to tenures generally, or to particular classes of tenures, become annexed to lakhiraj property. *UMACHURN BAG v. AJADANNISSA BIDEE*

[I. L. R., 12 Calc., 330]

51. — *Tax illegally levied.*—A statute not only enacts its substantive provisions, but as a necessary result of legal logic, it also enacts as a legal proposition everything essential to the existence of the specific enactments. Where the Legislature has imposed certain duties both upon the tax-payer and upon the Municipal Commissioners, and those duties, as to the tax-payer, enforceable by penalties, are to be performed at a particular time,—*Held* that there was implied a "latent proposition of law," which is as clear and binding as if it had been explicitly declared. That proposition is that there shall be a legally-sanctioned tax at the period at which the duties are to be performed. *LEMAN v. DAMODARAYA* . . . . . I. L. R., 1 Mad., 158

52. — *Acts imposing taxes—Ambiguity in Acts.*—In order to impose a tax, due, rate, or toll upon a subject, the framers of the Act or by-law under which such tax, etc., is imposed must use clear and unambiguous words to effect their purpose. When the words used are ambiguous, the intendment of the Courts will be in favour of the subject upon whom the tax is sought to be imposed. Thus where the framers of the Surat by-law imposed a tax of Rs 1 per Surat man upon "copper" imported into Surat for consumption, it was held that copper wrought up into pots did not fall within the words of the by-law. *Semble*—That when a tax is imposed upon goods imported into a town for consumption,

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and such goods after having been subjected to the tax upon being imported into the town are afterwards taken out for sale into the neighbouring villages and brought back and such goods are not liable to be subjected to tax a second time. **DULAH SHIVLAL & HIRE** . 8 Bom., A. C., 213

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— *Dombivli Municipality Act (III of 1972)* s. 193—Act for public benefit. Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction could be given to it than where powers are to be exercised merely for private gain or other advantage. **OLLIVANT & PARIMTULA NUR MAHOMED** (I L. R., 12 Bom., 474)

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— *Letters Patent, High Court, et al*—Every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity of nations or with the established rule of international law. All legislation is, *prima facie*, territorial. It binds all subjects of the Crown but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign. **KEASOWY DANODAR JAIRAM & KUBINT JAIRAM** I. L. R., 12 Bom., 607

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— *Stat. 24 & 25 Vict. c. 67*—Legislative power of the Governor-General in Council—"Indian territories now under the dominion of Her Majesty"—"Said territories"—23 & 29 Vict. c. 17 Preamble—32 & 33 Vict. c. 98 s. 1—The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which at the date when the Indian Councils Act (24 & 25 Vict., c. 67) received the royal assent (i.e., the 1st August 1871), were under the dominion of Her Majesty. In the preamble to the 24 & 25 Vict. c. 17, and in s. 1 of the 32 & 33 Vict. c. 98 Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law yet it may be so declared as to operate in future. *Postmaster-General of the United States v. Early* *Currier Rep., U. S., p. 86* referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. **EMPRESS V. BARAKI**, I L. R., 3 Calc., 143 I L. R. & Calc., 183, referred to. **ABDULLA & MOHAMMED**

(I L. R., 11 All., 490)

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— *Repeal of* statute which repeals another, *Effect of—General Causes Consolidation Act (X of 1937), s. 7—Reformatory Schools Act (I of 1876) s. 2—Criminal Procedure Code (Act X of 1972), s. 318, (X of 1932), ss. 3 and 399*—The repeal of a statute repealing another statute does not revive the repealed statute. The law in India as embodied in s. 7 of the General Clauses Act (X of 1937) is the

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same as the law in England. **Queen Empress v. Madassan**, I L. R., 12 Mod., 94, and **Queen Empress v. Manaji**, I L. R., 14 Bom., 381 referred to and approved of. **DEPUTY LEGAL REMEMBRANCE & AHMED ALI** . I L. R., 25 Calc., 333 [2 C. W. N., 11]

## STATUTORY POWERS.

See CASES UNDER INSPECTION—SPECIAL CASES—PUBLIC OFFICERS WITH STATUTORY POWERS

See RAILWAY COMPANY

(10 R. L. R., 241)

See ZAMINDAR

(14 B. L. R., 200 [I L. R., 11 A., 364])

## TAY OF EXECUTION.

See CASES UNDER EXECUTION OF DECREE—STAT OF EXECUTION &

See PRIVEY COUNCIL, PRACTICE OF—STAT OF EXECUTION PENDING APPEAL.

## STAY OF PROCEEDINGS.

See CRIMINAL PROCEEDINGS

(I L. R., 18 Bom., 291  
I L. R., 23 Calc., 610  
3 C. W. N., 498, 638  
3 C. W. N., 753)

See INSOLVENT ACT, s. 9

(I L. R., 21 Bom., 297)

See PRACTICE—CIVIL CASES—STAT OF PROCEEDINGS. I L. R., 21 Calc., 531

(I L. R., 18 Bom., 65)

1. — *Suits in respect of same subject-matter in different Courts—Criminal Procedure Code 1877, s. 20*—A, who was employed by B & Co. as their agent at Calcutta, instituted a suit for the balance of an account against his principals in the Court of the Subordinate Judge there in July 1878. In December of the same year B & Co. instituted the present suit against A for an account and for damages caused by his alleged negligence. Held that, as in both suits practically the same issues were triable, A was entitled, as having been first to institute his suit, to proceed in the Court in which he had chosen to bring his suit and to have the other suit stayed, but without prejudice to the right of the plaintiffs in the latter suit to institute a cross claim in the Calcutta Court. **MECKLING KHEYSARE & HASOJEE DEVA CHAND** [4 C. L. R., 282]

2. — *Procedure—Taxes*

—Right of plaintiff to choose place of trial—Civil Procedure Code (Act XIX of 1932), ss. 27 and 53. —The plaintiff brought this suit in the High Court

**STAY OF PROCEEDINGS—concluded.**

at Bombay against the defendant for defamation alleged to be contained in a notice that appeared in the *Bombay Gazette* on the 9th April 1884. The defendant was the Chairman of the Hinganghat Mill Company. The plaintiff had been for some years secretary and manager of that Company. In April 1888 he was dismissed from his appointment, and shortly afterwards he filed a suit (No 1 of 1888) in the Court of the Deputy Commissioner at Wardha, in the Central Provinces (which was the Court of the district in which Hinganghat is situated) for wrongful dismissal. The present suit was filed in July 1888. The defendant took out a summons calling on the plaintiff to show cause why the suit should not be stayed, and the plaint returned to the plaintiff, in order that, if he thought proper, it might be presented in the Court at Wardha. The defendant relied on the following points: (1) that neither he nor the plaintiff resided or carried on business at Bombay; (2) that all the defendant's witnesses resided at Wardha; (3) that the other suit (No. 1 of 1888) was pending at Wardha, and that the decree of that suit would decide the present case also. *Held* that the plaintiff was entitled to sue in Bombay. **GEFFERT v. BUCKCHAND MOHLA**

[I. L. R., 13 Bom., 178]

3. ——— *Civil Procedure Code (Act XIV of 1892), ss. 545, 546—Partition suit, Preliminary decree in—Preliminary decree, Appeal against—Powers of Appellate Court to stay subsequent proceedings.*—There is no provision in the Code of Civil Procedure which authorizes a Court to which an appeal is preferred against a preliminary decree for partition to stay, pending the hearing of the appeal proceedings taken by the Court which passed the decree subsequent to the passing of such decree. **BASANTA KUMAR SIKKAR v. BHUT NATH SIKKAR** . . . 1 C. W. N., 264

**STEAM-TUGS.**

1. ——— *Regulation as to tugs—River navigation—Towing.*—A party having two tugs, *A* and *B*, undertakes to supply tugs to two vessels, *P* and *Q* in the order of their engagements as soon as the tugs are free. *A* is first free, and tows *P*, which has the prior claim, to Diamond Harbour, where she becomes disabled. *B* subsequently tows *Q*, and, finding *A* disabled at Diamond Harbour, leaves *Q* and tows *P* out to sea, returning subsequently for *Q*. *Held* that *B* was not justified in leaving *Q*, but that she ought to have towed her out to sea without interruption. **NOWRAFE NUSSEER-WANJEE v. JOHANNES** . . . 1 Hyde, 293

2. ——— *Government pilots—Order to Government pilots prohibiting their engaging tugs at exorbitant charge.*—The Government may prohibit its pilots from allowing any vessels under their pilotage charge to be taken in tow of a steamer the owners of which will only render their services on exorbitant terms. **ROGERS v. RAJENDRO DUTT**  
2 W. R., P. C., 51; 8 Moore's I. A., 103

**STOLEN PROPERTY.**

Col.

1. OFFENCES RELATING TO . . . 8934
2. DISPOSAL OF, BY THE COURT . . . 8939

See CHARGE TO JURY—SPECIAL CASES—  
STOLEN PROPERTY

[I. L. R., 15 Bom., 369]

**1. OFFENCES RELATING TO.**

1. ——— *Concealment of stolen property—Penal Code, ss. 411, 414.*—*Held* that the prisoner, who, having received stolen property, concealed it in his house, could not be charged and convicted for two offences, i.e., of having dishonestly received stolen property under s. 411 Penal Code, and of assisting in the concealment of stolen property under s. 414 which applies to persons whose dealing with the stolen property is not of such a kind as to make them guilty of dishonestly receiving or retaining it. **GOVERNMENT v. NOWLIA**

[I. L. R., 15 Bom., 369]

2. ——— *Penal Code (Act XLV of 1960), s. 411—Evidence—Proving out stolen property concealed in a place not under the accused's control.* Where the sole evidence against a person charged with an offence under s. 411 of the Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person—*Held* that this was not in itself sufficient evidence to support a conviction under the above-mentioned section. **QUEEN-EMRESS v. GOBINDA**

[I. L. R., 17 All., 576]

3. ——— *Assisting in concealing or disposing of Gently known to be.*—Where persons are charged with assisting in concealing or disposing of property which they know or have reason to believe to be stolen, the nature or the property, as well as the circumstances under which it was being made away with, must be taken into consideration. **REG. v. HARISHANKAR FAKIRBHAT**

[2 Bom., 136; 2nd Ed., 130]

4. ——— *Voluntarily assisting in the disposal of stolen property—"Believe"—"Suspect"*—*Penal Code, s. 414.*—The word "believe" in s. 414 of the Penal Code is much stronger than the word "suspect," and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property, with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. **EMRESS v. RANGU TIMAJI** . . . I. L. R., 6 Bom., 402

5. ——— *Penal Code, ss. 193 and 414—Intention to get innocent person punished—Separate offences, Conviction of.*—Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such

**STOLEN PROPERTY—continued****1. OFFENCES RELATING TO—continued**

innocent person punished as an offender.—*Held* that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Penal Code and of voluntarily assisting in concealing stolen property under s. 414 Penal Code. **EMRESS v. RAMESHAR RAI** I. L. R., 1 All., 379

6 ——— Money obtained on forged money orders.—*Penal Code s. 410*—Money obtained upon forged money orders is not "stolen property" within the definition thereof given in the Penal Code s. 410. **QUEEN v. MOH MOHUN ROY** [24 W. R., Cr., 33]

7 ——— Receiving stolen property.—*Proof of guilty knowledge*—In a case in which the accused is charged with receiving stolen property it must be clearly proved that he retained the property with guilty knowledge. **QUEEN v. YAR ALL** IN THE MATTER OF THE PETITION OF YAR ALL [13 W. R., Cr., 70]

8 ——— Evidence.—*Penal Code (Act VI of 1860) s. 411*—To constitute the offence of receiving stolen property, there must be some proof that some person other than the accused had possession of the property, before the accused got possession of it. **ISHAN MITTAL v. QUEEN-EMRESS** I. L. R., 15 Cal., 511

9 ——— *Penal Code s. 411 and 401*—Criminal breach of trust—A prisoner cannot be convicted, under s. 411 of the Penal Code, for dishonestly receiving or retaining stolen property, in respect of property which he himself has been convicted, under s. 409 Penal Code, of having obtained possession by committing criminal breach of trust. **QUEEN v. SHUKRA** 2 N. W., 312

10 ——— *Property stolen at dacoity—Penal Code s. 412—Proof of commission of dacoity*—In order to sustain a conviction, under s. 412 of the Penal Code of receiving property stolen at a dacoity it is necessary to prove that the prisoner knew, or had reason to believe that dacoity had been committed or that the persons from whom he acquired the property were dacoits. **QUEEN v. JOGESHTR BAGDEE** 7 W. R., Cr., 109

11 ——— *Evidence of dishonest receipt of property*—Where stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one unless the receiver's conduct is satisfactorily explained. **IN THE MATTER OF THE PETITION OF RAJMOJ KURNOKAR** 25 W. R., Cr., 10

12 ——— *Penal Code, s. 411—Animal "nullius in terra regit"*—Bull set at large in accordance with Hindu religious usage.—*Appropriation of bull*—A person was convicted and sentenced under s. 411 of the Penal Code for dishonestly receiving a bull knowing the same to have been criminally misappropriated. It was found that at the time of the alleged misappropriation, the bull had

**STOLEN PROPERTY—continued.****1. OFFENCES RELATING TO—continued**

been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies. *Held* that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore "nullius in terra regit," and incapable of larceny being committed in respect of it, and that the conviction must be set aside. **QUEEN-EMRESS v. BANDEU** [I. L. R., 8 All., 51]

13 ——— *Penal Code, s. 83, 411—Discharge of child-thief—Doli incapax—Proof of theft—Conviction of receiver*—The fact that a child has been tried for theft and discharged under s. 215 of the Code of Criminal Procedure 1872, on the ground of want of understanding within the meaning of s. 83 of the Penal Code, is no bar to the conviction of a person charged under s. 411 of the Penal Code with receiving the property alleged to have been stolen. **QUEEN v. BHAGARAT KESAVA SARANU** I. L. R., 6 Mad., 373

14. ——— *Habitually receiving stolen property—Penal Code, s. 413*—A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under s. 413 of the Penal Code of being an habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates. **QUEEN-EMRESS v. BANDEU KANSARI** I. L. R., 19 Cal., 120

15 ——— Possession of stolen property.—*Evidence of theft—Possession of property* which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume, in the absence of explanation that the person in whose possession the property is found must have obtained the possession by stealing. **QUEEN v. POKHRESHTAR ANNE** 23 W. R., Cr., 18

16 ——— *Guilty knowledge—Inference of*—Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner it is for the party in whose possession the property is found duly to account for his possession, and unless he can do so a jury may fairly infer in such circumstances, that it was with a guilty knowledge that the prisoner took that when he knew to be not his own. **QUEEN v. SHUBERTFOODDEEN** 13 W. R., Cr., 28

17 ——— *Fraudulent possession of property reasonably suspected of being stolen—Police Act (XIII of 1856), s. 35 cl. (1)—Duty of the prosecution to prove to the satisfaction of the Court that there exist reasonable grounds of suspicion—Onus of proof*—A person cannot be called on to account for his possession of property under s. 35, cl. (1), of the Police Act (XIII of 1856).

**STOLEN PROPERTY—continued.****1. OFFENCES RELATING TO—continued.**

unless there is evidence which satisfies, not the police officer, but the Court, after judicial consideration, that such property "may be reasonably suspected of being stolen or fraudulently obtained." *QUEEN-EMPRESS v. DHANJIBHAI EDULJI* [I. L. R., 20 Bom., 348]

**18.** — *Presumption—Penal Code, s. 411—Receiver of stolen property—Presumption as to possession of property after theft.*—A common brass drinking-cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884. *Held*, in a case in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a probable presumption of his guilt, but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight that, taken by itself, he ought not to be called upon to explain how his possession was acquired. The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. *Rex v. Adam*, 3 C. & P., 600; *Rex v. Cooper*, 8 C. & P., 318; *Rex v. Partridge*, 7 C. & P., 551, followed. *INA SHRIKH v. QUEEN-EMPRESS*. I. L. R., 11 Cal., 161

**19.** — *India-rubber, Possession of—Smuggling.*—Where a person was charged under s. 411 of the Penal Code with having received stolen property (rubber, the produce of the Government forests at Cachar), and it was not proved that the rubber came from the Government forest, or that it was stolen property, it was held that the conviction under s. 411 was bad, and that he could not be convicted of smuggling—and that he could not be convicted of an offence under the Penal Code. *QUEEN v. BAJO HURI* [19 W. R., Cr., 37]

*QUEEN v. DASSORUT DASS*. 16 W. R., Cr., 63  
And see *QUEEN v. GOUBRE CHURN DOSS*  
[19 W. R., Cr., 38 note]

**20.** — *Presumption—Dishonest receipt of stolen property—Dacoity—Jury.*—In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused. The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity. *EMPRESS v. MALHARI* [I. L. R., 6 Bom., 731]

**21.** — *Possession of members of joint family—Finding stolen property in joint family house.*—*Held* the bare finding of stolen property and arms in the house of a

**STOLEN PROPERTY—continued.****1. OFFENCES RELATING TO—continued.**

joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. *QUEEN-EMPRESS v. NIRMAL DASS*. I. L. R., 22 All., 445

**22.** — *Penal Code, ss. 411, 414—Concealment of stolen property—Husband and wife.*—The only evidence of the receipt of stolen property by a wife was the fact that the property was found in the house where she lived with her husband. *Held* that that constituted the possession of the husband rather than that of the wife. *QUEEN v. DESILVA*. 5 N. W., 120

**23.** — *Res nullius—Bull set at large in accordance with Hindu religious usage—Penal Code, ss. 410, 411.*—A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of the deceased, thereby surrenders and abandons all proprietary rights in the animal, which thereafter is not "property" which is capable of being made the subject of dishonest receipt or possession within the meaning of ss. 410 and 411 of the Penal Code. *Queen-Empress v. Bandhu*, I. L. R., 8 All., 51, and *Queen-Empress v. Jamura*, Weekly Notes, All., 1884, p. 87, referred to. *QUEEN-EMPRESS v. NIHAL*. I. L. R., 9 All., 348

**24.** — *Penal Code, ss. 403, 429—Bull dedicated to an idol.*—A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but *prima facie* the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership. Such an animal can therefore be the subject of theft and criminal misappropriation. *QUEEN-EMPRESS v. NALLA* [I. L. R., 11 Mad., 145]

**25.** — *Retaining stolen property—Penal Code, s. 411—Knowledge.*—The offence of dishonest retention of stolen property, under s. 411 of the Penal Code may be complete without any guilty knowledge at the time of the receipt. *ANONIMOUS* [4 Mad., Ap., 42]

**26.** — *Evidence of guilty knowledge.*—Evidence of guilty knowledge is necessary to a conviction on a charge of dishonestly retaining stolen property. *QUEEN v. DOYAL SHILY-DAR*. 6 W. R., Cr., 87

**27.** — *Penal Code, s. 411—Proof that the property is stolen property necessary—Guilty knowledge of retainer.*—Where a person is accused of an offence under s. 411 of the Penal Code, he cannot, where the circumstances do not raise the presumption that he received the property knowing it to be stolen, be convicted of that offence merely because he is in possession of the property and does not account for his possession. The prosecution must prove both that the property was stolen and that the accused received it dishonestly. *QUEEN-EMPRESS v. BURKE*. I. L. R., 6 All., 224

**28.** — *Penal Code, s. 411—Dishonest retention of stolen property—*



**STOLEN PROPERTY—continued****1. OFFENCES RELATING TO—concluded**

*Property belonging to different owners—Separate convictions.*—Where a person was found in possession of stolen property alleged as belonging to different owners it did not appear that he had received such property at different times.—*Held* that such person could not properly be tried and convicted under s. 41 of the Penal Code separately in respect of the property identified by each owner. *Isah Muck v Queen Empress I I R 15 Cal.*, 511 approved. *QUEEN EMPRESS v MAHMAN*

[L. R., 15 All., 317]

**2. Disposition of stolen property—Penal Code s. 411 Legal presumption on.**

Where a document purporting to be a Collectorate notice form is part of a record and found by the Court to be genuine it was held to be in the possession of the person charged with retaining stolen property it was held that in a matter of this kind it was right to raise legal presumption arising out of the ordinary course of business and to dispense with direct evidence of the document having been actually on the record or stolen from it. Though it be true that before a man can be convicted of receiving stolen property knowing it to be stolen it must be shown that property has been stolen.—*Held* that the disappearance of the document from the record is the substitution of an imitation of it in its place showed that it must have been taken with a dishonest object. *ISAH CHANDRA CHANDRA v QUEEN EMPRESS* I. L. R., 21 Cal., 328

**2. DISPOSAL OF, BY THE COURT.**

**30. — Right to stolen property.**—*Property in cash or a fee.*—The property in stolen cash, and bills or notes payable to bearer which circulate as cash, is not payable from possession ordinarily. The property in stolen goods remains in the person from whom they are stolen. *ANONYMOUS*

[1 N. W., Ed 1873, 288]

**31. — Currency note.**—*Right to as between Government and the person from whom it has been stolen where thief has cashed it at treasury.* A R O currency note was changed by one A at the Government Treasury on the Shetray Hills. A was subsequently convicted by the Sessions Court of sale of having stolen the note from one S. The note was produced in evidence at the trial and the Court directed it to be given up to S, from whom it had been stolen. *Held* that the Sessions Court was wrong. A note of this kind being in legal view money the property in it passes by mere delivery and nothing short of fraud in taking an instrument payable to bearer will constitute an exception upon the rule. *QUEEN v MURPHY* IN THE MATTER OF THE PETITION OF COLLECTION OF SALARY [7 Mad., 233]

**32. — Order of Court as to property.**—*Restoration of property by Criminal Court.*—If personal property of which a complainant has been forcibly or illegally deprived, comes into the Magistrate's hands,

**STOLEN PROPERTY—continued.****2. DISPOSAL OF, BY THE COURT—continued**

he may order its restoration to its owner, otherwise the complainant must seek to recover it or its value through the Civil Court. *RAMSARAY DOSEY v LUCHMOVEE DABRA* W. R., 1834, Cr. 6

**33. — Criminal Procedure Code, 1861, 1869 s. 132A.**—Under a 132A, Criminal Procedure Code (Act VIII of 1863) no order can be passed with reference to the disposal of any property in a Criminal Court, unless that property is produced before the Court: such order must be made at the time of passing judgment. IN THE MATTER OF THE PETITION OF PASH MOHUN GOSHAMY, RASH MOHUN GOSHAMY v KALI KIR KANA 19 W. R., Cr. 3

**34. — Disposal of, by Magistrate where no order had been made by lower Court—Criminal Procedure Code, 1861, s. 132A, 132B.**—The Assistant Magistrate, on a review of the proceedings of the subordinate Magistrate, passed orders directing that certain produce should be delivered over to the parties whom he considered entitled thereto. The subordinate Magistrate had passed no orders under a 132A of the Criminal Procedure Code. *Held* that the orders of the Assistant Magistrate were made without any jurisdiction. *ANONYMOUS* 5 Mad., Ap., 92

**35. — Disposal of, where prisoner acquitted.**—Where a person was accused of dishonestly receiving stolen property, knowing it to be stolen and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen.—*Held* that the Magistrate was competent, believing that the property was stolen to make an order under s. 418 of Act X of 1872 regarding its disposal. *EXPRESS v NILLAMBHAR BART* I. L. R., 2 All., 278

**36. — Disposal of by Criminal Court—Criminal Procedure Code, 1872, Ch. XXX, ss. 415, 416, 417.**—*Restoration of property made over by the police.*—A was charged before the police with theft of certain property. The police considered that no theft had been committed, and reported the matter to a second class Magistrate, who, agreeing with the police, ordered the property to be restored to A. On application by the complainant, the District Magistrate found that A had recovered, though not dishonestly, the property from B, a deceased person, and ordered the property to be given by the police to B's heirs. It was so given. *Held* that the provisions of Ch. XXX of the Code of Criminal Procedure do not apply to such a case. Ss. 415, 416 and 417 contemplate proceedings preliminary to, and independent of inquiry upon general principles where there has been an inquiry, or a trial, and the accused person is discharged or acquitted by any Criminal Court that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by s. 418, such Court is of opinion that "any offence appears to have been committed" regarding it, then such order as appears right for the disposal of the property may be made. The High Court

**STOLEN PROPERTY—continued.****2. DISPOSAL OF, BY THE COURT—continued.**

cannot direct the restoration of the property already delivered by the police under the illegal order of the District Magistrate. *IN RE ANNAPURNABAI*

[I. L. R., 1 Bom., 630]

IN THE MATTER OF THE PETITION OF BASUDEB SURMA GOSSAIN. *BASUDEB SURMA GOSSAIN v. NAZIROODDEEN* . . . I. L. R., 14 Calc., 834

But see *IN RE HAREE BUNDRHO SANTRA*

[5 W. R., Cr., 55]

37. ————— *Criminal Procedure Code, 1882, s. 517—High Court's Criminal Procedure Act (X of 1875), s. 115—"Any property"—Reference to Police Magistrate—Evidence on reference. Remun.—*The words "any property" in s 115 of the High Court's Criminal Procedure Act (X of 1875) include as well property voluntarily produced before the Magistrate by a witness in the case as property seized by the police or found on the person of the prisoner. The reference to a Magistrate under s 115 of the High Court's Criminal Procedure Act, X of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statements of their respective cases, to have made out a *prima facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives. *REG. v. RAMDAS SAMALDAS. EX-PARTE MADAYJI DHAR- RAMSI* . . . 12 Bom., 217

38. ————— *Criminal Procedure Code, 1882, s. 523 Code of Criminal Procedure, 1872, ss. 415 and 416—Delivery of property seized or stolen—Inquiry into ownership.—*The provisions of s 523 of the Code of Criminal Procedure (Act X of 1882) are wider than the corresponding provisions of the Code of 1872 (ss. 415 and 416), and they enable the Magistrate to enquire into the ownership of property seized by the police, and deliver it to the person entitled to it, instead of to the person from whom it is taken. *In re Annapurnabai, I. L. R., 1 Bom., 630*, distinguished. *QUEEN-EMPERESS v. JOTI RAJNAK. I. L. R., 8 Bom., 338*

39. ————— *Criminal Procedure Code, 1882, ss. 517, 520, 523—Order of Magistrate restoring property alleged to be stolen—District Magistrate. Power of, to set aside such order.* Where on acquittal a Criminal Court passes an order for restitution of property under s 517 of the Criminal Procedure Code (Act X of 1882), the proper course for the District Magistrate, if he thinks the order improper, is to direct it to be saved under s 520 and not to treat the property as subject to an order under s 523 of the Code, and set it aside. *QUEEN-EMPERESS v. APHAM UMAR* [I. L. R., 8 Bom., 575]

40. ————— *Criminal Procedure Code, 1882, s. 517—Order as to property*

**STOLEN PROPERTY—continued.****2. DISPOSAL OF, BY THE COURT—continued.**

*as to which offence has been committed—Discharge of accused—*On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate, under s 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government. *Held* that, the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal and must be set aside. In setting it aside the High Court held, however, following *In re Annapurna Bai, I. L. R., 1 Bom., 630*, that they had no power to order restitution of the elephant. IN THE MATTER OF THE PETITION OF BASUDEB SURMA GOSSAIN. *BASUDEB SURMA GOSSAIN v. NAZIRODDIN*

[I. L. R., 14 Calc., 834]

41. ————— *Criminal Procedure Code, s. 517—Disposal of calf, not in esse at time of theft.—*R's cow having been stolen, the thief, after a lapse of a year and a half, was convicted. Six months after the theft, V innocently purchased the cow which, while in his possession, had a calf. The Magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V to R. *Held* that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal. *IN RE VERNEDE* . . . I. L. R., 10 Mad., 25

42. ————— *Criminal Procedure Code (Act X of 1882), ss. 517 and 523—Disposal of property produced before a Court during an inquiry—Restoration of previous possession if no offence has been committed.—*S 517 of the Code of Criminal Procedure is the only section under which a Court can make an order for the disposal of property produced before it in the course of an inquiry or trial. And it has jurisdiction to pass the order only if the case falls within the section, that is, if it is property "regarding which an offence appears to have been committed, or which has been used for the commission of an offence." Otherwise, the only legal order which the Court can pass is one restoring the previous possession. A Presidency Magistrate, finding the evidence not sufficient to warrant a conviction, discharged the accused, but ordered the property which had been produced during the inquiry to be detained until the title of the rightful owner was proved before a Civil Court. On a subsequent day he, apparently acting under s. 523 of the Code, ordered the property to be delivered to the complainant, from whose possession it had not been taken. *Held* that both the orders were *ultra vires*. The Magistrate was therefore directed to dispose of the property in a legal manner. If he found that the case fell within s 517, he should pass such order as he thought fit; if he found that it did not he must restore the previous possession. *IN RE DEVIDIN DERRATRASAD*

[I. L. R., 22 Bom., 844]

43. ————— *Criminal Procedure Code (Act X of 1882), ss. 517, 523, 524—*

**STOLEN PROPERTY—cont. next****2. DISPOSAL OF BY THE COURT—cont. next**

*Order as to standing crops on land of which possessor asks to be restored to possession.*—On 27th September 1897 complainant charged one R with criminal trespass under s. 447 of the Penal Code (Act XLV of 1860). He alleged that in the previous July R had entered into possession of the land and sowed rice upon it and that, when in the month of September 1897 he (the complainant) went to the field R had turned him out by force and refused to vacate the land. On the 1st November 1897 the case was heard by the third class Magistrate, who convicted R of the offence charged. On the following day (18th November 1897) the complainant applied to the Magistrate under s. 533 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant but attached the crops under Ch. XLIII of the Criminal Procedure Code. Thereupon one P intervened and claimed the crops as having been sown by himself. His claim was disallowed and the crops were ordered to be sold and the proceeds credited to Government under ss. 23 and 54 of the Code. *Held* that the order passed under ss. 523 and 54 with reference to the crops were illegal. The crops were no property in respect of which the offence was committed nor were they used in the commission of the offence. They were not such property as is referred to in s. 517 523 or 54 of the Criminal Procedure Code. **NARAYAN GOVIND v. BHAIJI** I. L. R., 23 Bom., 494

**STOLEN PROPERTY—concluded****2. DISPOSAL OF BY THE COURT—concluded**

45. *Criminal Procedure Code 1892 s. 517—Order for the disposal of property by first class Magistrate—appeal from such order to the Sessions Court.*—A decree-holder preferred a complaint against his judgment-debtor, charging them, under s. 207 of the Penal Code (Act XLV of 1860) with concealing certain movable property for the purpose of screening it from execution. No property was found by the police to have been so concealed in the house of a third person. The chief constable took possession of it, and kept it in his custody pending the inquiry which the first class Magistrate was about to make in the matter. Before the Magistrate entered upon the inquiry the complainant caused the property in the custody of the police to be attached and sold in execution of his decree against the accused. At the Court-sale the complainant himself purchased the property and thereupon the Magistrate ordered the property to be handed over to him. This order was reversed on appeal by the Sessions Judge. *Held* that the order of the first class Magistrate for the disposal of the property was no and could not have been, made under s. 517 of the Criminal Procedure Code (Act X of 1892) as the Magistrate did not hold any inquiry nor form any opinion on the concealment of such property as to whether "any offence appeared to have been committed regarding such property." The Sessions Judge had therefore no jurisdiction to hear any appeal from the first class Magistrate's order. **IN RE ANANT RAMCHANDRA LOTHIAN** [I. L. R., 10 Bom., 197]

46. *Criminal Procedure Code 1892 ss. 517 520—An order passed under s. 517 of the Code of Criminal Procedure may be revised by a Court of appeal, although no appeal has been preferred in the case in which such order was passed.* **QUEEN EXPRESS v. ANKUR** [I. L. R., 9 Mad., 448]

**STOPPAGE IN TRANSITU**

*See SALE OF GOODS.*

[I. L. R., 17 Bom., 62]

*See VENDOR AND PURCHASER—VENDOR'S RIGHTS AND LIABILITIES OF*

[3 Agrs., 11]  
I. L. R., 14 Bom., 57

**STORING JUTE**

*Storage of jute without license.* **Bengal Act II of 1872, s. 31—Criminal Procedure Code 1851 Ch. XV—Before a conviction for storing jute in a warehouse without a license can be had under s. 4 of Bengal Act II of 1872, proceedings should be taken under the provisions of Ch. XV of the Criminal Procedure Code, 1861 as required by s. 34 of the former Act. **QUEEN v. BHUGWAN CHANDRA KOOBDOO** 19 W. R., Cr., 4**

44. *Criminal Procedure Code 1892 ss. 517 and 523—Evidence of owner of property.* **Evidence Act (I of 1872) s. 25—Confession made to police officer.** *Admissibility of other purposes than as a confession.*—Statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them although inadmissible as evidence against them at the trial for the offence in which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under s. 523 of the Criminal Procedure Code (Act X of 1882). An order after trial, made by a Criminal Court for the restoration of property under s. 517 of the Criminal Procedure Code (Act X of 1882) is conclusive as to the immediate right to possession; where an order has to be made under s. 523, the Magistrate may the inquiry proceed on such evidence as is available and make an order for handing the property to the person he thinks entitled. This does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for conversion. The Criminal Court declined to interfere with an order made by the Magistrate under s. 523 of the Criminal Procedure Code for the delivery of property where the

32. *made such order upon the mere evidence of the accused to the police that the property of which a person has been found guilty of being illegally deprived, comes.* **TRIBHOVAN MAHAPAND** [I. L. R., 9 Bom., 131]

**STRANGER**

— Introduction of, into joint family.

See HINDU LAW—JOINT FAMILY—  
POWERS OF ALIENATION BY MEMBERS—  
OTHER MEMBERS.

[I. L. R., 1 All., 429  
I. L. R., 2 All., 898]

See HINDU LAW—PARTITION—RIGHT TO  
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[18 W. R., 23  
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**STRIDHAN.**

See CASES UNDER HINDU LAW—STRIDHAN.

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WIDOW—POWER OF DISPOSITION OR  
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**STRIKING OFF EXECUTION-PROCEEDINGS.**

See CASES UNDER ATTACHMENT—STRIKING OFF EXECUTION-PROCEEDINGS.

See CASES UNDER EXECUTION OF DECREE—  
STRIKING OFF EXECUTION-PROCEEDINGS.

See CAPS UNDER LIMITATION ACT, 1877,  
ART. 179 (1871, ART. 167; 1859, s. 20)—  
STEP IN AID OF EXECUTION—STRIKING  
CASE OFF FILE, EFFECT OF.

See LIMITATION ACT, 1877, ART. 179 (1871,  
ART. 167; 1859, s. 20)—STEP IN AID OF  
EXECUTION—SUITS AND OTHER PRO-  
CEEDINGS BY DECREE HOLDER.

[I. L. R., 4 Calc., 877]

**SUB-LETTING.**

See LANDLORD AND TENANT—FORFEITURE  
—BREACH OF CONDITIONS.

[2 Agra, Pt. II, 202  
W. R., 1864, Act X, 31  
I. L. R., 20 All., 469]

See LANDLORD AND TENANT—TRANSFER  
BY TENANT . I. L. R., 14 Bom., 384  
[I. L. R., 15 All., 218, 231]

**SUBORDINATE COURT.**

See APPEAL TO PRIVY COUNCIL—CASES IN  
WHICH APPEAL LIES OR NOT—APPEAL-  
ABLE ORDERS . I. L. R., 3 Calc., 522

See CASES UNDER CRIMINAL PROCEDURE  
CODE, s. 437.

**SUBORDINATE COURT—concluded.**

See SANCTION FOR PROSECUTION—POWER  
TO GRANT SANCTION.

[I. L. R., 22 Calc., 487]

Duty of—*Conflict of opinion in High  
Courts.*—The lower Courts are bound to follow the  
concurrent decisions of the Court to which they are  
subordinate, and are not at liberty to adopt a contrary  
opinion expressed by another High Court. KORBAN  
ALLY MIRDHA v. SHARODA P. OSHAD AICH

[I. L. R., 10 Calc., 82]

S. C. KORBAN ALI MIRDHA v. PITUMBARI DASI  
[13 C. L. R., 256]

**SUBORDINATE JUDGE, JURISDICTION OF—**

See COMPANIES ACT, s. 130.

[I. L. R., 17 All., 252]

See DEKAN AGRICULTURISTS' RELIEF  
ACT, s. 3 . I. L. R., 15 Bom., 30  
[I. L. R., 16 Bom., 123]

See DEKAN AGRICULTURISTS' RELIEF  
ACT, s. 4 . I. L. R., 19 Bom., 46

See DEKAN AGRICULTURISTS' RELIEF  
ACT, s. 15 (d). I. L. R., 16 Bom., 351

See EXECUTION OF DECREE—TRANSFER OF  
DECREES FOR EXECUTION AND POWER  
OF COURT, ETC. I. L. R., 18 Bom., 61

See INSOLVENCY—INSOLVENT DEBTORS  
UNDER CIVIL PROCEDURE CODE.  
[I. L. R., 21 Bom., 45]

See PLAINT—RETURN OF PLAINT.  
[I. L. R., 20 Bom., 675]

See PROBATE—JURISDICTION IN PROBATE  
CASES . I. L. R., 25 Calc., 341

See RIGHT OF SUIT—CHARITIES AND  
TRUSTS . I. L. R., 15 Bom., 148  
[I. L. R., 21 Bom., 48]

See VALUATION OF SUIT—SUITS.  
[I. L. R., 14 Mad., 183  
I. L. R., 22 Bom., 315]

1. — Suit brought to set aside pro-  
bate.—A Subordinate Judge has no jurisdiction to  
try a suit brought to set aside a probate. BULDER  
SURMAH v. TARANATH SURMAH 22 W. R., 418

2. — Complaint under Mad. Reg.  
IV of 1818, s. 35, cl. 1.—A Subordinate Judge  
has jurisdiction to entertain a complaint under cl. 1,  
s. 35, of Madras Regulation IV of 1816. Ponnusami Pillai v. Pachai, I. L. R., 2 Mad., 339,  
overruled PONNUSAMI v. KRISHNA  
[I. L. R., 5 Mad., 222]

3. — Trial of suit for land—Officer  
appointed in the Sonthal Pergunnahs under s. 2, Act  
XXXVII of 1855—Bengal Civil Courts Act, 1871  
—Reg. III of 1872, s. 5.—An officer in the Sontha  
Pergunnahs, appointed by the Lieutenant-Governor of  
Bengal under s. 2 of Act XXXVII of 1855, although  
vested with powers of a Subordinate Judge under Act

# SUBORDINATE JUDGE, JURISDICTION OF—continued

VI of 1871, has jurisdiction to try suits in regard to land, etc., where the value of the matter in dispute exceeds the value of Rs 1000. **RAM RUDRA CHATTERJEE v RAM PROAD DAS** 5 C L R., 128

4. — Valuation of suits.—*Order of causes of action—Civil Procedure Code (Act VIII of 1859), s 8 6—Act V of 177) s 15—Bengal Civil Courts Act (VI of 1871), s 19 8 C of Act VIII of 1872 corresponding with s. 15 of Act X of 1877 which provided that "every suit shall be instituted in the Court of the lowest grade competent to try it," did not affect the jurisdiction of a Subordinate Judge to try a suit wherein several causes of action were joined, the cumulative value of which was over Rs 1000, notwithstanding that, if separate suits had been brought on these several causes such suits must have been instituted in the Court of the Munsif.* **MASMOOLAN KHAN v RAM LALL AGNEWALLAH**

[L L R., 6 Cal., 6

5. — Suit for account.—*Claim valued at less than Rs 1000 but value to be accounted for exceeds that sum—Quere—Whether a first class subordinate Judge has jurisdiction to try a suit for an account where the plaintiff states that the property in the hands of the defendant, in respect of which the account is prayed exceeds Rs 1000, but values the claim at Rs 1000.* **MAHOMED GANESH v BAWA RANCHARAN DAS** 1 L R., 2 Bom., 219

6. — Appeal transferred.—*Bengal Civil Courts Act, 1871—N W P Rent Act, 1851, ss 206, 207, 208—A Subordinate Judge, to whom an appeal is transferred under the Bengal Civil Courts Act (VI of 1871) has not the power to dispose of it in the manner provided by ss. 206, 207, and 208 of the N W P Rent Act, 1851. The District Judge alone has the power to dispose of appeals in that manner.* **Ram Persad v Ras Kishan**, 1 L R., 6 All., 36, followed. **LODHI SINGH v ISHRI SINGH**

[L L R., 6 All., 295

7. — Appeal transferred.—*Act XII of 1881 ss 183, 206, 207, 208—The defendant in a suit instituted in a Civil Court set up as a defence that it was cognizable in the Revenue Court. The Court of first instance (Munsif) disallowed this defence and gave the plaintiff a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue Court. The appeal was transferred by the District Judge to the Court of the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that it was not cognizable in the Civil Courts, but in the Revenue. Held that, looking to the terms of ss. 183, 206, 207, and 208 of the N W P Rent Act, the District Judge had no power to transfer the appeal to the Subordinate Judge who had not the power vested in the Appellate Court by s. 208.* **RAM PRASAD v RAI KISHAN**

1 L R., 6 All., 36

8. — *N W P Rent Act (XII of 1881), ss. 93, 206, 207, and 208—Bengal, N.W.P., and Assam Civil Courts Act (XII of 1887), s. 22, cl 3—Transfer of appeal in a Rent Court suit from the District Judge to the Subordinate*

# SUBORDINATE JUDGE, JURISDICTION OF—continued

*Judge—Powers exercisable by the Subordinate Judge—Cl. (3) of s. 22 of Act XII of 1887 makes ss. 206, 207, and 208 of Act XII of 1881 applicable to appeals in suits within s. 93 of Act XII of 1881 when such appeals have been transferred under s. 22 of Act XII of 1887 by a District Judge to a Subordinate Judge and are being heard by such Subordinate Judge.* **NANDAY PRASAD v CHAVOOR**

[L L R., 16 All., 383

9. — Appeal referred by District Judge.—*Bengal Civil Courts Act (VI of 1871), s. 26—Power of review—Civil Procedure Code, 1859 s. 376.—Where a Subordinate Judge hears and disposes of an appeal referred to him by the District Judge under Act VI of 1871, s. 26, he does so as District Judge, and has therefore by implication the same power of reviewing his judgment as a District Judge has under s. 376, Act VIII of 1859.* **IN THE MATTER OF SHAMA CHEN BRUTI v PATSY & Co.**

[18 W. R., 293

10. — Appeal from Munsif after Act XIV of 1869.—*Assistant Judges in Bombay Presidency—A decision passed on appeal from a decision of a Munsif by an Assistant Judge, subsequent to the date on which Act XIV of 1869 came into operation (1st March 1869), and prior to the date on which the Assistant Judges in the Bombay Presidency were invested with appellate powers under the Act (4th April 1863), was not illegal, as the Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, under which the Assistant Judges had power to hear appeals.* **SAKHO NARAYAN KHAYDALKAR v VARATAY BHICAJI KHAYDALKAR**

[8 Bom., A. C., 238

11. — Power to inquire into application for execution of decree against ancestor of Sirdar.—*Agent for Sirdars.—Where a person's name was entered in red ink in the Dekkan Sirdars' list, indicating that he was entitled only to the rank and precedence of a third class Sirdar, it was held that a Subordinate Judge had jurisdiction to inquire into an application for execution of a decree passed against his ancestor by the Agent for Sirdars in the Dekkan.* **MAHARAJ GIN v ANANDRAO**

[8 Bom., A. C., 25

12. — Mortgage lien above limit of Subordinate Judge's jurisdiction.—*Attachment—One D applied to the subordinate Court of Saswad for the attachment and sale of certain valuable property in execution of a money-decree, under which the sum of Rs 317-4-9 was due to him from his judgment-debtor. On the attachment of the property the applicant presented a petition to the Court to the effect that he (applicant) had a mortgage lien on the property for Rs 1000, and that it might be sold subject to his lien and possession as mortgagee. The Subordinate Judge raised the question whether he had jurisdiction to entertain the application and inquire into the merits of the alleged mortgage. He was of opinion that he had, and referred the question for the opinion of the High Court, which concurred in*

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

his opinion and answered the question in the affirmative. *PURSHOTAM SINDHIVAR v. DHONDU AMBIT* [I. L. R., 6 Bom., 582]

13. ——— Mortgage lien, Inquiry into—*Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor.*—The plaintiff obtained a decree against *N* and *R* for Rs. 11-0 in the first class subordinate Court of Satara, and applied for execution against the person of *R*. When brought before the Court, *R* applied to be declared an insolvent under s. 314 of the Civil Procedure Code (Act X of 1877). The plaintiff then moved the Court to strike off his application for execution, and to send his decree to the second class subordinate Court of Vita for execution. The Satara Court accordingly sent the decree to the Vita Court and granted a certificate to the plaintiff under ss. 223 and 224 of the Civil Procedure Code. The Satara Court also informed the Vita Court that proceedings were pending in the Satara Court regarding the insolvency of *R*. On the application of the plaintiff, the Vita Court attached certain immovable property belonging to *N* and *R*. Thereupon one *T* claimed a mortgage lien on it for Rs. 115-9-3. The Vita Court therefore referred for the opinion of the High Court the questions whether it had jurisdiction to inquire into the validity of the mortgage lien claimed by *T*, and whether the execution of the decree in the Vita Court was to be stayed, pending the inquiry into the alleged insolvency of *R* in the Satara Court. *Held* that the Vita Court had jurisdiction to inquire into the validity of the alleged mortgage lien; that execution in that Court against *R* was to be stayed pending the inquiry in the Satara Court regarding his alleged insolvency, but that there was no reason for staying the execution of the decree against *N* in the Vita Court. *VISHNU DIKSUR v. NARSINGHRAV* [I. L. R., 6 Bom., 584]

14. ——— Subordinate Judge invested with powers of Small Cause Court—*Civil Procedure Code, 1877, s. 525—Arbitration award.*—A Subordinate Judge, although invested with the jurisdiction of a Judge of a Court of Small Causes, does not on that account become a Judge of a Court of Small Causes, nor his Court such a Court within the meaning of the Civil Procedure Code. He therefore has power, within the limits of his ordinary pecuniary jurisdiction, to receive and file awards of arbitrators under s. 25 of the Civil Procedure Code (Act X of 1877). *BAKRISUNAR v. LAKSUNMAN* . . . . . I. L. R., 3 Bom., 219

15. ——— Difference between a Court of Small Causes constituted under Act XI of 1865 and a Court of a Subordinate Judge invested with the jurisdiction of a Judge of a Small Cause Court under s. 28 of Act XIV of 1869—*Transfer of decree for execution—Act XI of 1865, s. 20—Code of Civil Procedure (Act XIV of 1869), s. 223—Act XIV of 1869, s. 28.*—The Courts of Subordinate Judges invested with the jurisdiction of a Judge of a Small Cause Court under s. 28 of Act XIV of 1869 do not thereby be-

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

come "Courts of Small Causes constituted under Act XI of 1865." They merely exercise a similar jurisdiction. This makes their decisions final in the cases to which the jurisdiction extends, but it does not imply that the variations of procedure are prescribed expressly for the Courts constituted under Act XI of 1865 are applicable to Courts constituted under a different Act and subject to different conditions. The Court of a Subordinate Judge exercising Small Cause Court powers is, under s. 5 of the Code of Civil Procedure (Act XIV of 1869), one of the "other Courts exercising jurisdiction of a Court of Small Causes," and, as such, its procedure is governed by the Civil Procedure Code without the variations provided by Act XI of 1865. Under s. 223 (d) of the Civil Procedure Code the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution, without requiring a certificate under s. 20 of Act XI of 1865. For this purpose, the two branches or sides of the Subordinate Judge's Court may be regarded as different Courts. *BRAGVAN DATALJI c. BALU* . . . . . I. L. R., 8 Bom., 230

16. ——— Suit for interest due on a mortgage.—The plaintiff sued to recover interest due on a mortgage of immovable property. The defendant pleaded that the plaintiff had received the profits of the mortgaged property, and had got possession of certain materials worth four thousand rupees, and that the mortgage-debt had been paid off. The suit was tried before a Subordinate Judge in his capacity of a Judge of a Court of Small Causes, who held that he had no jurisdiction to go into the questions raised by the defendant in his defence, and he gave judgment for the plaintiff. *Held*, on application to the High Court, that the defence being virtually that the debt had been paid off, and that nothing was due to the plaintiff, the Subordinate Judge had jurisdiction to decide the suit. *BABURAY AMBIT PETHE v. GANPATRAY DAVODAR* [I. L. R., 10 Bom., 69]

17. ——— Civil Procedure Code (Act XIV of 1869), s. 295—Decree passed by Subordinate Judge—Decree by same Court in exercise of its Small Cause jurisdiction—*Rateable distribution of assets.*—Certain moveable property was at first attached in execution of a money-decree passed by a Subordinate Judge in his Small Cause jurisdiction, of which a part was afterwards sold. In execution of a money-decree passed by the same Subordinate Judge in his ordinary jurisdiction, the remaining property was attached and sold. Prior to the date of this sale, the applicant applied for execution of a money-decree passed in his favour by the same Subordinate Judge in his Small Cause jurisdiction, and prayed for rateable distribution of the proceeds along with other decree-holders. *Held* that the application must be allowed. Although a Subordinate Judge invested under Act XIV of 1869, s. 28, with Small Cause powers, acquires the jurisdiction of two Courts, he does not become the Judge

# SUBORDINATE JUDGE, JURISDICTION OF

of two Courts, but remains the Judge of a Subordinate Court. *MAYHALL v. NARAYAN KRISHNA*

[I. L. R., 9 Bom., 174]

18

*Ex parte* of *decree* *Trust for a decree for execution—Act XIV of 1855 s. 2* *Act XIV of 1859, s. 28*—The plaintiff, having obtained a money-decree against *H* and others in a suit in the Subordinate Judge's Court at Dhulia, applied for execution by attachment and sale of their immovable property. That property was accordingly sold, but before the realization of the assets the defendant who also had obtained a money decree against the same judgment debtors in the same Court in its Small Cause jurisdiction applied for the execution of his decree by attachment and sale of the immovable property which had already been attached at the instance of the plaintiff. The Court under s. 295 of the Civil Procedure Code (Act XIV of 1852) ratably distributed the proceeds of the sale between the plaintiff and the defendant. The plaintiff now brought this suit in the Small Cause jurisdiction of the Subordinate Judge's Court at Dhulia to recover from the defendant the amount paid to him, alleging that it had been illegally paid as the procedure laid down in s. 223 of the Code had not been followed. *Held* that, as ruled in *Dhruvan Dargal v. Bala* I. L. R. 8 Bom. 250 a Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution whether the suit is a Small Cause suit or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are really co-extensive there is no distinction of sdes or branches. But where as in some cases the ordinary jurisdiction is wider locally than the Small Cause jurisdiction the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a Small Cause should not generally be executed on property beyond the Small Cause jurisdiction without a transfer, e.g., a dealing with the execution as in a suit tried in the usual way for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court. *DHARAMDAS SANTIDAS v. ANANAS GOVIND*

[I. L. R., 9 Bom., 237]

19

*Civil Procedure Code (Act XIV of 1852) s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice*—In a suit brought by the plaintiff to recover Rs. 79 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court, *Held* that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off. *RAMPRATAP v. GANESH BANGANATH*

[I. L. R., 12 Bom., 31]

# SUBORDINATE JUDGE, JURISDICTION OF—continued

20

*Appeal—Suit cognizable by a Court of Small Causes—Act XI of 1855, ss. 2 & 6, 12, 21—Bombay Civil Courts Act (XIV of 1859) s. 28—Final decision*—The plaintiff sued to recover Rs. 5 as damages for the wrongful removal of a tree. The suit was filed in the Court of a second class Subordinate Judge, who was invested, under Act XIV of 1859, s. 28 with the jurisdiction of a Judge of a Court of Small Causes. The case which was in itself of the nature of a Small Cause was however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree and awarded the claim. *Held* that, the suit having really been a Small Cause, no appeal lay to the District Court though the Subordinate Judge did not use the procedure of Act XI of 1855. Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction even if he was not quite alive to it at the time. A suit taken cognizance of under s. 2 & 6 or 17 of the Mofussil Small Cause Court Act (XI of 1855) does not cease to be a suit tried under the Act, because of some divergence from its summary procedure. A surplussance of form and elaborateness does not change the character of the decision for the purpose of its finality. S. 23 of the Bombay Civil Courts Act (XIV of 1859) does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts, but still it creates an additional and distinct jurisdiction. Since Act IX of 1872 came into force, the Court is to be regarded as two Courts in such cases. *KATAMBER VAJIRHET v. DRONDI NAYLAPA*

[I. L. R., 12 Bom., 456]

21.

*Suit against Trustee—Person collecting or receiving subscriptions for building a temple—Civil Procedure Code (Act XIV of 1859), s. 30—A person collecting and receiving subscriptions for the purpose of building a temple in pursuance of a resolution come to at a meeting of the community, holds them in the capacity of a trustee, and a suit in respect thereof should be filed under s. 30 of the Civil Procedure Code (Act XIV of 1852), in a Subordinate Judge's Court, and not in a Small Cause Court. *MAHOMED NATHURHAI v. HUSEIN* I. L. R., 23 Bom., 729*

22.

*Power of Subordinate Judge to try Munsif's case—Act XVI of 1868, ss. 13, 17, 18—Bengal Civil Courts Act (VI of 1871), ss. 19, 20—Civil Procedure Code, ss. 15 & 58—Per PETREHAK C.J. and BROTHURST MAHMOOD, and DETHOTT, JJ.*—The object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge's Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1000. *Per PETREHAK C.J.*—S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it. *Per DURNOTT, J.*—The words in s. 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow, and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. *BRODHBURST and MAHMOOD, JJ.*—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades. *Russick Chunder Mohunt v. Ram Lal Shaha*, 22 W. R., 301, and *Sufee-ool-lah Sircar v. Begum Bibee*, 25 W. R., 219, followed. *Per OLDFIELD, J.*—S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them. *Held*, therefore, by *PRATHERAM, C.J.*, and *OLDFIELD, BRODHBURST, and MAHMOOD, JJ.*, where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge. *Per DURNOTT, J.*—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction. *NIDHI LAL v. MAZHAR HUSAIN*

[I. L. R., 7 All., 230]

23. ————— *Civil Procedure Code (Act XIV of 1892), s. 15—Munsif, Jurisdiction of.*—S. 15 of the Civil Procedure Code does not preclude a Subordinate Judge from trying a suit within the jurisdiction of the Munsif's Court.

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

*Ledgard v. Bull*, L. R., 13 I. A., 134, distinguished. *MATRA MONDAL v. HARI MOHAN MULLICK*

[I. L. R., 17 Calc., 155]

See AUGUSTINE v. MEDLICOTT

[I. L. R., 15 Mad., 241]

24. ————— *Bengal Civil Courts Act (VI of 1871), s. 18—Sale in execution of decrees—Local limits of jurisdiction.*—Where a District Judge, under the authority vested in him by s. 18 of the Bengal Civil Courts Act (VI of 1871) has assigned to a Subordinate Judge the local limits of his particular jurisdiction, that officer can only exercise jurisdiction within such local limits. *Obhoy Churn Coondoo v. Golam Ali*, I. L. R., 7 Calc., 410, and *Prem Chand Day v. Mokkoda Debi*, I. L. R., 17 Calc., 699, followed. *DAKHINA CHURN CHATTOPADHYA v. BIASH CHUNDER ROY*

[I. L. R., 18 Calc., 526]

25. ————— *Concurrent jurisdiction with District Munsif—Suit of less than Rs 500 in value—Quære—Whether a Subordinate Judge has not concurrent jurisdiction with a District Munsif in suits less than Rs 500 in value.* *Matra Mondal v. Hari Mohan Mullick*, I. L. R., 17 Calc., 155, and *Nidhi Lal v. Mazhar Husain*, I. L. R., 7 All., 230, followed. *KRISHNASAMI v. KANAKASABAI*

I. L. R., 14 Mad., 183

26. ————— *Bombay Civil Courts Act (XIV of 1869), s. 28—Provincial Small Cause Courts Act (IX of 1887), s. 33—Judge exercising Small Cause Court jurisdiction.*—S. 33 of Act IX of 1887 precludes a Subordinate Judge invested with Small Cause Court powers under s. 28 of Act XIV of 1869 from entertaining a counter claim beyond the pecuniary limits of his Small Cause Court jurisdiction. *BAROTE GAGA PARSHOTAM v. PANJU RAMJAN*

[I. L. R., 14 Bom., 371]

27. ————— *Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1857), s. 13, cl. 2—District Judge, Power of—Transfer of property Act (IV of 1882), ss. 88, 90—Sale in execution of mortgage decree—Execution of decree.*—When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under s. 13 (2) of the Bengal, N.-W. P., and Assam Civil Courts Act, to assign to them different areas so as to limit or define their respective jurisdictions. The Court of such a Subordinate Judge which passed a mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property lying within the district, but outside the area assigned to it by the District Judge. *BACHU KOER v. GORAB CHAND*

I. L. R., 27 Calc., 272

28. ————— *Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal*



# SUBORDINATE JUDGE, JURISDICTION OF—continued

—*Effect of objection to jurisdiction on Effect of when a case is transferred to a District Court*—An appeal having been entered in a District Court against the decision of a District Munsif was heard in part by the District Judge who remanded the suit to the District Munsif for finding on fresh issues. Findings having been duly returned the District Judge transferred the appeal to the Subordinate Judge who heard and determined it. *Held* that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits under s. 19 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of s. 13 of the said Act which enables a District Judge to transfer appeals to him and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. s. 13 does not authorize the transfer to a Subordinate Judge of an appeal part heard and pending before the District Judge. The fact that objection was taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction. **KUMARASAMI PILLAI v. SUBBARAYA REDDIAR**

(I L R., 23 Mad., 314)

# SUBORDINATE JUDGE, JURISDICTION OF—continued

*malicious prosecution undertaken by him at the instance of his superior officer, to clear his character—Subordinate Judge, Power of to try such suit*—The defendant who was a Mamlatdar was required by his superior officer to clear his character from certain charges of bribery which had been brought against him in an anonymous letter, and he accordingly prosecuted the plaintiffs whom he suspected of having written the letter. The plaintiffs were convicted and sentenced by a Magistrate but on appeal were acquitted by the Sessions Judge. The plaintiffs thereupon brought this suit in a Subordinate Judge's Court to recover damages from the defendant for malicious prosecution. The jurisdiction of the Subordinate Judge to try the suit being questioned, he referred the case to the High Court. *Held* that the Subordinate Judge had jurisdiction to try the suit. The defendant was sued in his individual and not in his official capacity; and the fact that he was a Mamlatdar when he prosecuted the plaintiffs could not affect the character in which he was sued. **BANWAT HARGOTIND v. NARAYAN VAKAS DEVERANKAR** I L R., 11 Bom., 370

31. *Malicious prosecution—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), s. 32—Bombay Act X of 1876, s. 13—Prosecution initiated by order of superior officer*—An officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interests is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not assigned to an officer as such the consent or the order of his superior will not make the act an official one which in its nature is not so, as lying outside his official functions. The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirur. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory and were calculated to lower him in the estimation of the public to injure his reputation and to mar his professional prospects. The plaintiff sent him a notice claiming Rs 500 as damages for the injury done to him by the defendant. The defendant thereupon lodged a complaint before the District Magistrate at Sirur charging the plaintiff under s. 183 of the Penal Code with leading out a threat, etc. to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant

29. *Act XIV of 1869 ss. 23 and 24—Subordinate Judge appointed to assist another Subordinate Judge Powers of—Where a Subordinate Judge is deputed under s. 23 of Act XIV of 1869 to assist another Subordinate Judge the assistance by the Judge so deputed can only be afforded within the limits of his jurisdiction as fixed by s. 21 of the Act and cannot be extended, except in matters within his competence. The plaintiff having obtained a decree against the defendant in a suit in which the subject matter of the suit and the amount of the decree exceeded Rs 5000 in the Court of a Subordinate Judge of the first class presented it in that Court for execution. The Subordinate Judge transferred it for execution to the second class Subordinate Judge who had been appointed under Act XIV of 1869 to assist him and whose jurisdiction extended to Rs 5000 only. The second class Subordinate Judge ordered execution to issue. The defendant appealed and this order was reversed. The plaintiff appealed to the High Court, and raised for the first time an objection that the second class Subordinate Judge had no jurisdiction to entertain the application for execution. The defendant contended that his objection was taken too late on second appeal. *Held* that the second class Subordinate Judge had no jurisdiction to entertain and deal with the plaintiff's application for execution, and that the plaintiff's objection should be allowed. An objection to the jurisdiction on the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings. **WAK HARGOTIND v. NARAYAN VAKAS DEVERANKAR***

(I L R., 12 Bom., 155)

30. *Malicious prosecution—Suit against a Mamlatdar for*

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer; and that therefore the Court of the Subordinate Judge had no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that therefore the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by the District Judge only, under s. 32 of the Bombay Civil Courts Act (XIV of 1869). He therefore dismissed the suit. On appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He therefore reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge. On appeal by the plaintiff,—*Held* by the High Court that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was therefore reversed, and the District Judge was directed to dispose of the appeal on its merits. **GOPI MAHA-BLESVAR BHAT v. SHESO MANJU**

[I. L. R., 12 Bom., 358]

**32.**—*Suit against Collector—Act done in official capacity—Bombay Revenue Jurisdiction Act (X of 1876), s. 15.*—The plaintiff sued the Collector of Dharwar and his chitnis for having destroyed certain certificates of efficiency which had been given to him by Mamlatdars in whose service he had been employed. The defendants pleaded that the certificates had been destroyed, because they were not issued by the Mamlatdars in proper form. *Held* that the act of the defendants was an act done by them in their official capacity, and that the Subordinate Judge could not entertain the suit. **SWAMIRATACHARYA v. COLLECTOR OF DHARWAR**

I. L. R., 15 Bom., 441

**33.**—*Bombay Civil Courts Act (XIV of 1869), s. 32, as amended by the Bombay Revenue Jurisdiction Act (X of 1876), s. 15, and by Bom. Act XV of 1880, s. 3—Bom. Reg. II of 1827, s. 43—Suit against officer of Government—Acts done by the defendant in his official capacity—Civil Procedure Code (1852), s. 421.*—On the death of the talukhdar of Xerwada leaving a widow and minor son, the Mamlatdar of Amol, acting under the order of the Collector of Broach, entered the talukhdar's house, made an inventory of the moveables, took possession of the property of the deceased, and locked up some of the rooms. Among the property seized (it was alleged) was certain property belonging to the widow. She brought this suit against the Collector and Mamlatdar, claiming damages for these wrongful acts.

# SUBORDINATE JUDGE, JURISDICTION OF—continued.

The suit was filed in the Court of the Subordinate Judge. *Held* that the acts complained of were done by the defendants in their official capacity, and that under s. 32 of the Bombay Civil Courts Act (XIV of 1869) the Subordinate Judge had no jurisdiction to entertain the suit. **ALLEN v. BAI SHRI DARIADA**

[I. L. R., 21 Bom., 754]

**34.**—*Patil and kulkarni of village—Impressment of bullocks by patil and kulkarni of village for use of Government officer—Suit for damages for acts done by officer of Government in official capacity—Bombay Revenue Jurisdiction Act (X of 1876), s. 15—Bombay Civil Courts Act (XIV of 1869), s. 32—Bom. Reg. II of 1827, s. 52.*—The patil and kulkarni of a village having impressed a pair of bullocks belonging to the plaintiff for the use of an abkari inspector, the plaintiff sued them for damages in the Court of a Subordinate Judge. The defendants pleaded (*inter alia*) that the Subordinate Judge had no jurisdiction to try the suit under the Bombay Revenue Jurisdiction Act (X of 1876). *Held* that the suit was properly instituted in the Court of the Subordinate Judge, as the defendants were sued in their private capacity. It is not clear that the rule about impressment of carts found in Ch. I of Naime's Revenue Handbook actually order village patils to impress carts against the owner's will; neither it is clear what officers are to be supplied. There is nothing to show that any law ever imposed this duty on a kulkarni, or that provision was made after the repeal of the Regulation of 1818 as regards patils except for military bodies. **BUDHO v. KESO**

[I. L. R., 21 Bom., 773]

**35.**—*Money lent to public officer—Money lent to him in his official capacity—Bombay Civil Courts Act (XIV of 1869), s. 32.*—The plaintiff had contracted to supply materials requisite for a public building. The defendant was the Supervisor, Public Works Department, in charge of the works. From time to time defendant borrowed money from the plaintiff and (*inter alia*) four sums amounting to Rs 3-5 which he paid as wages to labourers working under him. It was not proved, however, that he had borrowed the moneys as supervisor, and the defendant did not plead that he borrowed them in his official capacity. *Held* that, inasmuch as a Public Works Supervisor has not usually authority to borrow money for the purpose of the work of which he may be in charge, or any way to pledge the credit of Government, the mere statement of the defendant when he borrowed the moneys that he wanted them to pay the labourers was not under the circumstances enough to show that the defendant borrowed them in his official capacity, and that the Subordinate Judge had authority to entertain the suit in respect of them. In claims arising out of contract the same test must be applied to determine the question of jurisdiction as in those having their origin in tort, i.e., was the loan

**SUBORDINATE JUDGE, JURISDICTION OF—concluded.**

conducted by the defendant in his official capacity ?  
**HANMANT ANJABA v. RAJ RAL MANICKCHAND**  
 [I. L. R. 23 Bom., 170]

38 ——— *Dismissal of suit by a subordinate judge on appeal—Fees to appeal before a subordinate judge who agrees with the finding of the former subordinate judge—Where there are two subordinate judges in the same place one of them is not competent to overrule the decision of the other. The Court is one though there are separate presiding officers. See *Govind v. Khatkar* I. L. R. 3 All. 50 and *Ram Prasad v. Ram Kaur* I. L. R. 6 All. 269 referred to. **KHARAG PRASAD BHAGAT v. DUDHIAJI PAI***

[I. L. R., 14 All., 348]

37 ——— *Application for declaration of a bankrupt—Bom. Peg VIII of 1927 s. 2—Subordinate judge gave order for summary of a strict Court under Act VII of 1859—A subordinate judge who (under s. 1 of Act VI of 1859) is authorised by the Government with the functions of a strict Court under Act VII of 1859 has jurisdiction to hear and determine an application made under s. 1 of Bombay Regulation VIII of 1927. **PITAMBAR MANCHARAM v. ISHVAR JADURAM***

[I. L. R., 17 Bom., 230]

**SUB-REGISTRAR.**

See **MAGISTRATE JURISDICTION OF—TRANSFERENCE OF MAGISTRATE DURING SICK**  
 I. L. R., 15 Mad., 132

See **PRO STRAM.**

**SUBROGATION**

See **COMPANY—WINDING UP—DEBTORS AND HOLDERS OF LIQUIDATORS.**  
 [I. L. R., 18 Calc., 31]

**SUBSCRIPTION**

See **RIGHT OF VOTE—SUBSCRIPTION**  
 (10 C. L. R., 107)  
 I. L. R., 14 Calc., 64

**SUBSISTENCE-MONEY**

1. ——— *Payment of subsistence-money—Civil Procedure Code 1939 s. 27—According to Act VIII of 1859 as it stood at the end of 1856 and until the year 1873 the law is for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the order made for his commitment to the civil jail. **KASTURCHAND v. EAOJI ADASHIV***

[I. L. R., 4 Bom., 65]

Under the present Code it has to be paid into Court before the order for his arrest can be made.

2. ——— *Illegal commitment—Duty of jailer—Unless subsistence-money is paid before the commitment, the commitment is*

**SUBSISTENCE MONEY—continued**

illegal. The jailer is bound by the words of the Act. It is for him, and not for the prisoner to see that the money is paid. **IN THE MATTER OF THOMAS**  
 [Bourke, O. C., 431]

3. ——— *Fixing subsistence-money—Detention in jail on decree of a subordinate judge prior to a decree of discharge—Where a defendant is arrested prior to a decree under Act VIII of 1859 s. 27 and a decree is afterwards obtained against him in the suit, the plaintiff, if he wishes to detain the defendant in prison must have him brought before the Court and his subsistence-money fixed, in the same way as in the case of an arrest in execution of a decree and if he fails to do so the defendant is entitled to his discharge from prison. **IN THE MATTER OF CALIACHAND DASS***

[I. Ind. Jur., N. R., 327]

4. **C. HANPERSAUD FOY v. CALIACHAND DASS**  
 [Bourke, O. C., 433]

4. ——— *Order for allowance—Application for discharge in absence of order—Civil Procedure Code 1939, ss. 176, 273—S. H. and two other debtors in the custody of the Sheriff on a *ca. ad. respond.* appeared on a *habeas corpus* for the execution of a writ to show cause why they should not be discharged. S. H. had been arrested in execution of a decree in a suit which was begun under the old procedure in the Supreme Court, and the question was whether the procedure in his case should be regulated by Act VII of 1859 or Act VIII of 1939. The grounds relied on by all three prisoners (besides the above in S. H.'s case) were, that no order for their allowance had been made by the Court nor had they been brought before it for that purpose. *Held* that the case of S. H. was to be regulated by the old procedure and as under Act VII of 1859 no order for allowance was necessary he must be remanded to jail. *Held* also (PERCIVAL C. J. dissenting) that a prisoner arrested on a *ca. ad. respond.* must within a convenient time be brought before the Court to have his allowance fixed, that an allowance was due him in the running of a 273 or 278 of Act VIII of 1859 in a subsistence-money fixed by order of the Court, that the Court must have the prisoner before them to exercise their discretion upon a matter which must be determined before he can be finally committed to prison and which may be so determined as to result in his being discharged; that a decree must be carried into execution by and under the direction of the Court when pronounced by means of a formal application to the Court, and an order passed thereupon that a jailer or other officer cannot lawfully receive a prisoner for debt and commitment unless the preliminary payment of subsistence has been made in compliance with the order of the Court and that the jailer cannot lawfully detain a judgment-debtor when the time limited for payment of any subsistence-money under the order of the Court passes without due payment accordingly. **IN RE SUNDAR CHANDER HALLDAY IN RE DOORGAPPA AND MITTER. IN RE RAKHAS DASS***

[Bourke, O. C., 59]

**SUBSISTENCE MONEY—continued.**

5. ———— **Right of debtor to discharge**—*Omission to make order for allowance Civil Procedure Code, 1859, s. 276, 278.*—A debtor, having been imprisoned on a writ of *ca. sa.*, was brought up on a *habeas corpus*, and applied for his discharge on the ground that his arrest and imprisonment were illegal, as no order for his allowance under s. 276 of Act VIII of 1859 had been made. Sufficient subsistence-money, however, was paid to the Sheriff previous to the arrest, and he was kept amply supplied with it. *Held* that ss. 276 and 278 of Act VIII of 1859 applied as much to the execution of a *monsul* decree as to an arrest by writ of the High Court; that no one is to be imprisoned in execution of a decree unless subsistence-money for a month in advance be paid to the person to whose custody he is committed; that a similar payment must be received in advance every successive month pending the imprisonment; that if any such payment be not made, the prisoner is entitled to be released, that the "allowance" referred to in s. 276 of Act VIII of 1859 meant subsistence-money of 4 annas per diem, that s. 276 of Act VIII of 1859 enacted only that the prisoner shall have an allowance of 4 annas per diem paid monthly, unless the Court shall specially fix a less amount; that an order for an allowance to the prisoner was not necessary, and was intended only as a relief to the execution-creditor; that the omission to have such order made did not render the arrest and imprisonment illegal; that in the absence of such order, s. 278 of Act VIII of 1859 ensured 4 annas a day as subsistence-money for the prisoner. *AGA ALI KHAN v. JOYDOLAL PERSAD*

[Bourke, O. C., 52]

6. ———— **Non-payment of subsistence-money in advance—Civil Procedure Code, 1859, s. 276.**—The monthly subsistence-money under s. 276 of Act VIII of 1859 must be paid in advance; therefore, where a debtor was arrested and subsistence-money paid for January, but no further deposit was made till 14th February, the prisoner was held entitled to his discharge. *IN RE KOOY LOH Doss*

Bourke, O. C., 51

7. ———— **Application for discharge on non-payment of subsistence-money—Petition for discharge—Civil Procedure Code, 1859, s. 278.**—A prisoner was arrested on the 30th of December on a *ca. sa.* dated the 24th of December, on which day the execution-creditor paid subsistence-money for thirty days. This failing on the 29th of January, the prisoner made a fruitless application to the Sheriff for more, and then applied to the Court for his discharge, upon which notice was directed to be given to the execution-creditor. *Held* that no particular form of petition of discharge was required from a prisoner applying for his discharge for non-payment of subsistence-money, that subsistence-money must be paid in advance by the execution-creditor before putting a writ of *ca. sa.* in force; that the discharge by the Sheriff of a prisoner detained on a writ of *ca. sa.* was equally imperative on the happening of any of the contingencies specified in s. 278 of Act VIII of 1859, and that on failure of subsistence-money the prisoner should be released, and further

**SUBSISTENCE MONEY—concluded.**

detention of him by the person in whose custody he is was illegal. *SPFYER v. JANSSEY*

[Bourke, O. C., 28]

8. ———— **Non-payment of subsistence-money in advance—Act VIII of 1859, ss. 276, 278.**—A prisoner was arrested on August 1st, and committed to prison on the evening of the same day. Before his committal, the execution-creditor paid into the hands of the Jailor a sum sufficient for his subsistence-money for twenty-seven days, at the established rate of 4 annas per day. On the 5th August a writ of *habeas corpus* was applied for to bring the prisoner up, and on the 6th a further sum of 4 annas was paid to the Jailor to cover any deficiency in the former payment. *Held* that the requirements of s. 276, Act VIII of 1859, had not been fulfilled, and that the prisoner was entitled to his discharge under s. 278. *DUTT v. CORLIUS*

[5 B. L. R., Ap., 79]

9. ———— **Mode of payment of subsistence-money**—On the 30th of September, the plaintiff, a detaining creditor, paid to the Jailor of the Calcutta Jail subsistence-money for thirty days, for a prisoner confined at the suit of the plaintiff, the Jailor then having a balance of 4 annas over from the subsistence-money for September. *Held* that there was a sufficient compliance with s. 276 of Act VIII of 1859. *HAZADHAR DEY v. AMBIKA CHARAN Bose*

5 B. L. R., Ap., 8

10. ———— **Refund of subsistence-money—Release at request of creditor—Bomb. Act IV of 1865**—Where the defendants were arrested through the Munsif's Court in execution of a decree, but were released at the request of the execution-creditor before they had been sent to the civil jail, it was held that the execution-creditor was entitled to a refund of the balance of subsistence-money advanced by him that remained in the Munsif's hands at the time of his debtor's release. S. 10 of Act IV of 1865 (Bombay) was not applicable to such a case. *EX-PARTE KASHINATH BALAL OK*

[5 Bom., A. C., 84]

11. ———— **Effect of discharge of debtor—Non-payment of subsistence-money—Future arrest in execution of same decree, Effect of discharge on.**—The discharge of a defendant from confinement in jail in consequence of the plaintiff's failure to pay subsistence-money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of the decree. *APPIAH CHETTY v. CHENGADOO*

4 Mad., 76

**SUBSTANTIAL INJURY.**

See CASES UNDER SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.

**SUBSTANTIAL QUESTION OF LAW.**

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH AN APPEAL LIES OR NOT—SUBSTANTIAL QUESTION OF LAW.

See QUESTION OF LAW.

## SUCCESSION

See CASES UNDER CONVERTS

See ENGLISH LAW—PRIMOGENITURE  
[5 Bom. O. C., 172]

See CASES UNDER HINDU LAW—INHERITANCE

See MAHOMEDAN LAW—DEBTS

[1 L. R., 4 Calc., 142  
1 L. R., 4 All., 381  
1 L. R., 7 All., 823]

See CASES UNDER MAHOMEDAN LAW—INHERITANCE

See CASES UNDER MALABAR LAW—INHERITANCE

See MARRIAGE SETTLEMENT

[1 Ind. Jur., N. S., 290]

See PARSIS  
1 L. R., 1 Bom., 508  
[1 L. R., 2 Bom., 75  
1 L. R., 4 Bom., 537  
1 L. R., 11 Bom., 1  
1 L. R., 5 Bom., 508  
1 L. R., 6 Bom., 151  
1 L. R., 22 Bom., 355, 909]

See PRINCE OF WALES, PRINCE OF—PRACTICE OF—REVIEW OF APPEAL

[1 L. R., 21 Calc., 997  
1 L. R., 21 All., 163]See SALTWATER LAW APPLICABLE IN  
[1 L. R., 19 Bom., 680]

Deed altering course of, by Hindu law.

See COMPROMISE—CONSTRUCTION, ENFORCING EFFECT OF AND SETTING ASIDE DEEDS OF COMPROMISE

[8 B. L. R., 203  
13 Moore's L. A., 497]

to permanent tenure.

See BENGAL TENANCY ACT s. 16.  
[1 L. R., 24 Calc., 241]

to tax

See CASES UNDER HINDU LAW—CUSTOM—INHERITANCE AND SUCCESSION

See HINDU LAW—INHERITANCE—IMPARTIBLE PROPERTY

See JUDGMENT IN REM  
[11 B. L. R., 244  
14 Moore's L. A., 387]

to talukhdari.

See CASES UNDER OTHER ESTATES ACT 1850

## SUCCESSION ACT (X OF 1865).

See CONVERTS  
1 L. R., 10 Mad., 69  
[1 L. R., 20 Bom., 53]

as 2 and 3—Minor—The definitions of "minor" and minority in the Succession Act do not apply to cases in which a person enters into a con-

## SUCCESSION ACT (X OF 1865

—continued

tract on his own behalf, and not in any representative character under that Act. *SUTAN CHAND & SMYTH*  
12 B. L. R., 358 21 W. R., 221

s. 4.

See DIVORCE ACT, s. 25

[5 B. L. R., Ap., 9  
1 L. R., 5 Calc., 357  
1 L. R., 9 Mad., 13]

See HUSBAND AND WIFE

[8 B. L. R., 373  
1 L. R., 1 Calc., 235]1. — Operation of section—*Rights acquired before passing of Act*—The provisions of s. 4 of the Succession Act are prospective and leave rights unaffected which had already been acquired before the Act passed. *SARKIS & PROSOMOVYER DOSSER*  
[1 L. R., 6 Calc., 794 8 C. L. R., 78]2. *Married woman Liability of—Separate estate—Restraint on an incorporation—Husband and wife—Married Women's Property Act (III of 1874) s. 8*—In a suit against a husband and wife and the trustees of the wife's marriage settlement on two joint and several promissory notes given by the husband and wife after their marriage, but before the passing of the Married Women's Property Act (III of 1874) the plaintiff sought to render liable property settled on the marriage upon the wife for her separate use without power of anticipation. The marriage was contracted after the passing of the Succession Act. Held that s. 4 of that Act did not prevent the operation of the clause in the marriage settlement in restraint of anticipation. Held further that s. 8 of the Married Women's Property Act 1874 does not apply to contracts made before the passing of the Act. *See per CORCORAN C.J.*—If the contract had been made after that Act came into operation, the plaintiff would have had a remedy against the wife's separate estate notwithstanding the clause restraining anticipation. *PERKINS & MANUK*  
13 B. L. R., 363. 23 W. R., 1753. — and s. 44—*Husband and wife—Parties with English domicile married in India—Succession to moveable property*—H. M., a British subject having his domicile in England, married in Calcutta in April 1866 C, a widow who at the time of the marriage had also an English domicile. C, after her marriage with H. M., became entitled as next of kin to shares in the moveable properties of her two sons by her former marriage. These shares were not realized nor reduced into possession by C during her life. C died in 1872, leaving her husband but no legal descendants. In March 1874 H. M. filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875 letters of administration of the estate as co-administrators of C were, with the consent of H. M. granted to the Ad. Administrator General of Bengal, by whom the shares to which C became entitled as next of kin of her sons were realized. In a special case for the opinion of the Court under Ch. VII Act

# SUCCESSION ACT (X OF 1865) —continued.

VIII of 1859,—*Held* that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee, as assignee of the estate of *H M*, was entitled to the whole fund realized by such shares in the hands of the Administrator-General. S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile. *MILLER v. ADMINISTRATOR-GENERAL OF BENGAL*

[I. L. R., 1 Calc., 412

4. — *Marriage—Husband and wife—Domicile Succession to property.*—A person with an English domicile marrying a wife with an Indian domicile is, on her death, entitled to inherit the whole of her moveable property to the exclusion of the next of kin. Ss. 4 and 44 of the Succession Act do not affect the law of succession, but relate to the immediate effect of marriage on moveable property be ongoing to either of the married persons, and not comprised in an antenuptial settlement. *HILL v. ADMINISTRATOR-GENERAL OF BENGAL* . I. L. R., 23 Calc., 506

s. 5.

See FOREIGN STATE.

[I. L. R., 11 Calc., 17

— and s. 10.

See DOMICILE . I. L. R., 4 Calc., 106

s. 35.

See CONVERTS . I. L. R., 9 Mad., 466

s. 42.

See PARSIS . I. L. R., 2 Bom., 75

ss. 48, 54.

See WILL—VALIDITY OF WILL.

[I. L. R., 7 Mad., 515

s. 50.

See CASES UNDER WILL—ATTESTATION.

See CASES UNDER WILL—SIGNATURE.

s. 54.

See WILL—CONSTRUCTION.

[I. L. R., 4 Mad., 244

s. 56—*Revocation of will—Lawful polygamous marriage.*—The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the lifetime of his first wife, held to be revoked by such second marriage under s. 56 of the Succession Act. *GABRIEL v. MORDAKAI* [I. L. R., 1 Calc., 148

s. 58.

See WILL—ATTESTATION.

[I. C. W. N., 428

s. 68.

See WILL—CONSTRUCTION.

[I. L. R., 15 Mad., 448

# SUCCESSION ACT (X OF 1865) —continued.

s. 75.

See WILL—CONSTRUCTION.

[I. L. R., 6 All., 583

s. 82.

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ESTATES ABSOLUTE OR LIMITED . I. L. R., 24 Calc., 646

[I. L. R., 22 Bom., 833

s. 91.

See WILL—CONSTRUCTION.

[I. L. R., 6 All., 583

s. 96—*Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (I of 1881), s. 131.*—A testator, by his will, dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his son's daughter *J*, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia. The testator died on the 2nd February 1881, and *J* in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. *J* left an only child *B*, who was born before the death of the testator. *B* sued to recover the legacy left to her mother; the defence was that the legacy had lapsed. *Held* that *J* was, in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator. *JITU LAL MAHATA v. BINDA BBI* . I. L. R., 16 Calc., 549

s. 98.

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

[I. L. R., 8 Calc., 157, 637

I. L. R., 15 Bom., 328, 652

I. L. R., 16 Bom., 492

See WILL—CONSTRUCTION.

[I. L. R., 4 Calc., 670

— Application of section—*Vested interests.*—*Semble*—S. 98 of the Succession Act applies only to vested interests. *MASEY v. FERGUSSON* . I. L. R., 4 Calc., 304

ss. 98—103.

See CASES UNDER HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

s. 101.

See PERPETUITIES, RULE AGAINST.

[I. L. R., 20 Bom., 511

ss. 101, 102.

See WILL—CONSTRUCTION.

[I. L. R., 4 Calc., 304

s. 105.

See WILL—CONSTRUCTION.

[I. L. R., 15 Mad., 448

## SUCCESSION ACT (X OF 1885)

—continued.

— ss. 234–231.

See CASES UNDER PROBATE—OPPOSITION  
TO, AND REVOCATION OF, GRANT

s. 235.

See JUDICIAL COMMISSIONER, ASSAM.  
[12 W. R., 424

s. 237 *Exemplification of will—Probate—Order to produce testamentary paper.*—The testator died in Calcutta, leaving a will, whereof he appointed *A, B, C*, and *D* executors. *D*, the mother of the testator, had carried on business in partnership with the testator in Calcutta, and a considerable portion of the testator's estate was in India. *A* renounced probate, and the will was proved in England by *B* and *C*, who sent their agents in Calcutta an exemplification of the will for the purpose of obtaining a grant of probate or letters of administration to the estate in India. In an application by *D* for an order directing the agents to bring the exemplification into Court with a view to obtaining probate thereof, *Held* that the exemplification was an instrument which the Court would order to be produced under s. 237, Succession Act IN RE THE GOODS OF NEWTON. 8 B. L. R., Ap., 76

s. 239.

See RECEIPT. I. L. R., 17 Bom., 388

s. 240.

See LETTERS OF ADMINISTRATION.  
[I. L. R., 17 Bom., 689

s. 242.

See PROBATE—EFFECT OF PROBATE.  
[8 B. L. R., 208

s. 244.

See PROBATE—JURISDICTION IN PROBATE  
CASES. 4 C. L. R., 498

s. 255.

See EXECUTOR. I. L. R., 21 Bom., 400

s. 256.

See PROBATE—ADMINISTRATION BONDS.  
[I. L. R., 7 Calc., 84  
3 Md., Ap., 10  
4 C. L. R., 498  
I. L. R., 26 Calc., 407

ss. 256, 257.

See ADMINISTRATION BOND. 6 N. W., 62  
[I. L. R., 10 All., 29

s. 257.

See ACT XL OF 1858, s. 21.  
[I. L. R., 5 All., 248  
See GUARDIAN—LIABILITY OF GUARDIANS.  
[I. L. R., 5 All., 248

## SUCCESSION ACT (X OF 1885)

—continued.

s. 258—*Grant of letters of administration with will annexed—Practice.*—Letters of administration with the will annexed may under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator. IN THE GOODS OF WILLSON  
[I. L. R., 1 Calc., 149

s. 261.

See PROBATE—APPLICATION FOR PROBATE,  
ETC. I. L. R., 19 Md., 458

s. 263.

See APPEAL—CERTIFICATE OF ADMINIS-  
TRATION. I. L. R., 20 Calc., 245

See APPEAL—PROBATE  
[I. L. R., 27 Calc., 5

s. 264.

See REFERENCE TO HIGH COURT—CIVIL  
CASES. I. L. R., 5 Calc., 758

s. 255.

See APPEAL—PROBATE. 2 C. L. R., 589

s. 266

See RIGHT OF SUIT—INTESTACY.  
[I. L. R., 18 Bom., 337

s. 269

See EXECUTOR. I. L. R., 1 All., 710  
See LETTERS OF ADMINISTRATION.  
[I. L. R., 23 Calc., 579

s. 280.

See ADMINISTRATOR.  
[I. L. R., 17 Bom., 637

s. 282.

See ADMINISTRATOR. 8 Bom., O. C., 20  
See ADMINISTRATOR—GENERAL'S ACT.  
[I. L. R., 25 Calc., 54

1. ———— *Decree, Satisfaction of*  
—*Executor—Administrator.*—Where a person obtains a decree against an executor or administrator, he is entitled to have his decree satisfied out of the assets of the deceased, and s. 232 of the Succession Act does not interfere with that right. NILKOMUL SHAW v. REED  
[12 B. L. R., 287; 17 W. R., 513

2. ———— *Debt—Liability to pay*  
*calls on shares in company.*—A liability to pay calls is a debt within the meaning of s. 282 of the Succession Act. ASIATIC BANKING COMPANY v. VIEGAS. 8 Bom., O. C., 20

3. ———— *Judgment-creditor—Execu-*  
*tion of decree—Right to assets in hands of*  
*Administrator-General—Administrator-General's*  
*Act (II of 1874), s. 35.*—A decree for money was obtained against a person who afterwards died intestate. Letters of administration to his estate

**SUCCESSION ACT (X OF 1865)***—concluded—*

were granted to the Administrator General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator General. *Held* that he was entitled to have his decree satisfied out of the assets of the deceased, although his assets were not sufficient to pay in full all the claims made against the estate. **RENTY v. DE PRINCE**. I. L. R., 10 Cal., 929

s 328.

See ADMINISTRATOR 8 Bom., O. C., 20

s 331

See PROBATE—POWER OF HIGH COURT TO GRANT, AND FORM OF

[I. L. R., 6 Bom., 452]

See WILL—FORM OF WILL.

[2 B. L. R., A. C., 79]

1. *Jains* "Hindu"—The term Hindu in s. 331 of Act X of 1865 means and includes a Jain and consequently in matters of succession, Jains are not governed by that Act. **BACHUBAI v. MAKHAN LAL**. I. L. R., 3 All., 55

2. *Native Christians* Hindu law—*Inheritance*—The Succession Act governs the succession in Native Christian families; and since the passing of that Act such families have not been at liberty to adhere to the Hindu law of succession. *Held* that if the family continued to observe the Hindu law of succession until the Succession Act altered their rule of succession, the members of the family who were born before the latter Act came into operation could not be deprived of the rights acquired by them under the Hindu law. **GOVINDASAMI NADAN v. DORASAMI AYYAN**

[I. L. R., 2 Mad., 209]

3. *Native Christian—Application under Act XXVII of 1860 for certificate of administration*—Petitioner, a Native Christian, applied under Act XXVII of 1860 for a certificate of heirship to his deceased grandfather. The Civil Judge refused it on the ground that Native Christians are not Hindus within the meaning of the term as used in s. 331 of the Succession Act (X of 1865) and therefore that they are affected by the provisions of that Act, and cannot proceed under Act XXVII of 1860. *Held* upon appeal that the order of the Civil Judge was right. **IN THE MATTER OF THE PETITION OF VATHILAR**

7 Mad., 121

4. — and s. 2—*Converts to Christianity from Hinduism—Inheritance—Evidence of custom of inheritance*—*Koli caste of fishermen*. The Indian Succession Act (X of 1865), and the rules of inheritance prescribed by it, apply to Hindus who have become Christians, and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible. **DAGRE v. PACOTTI SAI JAO**

I. L. R., 19 Bom., 783

**SUCCESSION CERTIFICATE ACT (VII OF 1880)**

See CASES UNDER APPEAL—CERTIFICATE OF ADMINISTRATION, ETC.

See BOMBAY CIVIL COURTS ACT s. 16.

[I. L. R., 16 Bom., 271]

See CASES UNDER CERTIFICATE OF ADMINISTRATION.

Village Courts Act (Mad. Act I of 1880)—The provisions of the Succession Certificate Act apply to suits in a Village Munsif's Court. **HASANI AMMAL v. OLAGA PADAYACHI**

[I. L. R., 21 Mad., 115]

s 4.

See LIMITATION ACT, 1857 s. 179—

NATURE OF APPLICATION—GENERALLY

[I. L. R., 20 Cal., 755]

I. L. R., 20 Bom., 78

See PARTIES—PARTIES TO SUITS—PARTNERSHIP, SOCIETIES, &amp;c.

[I. L. R., 18 Cal., 88]

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 672

[I. L. R., 16 Mad., 454]

s. 6

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 672

[I. L. R., 19 Bom., 780]

s. 17

See COURT FEES ACT, 1870, s. 25

[I. L. R., 19 Bom., 145]

s. 19

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL

[I. L. R., 17 Mad., 157]

s. 26.

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL

[I. L. R., 17 Mad., 167]

See SUBORDINATE JUDGE, JURISDICTION OF

I. L. R., 17 Bom., 230

**SUDDER COURT**

Meaning of term—*Act VIII of 1842*—*Criminal Procedure Code, 1861 s. 19*—Meaning of the term "Sudder Court" as defined by Act VIII of 1842 and by s. 19 of the Criminal Procedure Code. **RE v. TANKASTAVANI**

[2 Bom., 2nd Ed., 106]

**"SUDDER KHAJANA."**

Meaning of term.—The words "sudder khajana" do not necessarily mean a rental payable to Government, but may mean a rental payable to the zamindar. **KALKER TARA DEBIA v. VITTHALCHAND SHANHA**

12 W. R., 90



## SUDRAS.

See CASES UNDER HINDU LAW—ADOPTION—REQUISITES FOR ADOPTION—CEREMONIES.

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT BE ADOPTED.

[I. L. R., 1 Mad., 62  
I. L. R., 3 Calc., 443  
I. L. R., 6 Mad., 43  
W. R., 1864, 133  
8 Bom., A. C., 67  
I. L. R., 6 Bom., 524  
7 Bom., Ap., 26  
12 Bom., 364  
I. L. R., 10 Calc., 68]

See CASES UNDER HINDU LAW—INHERITANCE—ILLEGITIMATE CHILDREN.

See HINDU LAW—INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.

[I. L. R., 4 Bom., 37  
I. L. R., 18 Calc., 151  
I. L. R., 17 I. A., 128]

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—ILLEGITIMATE CHILDREN . . .

3 B. L. R., P. C., 1  
[13 Moore's I. A., 141  
2 B. L. R., P. C., 15  
5 Mad., 405  
I. L. R., 8 Mad., 325, 557  
I. L. R., 1 Mad., 308]

See HINDU LAW—MARRIAGE—VALIDITY OR OTHERWISE OF MARRIAGE.

[3 B. L. R., P. C., 1  
13 Moore's I. A., 141  
I. L. R., 1 Calc., 1  
I. L. R., 15 Calc., 708]

See HINDU LAW—PARTITION—RIGHT TO PARTITION—ILLEGITIMATE CHILDREN.

[I. L. R., 12 Mad., 401]

## SUICIDE.

See ABETMENT . . . 1 Agra, Cr., 21  
[3 N. W., 316]

See ENGLISH LAW—SUICIDE.

[1 W. R., P. C., 14: 9 Moore's I. A., 387]

Attempt to commit suicide—*Penal Code, s. 309—Intention—Locus penitentiae*—*R.*, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under s. 319 of the Penal Code of having attempted to commit suicide. *Held* that the conviction was illegal. *QUEEN-EMPRESS v. RAMAKFA* I. L. R., 8 Mad., 5

## SUIT.

See BENGAL RENT ACT, 1869, s. 101.  
[6 B. L. R., 569]

See BENGAL RENT ACT, 1869, s. 102.  
[19 W. R., 307  
23 W. R., 207]

## SUIT—continued.

See BROACH ENCUMBERED ESTATES ACT, s. 19. . . I. L. R., 5 Bom., 448

See COURT FEES ACT, 1870, s. 11.  
[I. L. R., 24 Calc., 173]

See COURT OF WARDS ACT, 1879, s. 20.  
[I. L. R., 18 Calc., 500]

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWER OF COURT . . . I. L. R., 18 Calc., 635  
[I. L. R., 12 All., 392]

See LIMITATION ACT, 1877, s. 14 (1871, s. 15) . . . 3 Agra, 39  
[I. L. R., 1 All., 97]

See LIMITATION ACT, 1877, ART. 84 (1871, ART. 85) . . . I. L. R., 1 Bom., 253  
[I. L. R., 22 Calc., 943]

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167)—PERIOD FROM WHICH LIMITATION RUNS—WHERE PREVIOUS APPLICATION HAS BEEN MADE.  
[I. L. R., 2 Calc., 336]

See PENSIONS ACT, s. 4.  
[I. L. R., 16 Bom., 731]

See RES JUDICATA—ADJUDICATIONS. . .  
[I. L. R., 3 Calc., 340]

Abatement of—

See ABATEMENT OF SUIT.

Change in form of—

See CASES UNDER PLAINT—AMENDMENT OF PLAINT.

See VARIANCE BETWEEN PLEADING AND PROOF.

for declaration of right to officiate in hereditary office.

See CASES UNDER JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

See CASES UNDER RIGHT OF SUIT—OFFICE OR EMOLUMENT.

for land.

See CASES UNDER JURISDICTION—SUITS FOR LAND.

for money charged on immoveable property.

See CASES UNDER LIMITATION ACT, 1877, ART. 132.

See CASES UNDER MORTGAGE—SALE OF MORTGAGED PROPERTY—MONEY-DECREES ON MORTGAGES.

for share of fees—

See CASES UNDER JURISDICTION OF CIVIL COURT—FEES AND COLLECTIONS AT SHERINES.

## SUIT—continued

See CASES UNDER LIGHT OF SUIT—OFFICE  
OR ENGAGEMENT

— for turn of worship of idol

See LIMITATION ACT 1877 ART 131.  
[6 B L R, 352 15 W R 99  
I L R, 4 Calc., 683  
I L R, 8 Calc 807 10 C L R., 4 9

— Institution of—

See CASES UNDER LIMITATION ACT, 1877  
s 4.

— Restoration of—

See CASES UNDER CIVIL PROCEDURE CODE  
ss 93 99 and 110

— Revival of—

See ABATEMENT OF SUIT—SUITS.  
[I L R, 5 Calc. 139  
See CASES UNDER LIMITATION ACT 1877,  
ARTS 171 1 1A 171B.

See LIMITATION ACT 1877 ART 178  
[I L R, 6 Calc, 80  
I L R, 8 Calc, 420  
I L R, 5 Calc, 139  
I L R., 5 Bom., 28

See PARTIES—SUBSTITUTION OF PARTIES

1. — Notice of revival.—Before a  
suit can be revived, notice should be served upon the  
opposite party to appear in support of the decree  
as originally made *HURO MOHUN MOOKERJEE v*  
*MOHENDRONATH GHOSH* . 16 W R., 135

2. — Right to revive suit.—*Act*  
*LIII of 1860 s 2—Civil Procedure Code 1859*  
*s 378—S 2 Act LIII of 1860 referred to appeals*  
and also to suits, and as the suit of the special  
appellant which had been decreed in the Court of  
first instance was dismissed by the lower Appellate  
Court, the special appellant was held entitled to a  
revival of his suit *s 378 Act VIII of 1859*  
refers to applications for review of judgment, but  
this was an application for revival of the suit under  
*s 2 Act LIII of 1860 BENGSHENDR MENDUL*  
*v PRADLO LOCHEN POY* W R., F B., 11  
[1 Ind Jur., O S., 5 Marsh., 38 1 Hav., 80

3. — Revival of suit by successor  
of Judge—*Ex parte decree—Act X of 1859, s 68*.  
—Where a *fina* against whom an *ex parte* decree  
has been passed by a Court of appeal to his successor  
under *s 58 Act X of 1859* for a revival of the  
suit, showing good and sufficient cause for their non-  
appearance and that there had been a failure of  
justice the successor was competent to alter or rescind  
his predecessor's decree according to the justice of the  
case. *PRONOL LOCHER DOSSER v KASHEE NATH*  
*ROY CHOWDERY KASHEE NATH ROY CHOWDERY*  
*v SHARITREE HOODUREN DOSSER*

[10 W R., 166

4. — Effect of revival.—*Act X of*  
*1859 s 58*—The revival of a suit under *s 58*,

## SUIT—concluded

*Act X of 1859* did not re-open the case as regards  
all the defendants out only as regards the party who  
had applied to have his particular case revived and  
heard on the merits. *BROJONATH EYENMAN CRO-*  
*KERSETTY v ANOND MOYER DEBIA CHOWDHURY*  
[7 W R., 237

5. — Form of order for revival—  
*Abatement—Civil Procedure Code (Act XIV of*  
*1859) ss 365 366, 371*—The plaintiff died on the  
24th August 1881 and in December 1881 letters of ad-  
ministration to his estate were granted to the Ad-  
ministrator-General. The defendant died in June  
1881 leaving a widow and one son his survivor.  
By his will he appointed two executors. On the 3rd  
February 1885 the Administrator-General took out  
a summons to revive the suit. *Held* that notwithstanding  
the provisions of *s 365* of the Civil  
Procedure Code (XIV of 1859) and of the Limitation  
Act XV of 1877, it was competent for a Judge in  
chambers to revive the suit by making an order for  
abatement under *s 366* of the Code, coupled  
with an order under *s 371* setting aside the  
order for abatement *FULVHU v GOODEDAS*  
*VALLABHDAS* . I L R., 9 Bom., 275

6. — Mode of revival.—*Revised by*  
*Bill—Civil Procedure Code 1877*—There is nothing  
in the Civil Procedure Code to prevent a suit being  
revived as before it was passed by Bill if the simpler  
mode of proceeding is for any reason not available.  
*ATTORNEY DOSSER v HURRY DOSS DUTT*  
[I L R., 7 Calc., 74 9 C L R., 357

— Title of—

See HIGH COURT, JURISDICTION OF—  
CALCUTTA—CIVIL.  
[2 Ind. Jur., N S., 245

See PRACTICE—CIVIL CASES—PARTIES.  
[I L R., 22 Calc., 270

— Withdrawal of—

See CASES UNDER WITHDRAWAL OF SUIT

## SUITS VALUATION ACT (VII OF 1887)

See CASES UNDER VALUATION OF SUITS

— s 8.

See MUMBAI JURISDICTION OF  
[I L R., 19 Mad., 56

— s 11

See APPELLATE COURT—OBJECTIONS  
TAKEN FOR FIRST TIME ON APPEAL.  
[I L R., 19 Mad., 416

## SUMMARY DECISION

See CASES UNDER LIMITATION ACT 1877.  
ART 178 (1859, s 22

**SUMMARY ORDER.**

— Suit to set aside—

See CASES UNDER LIMITATION ACT, 1877,  
ART. 13 (1871, ART. 15).**SUMMARY PROCEDURE.**See MAGISTRATE, JURISDICTION OF—  
GENERAL JURISDICTION.

[I. L. R., 15 Mad., 83]

See MAINTENANCE, ORDER OF CRIMINAL  
COURT AS TO.

[I. L. R., 20 Calc., 351]

See CASES UNDER NEGOTIABLE INSTRU-  
MENTS, SUMMARY PROCEDURE ON.See PRACTICE—CIVIL CASES—LEAVE TO  
SUE OR DEFEND.

[I. L. R., 3 Calc., 539]

**SUMMARY SUIT.**

— Cross claim in—

See COMPENSATION—CIVIL CASES.

[I. L. R., 18 Bom., 717]

**SUMMARY TRIAL.**

See CATTLE TRESPASS ACT, s. 20.

[I. L. R., 23 Calc., 248]

See PRACTICE—CRIMINAL CASES—SIGNA-  
TURE OF MAGISTRATE.

[I. L. R., 6 Mad., 396]

1. ——— Requisites for legal conviction—*Criminal Procedure Code, 1872, ss. 222-230—Procedure.*—In summary cases under Ch. XVIII, ss. 222-230, of the Code of Criminal Procedure, 1872, the formalities provided by that chapter should be most strictly observed. If they are not, a conviction will be set aside. *QUEEN v. JOHIE SINGH* . . . . . 22 W. R., Cr., 28

2. ——— *Criminal Procedure Code, 1872, s. 222—Procedure.*—In a case tried under the summary procedure authorized by s. 222 of the Criminal Procedure Code, 1872, it must appear clearly on the face of the conviction that the case was dealt with as one of those which come under the purview of that section. If the case be one of theft, it should appear what the value of the property alleged to have been stolen really was. *QUEEN v. ABHEEN PARRIDA* . . . . . 20 W. R., Cr., 17

3. ——— Test of summary trial—*Criminal Procedure Code, 1872, s. 222—Care in recording proceedings and in decision.*—Where the procedure is of a summary nature, the trial is summary, notwithstanding the length and carefulness of the record and decision. *QUEEN v. DOMA RAM* [24 W. R., Cr., 66]

4. ——— Test of summary case—*Criminal Procedure Code, 1872, s. 222—Jurisdiction to try summarily.*—It is the nature of the complaint which should determine whether a case should be

**SUMMARY TRIAL—continued.**

tried summarily under s. 222 of the Code of Criminal Procedure. Where the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial. *Dwarkanath Mazoomdar v. Nabe Das, 21 W. R., 829, and Chunder Shekur Thakoor v. Nitaloo, 2 W. R., 29, followed.* IN THE MATTER OF BEPUTOOLLA v. NAJIM SHEIKH

[2 C. L. R., 374]

5. ——— *Criminal Procedure Code, 1872, s. 222—Criterion for testing.*—Whether a case is triable summarily or not, must be determined by the complaint, not by an estimate formed by the Magistrate (e.g. of the worth of the property which the accused is charged with having stolen) after evidence has been recorded: and such estimate cannot retrospectively warrant a mode of trial which was originally illegal. *RAM CHUNDER CHATTERJEE v. KANYE LAHA* . 25 W. R., Cr., 19

6. ——— *Criminal Procedure Code, s. 260—Complaint including charge not summarily triable—Summary jurisdiction not necessarily ousted thereby.*—The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. Whether a complaint affords sufficient grounds for a summary trial or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Ram Chunder Chatterjee v. Kanye Laha, 25 W. R., Cr., 19; Chunder Seekor Sookul v. Dhurm Nath Tewaree, 1 C. L. R., 434; Beputoolla v. Najim Sheikh, 2 C. L. R., 474; and Empress v. Abdool Karim, I. L. R., 4 Calc., 18, referred to.* *QUEEN-EMPRESS v. JAGJIWAN*

[I. L. R., 10 All., 55]

7. ——— *Value stolen in case of theft as determining jurisdiction to try summarily—Evidence, Mode of taking.*—In a case in which the accused was charged with theft of a box containing Rs 50 in cash and of the box worth 8 annas 6 pie, the Magistrate considered the box to be of no value, and struck out the 8 annas 6 pie, and thereupon tried the case summarily under s. 222 of the Criminal Procedure Code, 1872. Held that the Magistrate was not at liberty, upon his own authority and without taking evidence, to throw the box entirely out of consideration, as upon that depended his jurisdiction to dispose of the case summarily. Such evidence should have been taken precisely in the same way as evidence upon the merits of the case, and as it was not taken, the Court held that the Magistrate had no jurisdiction in this case. *QUEEN v. BUZZEH ALI* . . . . . 22 W. R., Cr., 65

8. ——— Matters necessary to be stated in the record of a summary trial—*Criminal Procedure Code (1882), ss. 260, 263—Offence under Gambling Act (111 of 1867), ss. 3 and 4.*—Where a Magistrate invested with powers

**SUMMARY TRIAL—continued**

under a 200 of the Code of Criminal Procedure is trying a case summarily it is desirable that he should act out under the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. The record of a summary trial contained in the column corresponding to cl. (A) of s. 203 of the Code of Criminal Procedure the following entry: "The police made a raid on information received and caught all the accused gambling. The defence of Mukunda, Manno, Kali Charan, Balfan, and Gohari Lal involves the absurdity that the police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukunda of keeping a common gaming house—s. 4, Gambling Act. I convict the other six defendants of gaming in a common gaming house—s. 5, Gambling Act." Held that this entry, though it should have been more explicit, was a sufficient compliance with the requirements of the law. **QUEEN EXPRESS v. MEHTA LAL**

[I. L. R., 21 All., 169]

9. Case instituted by Magistrate—*Criminal Procedure Code 1872 s. 220*—*Institution by Magistrate without complaint*—Where an accused person had, at the instance of the Magistrate who had come across him while out walking one morning, encroaching on an embankment, been placed on his defence for mischief and summarily tried and sentenced to two months' rigorous imprisonment.—Held that, in a case of this kind, where Government had been made prosecutor, but no complaint had been offered to the Magistrate who had acted on his own impulse, the Magistrate had erred seriously in dealing with the case summarily and sentencing of the accused to imprisonment. **IN THE MATTER OF THE PETITION OF PRAN NATH BHALLA. IN THE MATTER OF THE PETITION OF ROMA NATH BANERJEE** 25 W. R., Cr., 69

10. Criminal trespass and mischief. *Magistrate Jurisdiction—Code of Criminal Procedure (Act X of 1882), s. 260*—A person may be tried summarily for criminal trespass and mischief unless there is a bona fide claim of right depriving the Magistrate of jurisdiction. **Shakar Mahomed v. Chauder Mohan Sha**, 21 W. R., Cr., 39 disapproved. **Issur Chander Mond v. Rohim Sheikh** 25 W. R., Cr., 65 distinguished. **GAMRIYILAH SARKAR v. ANJUL CHAKRA**

[I. L. R., 10 Calc., 403]

11. Mischief combined with theft.—*Criminal Procedure Code, 1872, s. 222*—A charge of mischief even if combined with one of theft, is triable summarily under Act X of 1872, s. 222. **QUEEN v. RAMADEV PATEK**

[25 W. R., Cr., 5]

12. Offence under Act XXI of 1858.—*Criminal Procedure Code, 1872, s. 222 and s. 148*—*Illegal possession of opium*—On a conviction, under Act XXI of 1858, of having in possession

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opium not supplied from Government stores, the Magistrate tried the case summarily under s. 222, Code of Criminal Procedure, and passed a sentence of fine or imprisonment, and confiscation of the opium. Held that the case could not be tried summarily, the additional sentence of confiscation not coming under s. 148, Code of Criminal Procedure. **QUEEN v. JESOO NATH SHAMA** 23 W. R., Cr., 33

See IN THE MATTER OF THE PETITION OF KRISHNA MOHUN CHOWDHURIES [22 W. R., Cr., 43]

13. Criminal Procedure Code, s. 260—Act XIII of 1859, s. 3—Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code. **QUEEN EXPRESS v. INDARJIT** [I. L. R., 11 All., 262]

14. *Illegal possession of opium—Offence punishable by fine and confiscation*—An offence under s. 43 of Act XIII of 1859 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 43 being merely a consequence of the conviction, and not forming part of the punishment for the offence. **EXPRESS v. BAIKUNATH DASS** [I. L. R., 3 Calc., 366; 1 C. L. R., 442]

15. Criminal intimidation.—*Criminal Procedure Code, 1872, s. 222*—Where a head constable of police of many years' service was charged with criminal intimidation with a view to prevent a person from giving evidence against serious offenders, and the District Magistrate tried the case summarily under the special power given by s. 222 (10) of the Code of Criminal Procedure, 1872.—Held that the case ought not to have been tried summarily. **SCRAMANTIA v. QUEEN** [I. L. R., 6 Mad., 366]

16. Offences one triable summarily and the other not.—*Criminal Procedure Code 1858, s. 260*—*Omission of charges as to give summary jurisdiction*—Where an accused was charged with offences one of which is triable summarily and the other not so triable, it is not open to a Magistrate to discard the latter charge and proceed to try the case summarily. **RAMANTY v. MANTON v. KOTLASH MANTON**

[I. L. R., 11 Calc., 236]

17. Alteration of charge to make it triable summarily.—*Criminal Procedure Code, 1872, ss. 222-230*—*Power of Magistrate*—The powers conferred upon Magistrates under the 18th chapter of the Criminal Procedure Code, 1872, were not intended to give them the power of altering a charge brought against an accused person so as to bring his case within the provisions of that chapter, but when a charge of a serious offence—one which the Magistrate is not competent to inquire into summarily—is preferred, it is the duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit or commit for trial, the person implicated. The procedure under Ch. XVIII is to be followed when

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a charge is plainly and directly one of those specified in s. 222. **CHUNDER SHEKHUR THAKOOR v. NITALOO**  
[22 W. R., Cr., 29]

**HARAN SHEIKH v. RAMDHUN BISWAS**  
[24 W. R., Cr., 21]

**EMARAL SHEIKH v. MOHAMMADI SHEIKH**  
[24 W. R., Cr., 48]

*See* **EMPRESS v. ANDOOL KARIM**  
[I. L. R., 4 Calc., 18]

18. ———— *Alteration of charge for purpose of trying case summarily—Practice condemned.*—The action of Magistrates in not trying accused persons for offences which the acts attributed to them constitute, but in trying the case as one under s. 143, Penal Code, for the purposes of holding the trial under summary procedure is highly improper. **SHEO BHUNJUN SINGH v. MOSAVI**  
[4 C. W. N., 795]

19. ———— *Alteration of charge of dacoity to one of unlawful assembly.*—In a case where the charge was originally one of dacoity, but in the course of the proceedings that charge was ignored and the accused put on their defence on a charge of being members of an unlawful assembly, and the proceedings continued in a summary way,—*Held* that, the original charge being one of dacoity, the Magistrate had no jurisdiction to alter it and try the case summarily. **DWAHKNATH MAZOOMDAR v. LALU DASS** . . . 21 W. R., 89

20. ———— *Rioting altered to charge of mischief.*—Where a charge of rioting was tried summarily by the Magistrate as one of mischief and unlawful assembly, the Sessions Judge, relying on the case of *Chunder Shekhur Thakoor v. Nitaloo*, 22 W. R., Cr., 29, submitted, at the request of the accused, that the summary order might be set aside, and the accused might be tried for rioting under Ch. XVII of the Criminal Procedure Code. The High Court declined to interfere at the instance of the accused persons, and distinguished this from the case cited by the Sessions Judge, as the reference there was made by the Magistrate in the interests of public justice. **QUEEN v. ABOO SHEIKH**  
[23 W. R., Cr., 18]

21. ———— *Alteration of assault on public servant to one of assault—Criminal Procedure Code, 1872, s. 222—Penal Code, ss. 352, 353.*—The accused in this case were convicted by the Magistrate summarily of offences under ss. 352 and 341, Penal Code, although it was contended on their behalf that, if guilty, they ought to have been convicted under s. 353, in respect of which a summary trial could not be held. The Sessions Judge, on the Magistrate's own judgment, recommended that the convictions should be set aside, on the grounds (1) that the facts showed that the accused should have been convicted under s. 353 or under s. 342, and (2) that the Magistrate had no power to convict of the lesser offence, and so give himself jurisdiction to try the case summarily. *Held*, in concurrence with the Sessions Judge, that the accused ought to

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have been tried under s. 353: the Magistrate's summary proceedings were accordingly set aside and a fresh trial directed. **QUEEN v. BAVEE MADHUR DOSS** . . . 23 W. R., Cr., 3

22. ———— *Alteration of charge from lurking house trespass or house-breaking at night to receiving stolen property—Magistrate, Jurisdiction of—Penal Code, ss. 411, 457—Criminal Procedure Code, 1872, ss. 141, 222—Alteration of charge from one offence to another.*—A Magistrate, who is otherwise competent, has, under s. 141 of Act X of 1872, a discretion to inquire into and try a person on any charge which he may consider covered by the facts complained of by any person, or reported by the police, without reference to the particular charge that may have been preferred by the complainant or by the police, and without reference to the procedure which, when he has determined the offence with which he will charge the accused, it will be competent to him to adopt. *Held*, therefore, when a person was brought before a Magistrate by the police, charged with an offence under s. 457 of the Penal Code, an offence not triable in a summary way, that the Magistrate was competent to alter the charge to one under s. 411, and to try the accused summarily under the provisions of s. 223 of Act X of 1872. **IN THE MATTER OF MEWA** . . . 6 N. W., 254

23. ———— *Appeal from summary trial—Insufficiency of evidence—Criminal Procedure Code, 1872, ss. 222 to 230.*—If on appeal from a summary trial under Ch. XVIII of the Criminal Procedure Code (Act X of 1872), the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him. **QUEEN v. KHERAS MULLAH**  
[11 B. L. R., 33]

24. ———— *Magistrate, Power of, to try case summarily—Criminal Procedure Code (Act X of 1872), s. 260.*—A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case. *Held* that the Magistrate had power to try the case summarily. When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of

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which he really complains disclose such offences  
GOLAF PANDIT v. BODDAM

[I. L. R., 18 Calc., 715

25.

— *Criminal Procedure Code (Act V of 1898) s. 260*—Summary procedure under Penal Code s. 323 after enquiry into the greater charges under s. 147 and 324 not triable summarily. A first class Magistrate took a case on his file and commenced a regular enquiry thereon under ss. 147 and 260 of the Indian Penal Code; but after hearing evidence and being of opinion that only an offence under s. 323 of the Indian Penal Code had been made out he proceeded to deal with the case summarily. Held that inasmuch as the evidence adduced was not sufficient to justify a commitment but clearly disclosed an offence over which he had summary jurisdiction the Magistrate was right in acting as he did. Such a course is different to disregard or part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has bona fide acted in the interests of justice. *Express v. Adool Kormu, I. L. R., 4 Cal., 19* distinguished. *QUEEN EMPIRESS v. RANGAMANI* I. L. R., 23 Mad., 459

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See *ASSESSORS* 7 B. L. R., 63 67 note  
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See *CASES UNDER CHARGE TO JURY*

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See *INSPECTION OF DOCUMENTS—CRIMINAL CASES* I. L. R., 19 Calc., 52

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See *CASES UNDER WITNESS—CIVIL CASES*  
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See *CASES UNDER WITNESS—CRIMINAL CASES—Summoning Witnesses*

Application for—

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See *PRINCIPAL AND SURETY—DISCHARGE OF SURETY* I. L. R., 14 Bom., 297

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Refusal to grant receipt for—

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to attend taxation.

See *COSTS—TAXATION OF COSTS*

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See *LIMITATION ACT, 1877, s. 4*

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1. — Issue of summons—*Time after period of limitation*—A summons ought not to be ordered to issue after the lapse of the period of limitation prescribed for a suit, unless the plaintiff has, in the meantime, done what he can to prosecute his suit with proper diligence. If a defendant is aggrieved by an order directing a summons to issue in such a case, he ought to apply to set aside the order and the summons under it. *GREENBER COOMAR DUTT v. JAGGATKUMAR DAZER* I. L. R., 5 Calc., 128

2. — Issue of fresh summons—*Return of old summons*—A fresh writ of summons will not be granted till the old one is returned into Court. *INSURCHUSSEEN SEIN v. ARASOTORN CHAT TIKER* 1 Ind. Jur., N. S., 233

3. — Application for fresh summons—*Practice*—An application for a fresh summons to appear etc., should be issued on petition showing that a first summons had been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed. *URQUHART v. GILBERT*

[1 Ind. Jur., N. S., 224

4. — Grant of second summons—*Discretion of Judge—Practice—Rule 12 of High Court Rules, 1st May 1875—Laches*—A Judge has, under rule 12 of the Rules of 1st May 1875 discretion as to granting a second summons, and is bound to inquire into the circumstances under which it is applied for, and when there has been great and unexplained laches, he should refuse it. Unless such discretion is clearly shown to have been improperly exercised, the Court will not interfere on appeal but under the circumstances of this case the Court on appeal finding there was no definite rule of practice as to the time within which a second summons might be applied for, allowed a second summons to issue. *GOTCHEN SOOR v. PEARY LALL PAUL*

[15 B. L. R., Ap., 13

5. — Mistake in summons—*Award of summons at hearing—Practice*—The defendant was manager of a joint Hindu family carrying on business in Bombay, Madras, and other places. In a suit in the High Court of Bombay against him as such manager, a decree was passed on the 11th

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April 1896, in execution of which on the same day certain property, in which the joint family was interested, was attached. On the 9th April 1896, however, the defendant had been adjudged an insolvent by the Insolvent Court at Madras under s. 9 of the Insolvent Act. On the 6th May 1896 the Official Assignee, Bombay, took out a summons to have the attachment removed. By mistake the summons in this case purported to be taken out by the Official Assignee of Bombay, omitting to describe him as constituted attorney of the Official Assignee of Madras. Held that the summons might be amended at the hearing by substituting the name of the Official Assignee of Madras and disposed of on that basis. **SARDAMAL JAGONATH v. ARANYATL SABHAPATHY MOODLIAR**. I. L. R., 21 Bom., 205

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See **SOLDIER**. I. L. R., 11 Mad., 475

See **SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE**, s. 622  
[I. L. R., 18 Bom., 608]

See **TRANSFER OF PROPERTY ACT**, s. 132  
[I. L. R., 21 Bom., 60]

See **WITNESS—CRIMINAL CASES—SUMMONING WITNESSES** 5 Bom., Cr., 20  
[3 Mad., Ap., 5  
6 Mad., Ap., 29]

**— Date of service.**

See **LIMITATION ACT, 1877, ART 159**.  
[I. L. R., 23 Calc., 578]

**— Fine for avoiding—**

See **WITNESS—CIVIL CASES—DEFAULTING WITNESSES** 1 B. L. R., A. C., 186

**— on wrong person.**

See **COSTS—SPECIAL CASES—SERVICE OF SUMMONS BY MISTAKE**.  
[I. L. R., 4 Bom., 619]

1. — — — **Proof of service—Presumption—Objection taken on appeal.**—No legal decree can be passed *ex parte* without a Court being satisfied of the due service of the summons. From the mere fact of the plaintiff obtaining an *ex-parte* decree, it is not to be presumed that the service of summons was proved. To satisfy a Court of appeal if the objection is raised, there must be proof that the service of summons was actually made. **RAY LOCHUN SOOR v. NITTA KALLEE DEBIA**. 12 W. R., 211

2. — — — **Onus probandi—Civil Procedure Code, 1859, s. 119.**—Under Act VIII of 1859, s. 119, the onus of proving non-service of summons was on the party claiming the benefit of that section. **TORAB ALI v. CHOORAMUN SINGH CHOWDHRY**. 24 W. R., 282

3. — — — **Omission to serve summons—Appearance of defendant.**—Where a summons has not been issued to a defendant, the defect is cured by his appearance. **KHALUT CHUNDER GHOSE v. SARODA SOONDERY DOSSEE** Bourke, O. C., 244

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4. — — — **Mode of service—Act XIX of 1853, s. 26, Suit under—Personal service.**—To maintain an action under Act XIX of 1853, s. 26, it was necessary that the summons to attend should have been personally delivered. **DHUNPUT SING v. PREM BIBEE**. 24 W. R., 72

5. — — — **Substituted service—Civil Procedure Code, 1859, s. 57—Application to set aside ex-parte decree.**—Substituted service if duly effected under the provisions of the law is as valid as personal service; and therefore, where substituted service had been effected under s. 57 of Act VIII of 1859, an *ex-parte* judgment would not be set aside on an allegation of no notice, and of good defence on the merits. **KISSUR CHUND v. BHOOBUNESSUR CHUNDER**

[Bourke, O. C., 25: Cor., 151]

6. — — — **Practice—Setting aside ex-parte decree—Civil Procedure Code, 1877, ss. 82, 84.**—Where substituted service of the summons is ordered under s. 82 of the Civil Procedure Code (Act X of 1877), a sufficient time ought, under s. 84, to be given for notice of the fact to reach the defendant, wherever he may be; and, if an *ex-parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree. **ALLY DEBANEE v. HYDER HOOSAIN**. I. L. R., 2 Bom., 449

7. — — — **Procedure in case of non-service.**—Every summons not actually served on a defendant or respondent or his recognized agent must be stuck up on the house in which the defendant or respondent is dwelling. If the defendant or respondent cannot be found, the summons should be returned to the Court and an order obtained from the Court as to the mode of service. **GOPAL DOSS v. GREEDHAREE DOSS**. 6 W. R., 13

8. — — — **Civil Procedure Code (Act XIV of 1882), ss. 78, 80, 82—Substituted service—Duty of process-server.**—Mere temporary absence of a person to be served does not justify the process-server in fixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected. **SUBRAMANIA PILLAI v. SUBRAMANIA ATYAR**

[I. L. R., 21 Mad., 419]

9. — — — **Service of summons on minors carrying on partnership business with others—Affixing summons on house in which business is carried on—Civil Procedure Code (Act XIV of 1882), ss. 74, 76, and 443.**—In a suit for the enforcement of an equitable mortgage of certain property belonging to a partnership business, brought against certain minors and other persons who constituted a firm carrying on business within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction, the summonses were neither served upon the minors nor upon their guardian personally, but were affixed on the house in which the business was carried on. Held that there was no service of summons either personal or substituted upon the minors either under

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s 74 or under s 76 of the Code of Civil Procedure, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership or business are minors. *Held* also that ss 74 and 76 of the Code of Civil Procedure are controlled by s 443 of the said Code.

JATINDRA MOHAN PODDAR v. SRINATH KOT  
[I. L. R., 28 Calc., 287  
3 C. W. N., 281]

10. — *Affixing copy of summons to door of defendant's residence.*—*Dwelling.* Service of a copy of the summons on the door of the house in which the defendant is dwelling is one of the modes of service provided in lieu of personal service but it is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. There may be a dwelling sufficient to give jurisdiction and yet not the kind of dwelling necessary to make a good service. ANANTHA NARAYANA v. PERIYANA KOSK

[5 Mad., 101]

It sh<sup>d</sup> be shown he was dwelling in the house, and that he could not after diligent search be found.

KRISHNAN IYER v. CHITTIBHARATHI LALL  
[21 W. R., 242]

11. — *House service.*—*Civil Procedure Code (1852), ss 56-52.—Practice.*—Where a defendant is temporarily absent from home and is not represented at his house by an agent or male member of his family, a Judge is not justified in treating the fixing of a summons to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there. The Civil Procedure Code (Act XIV of 1852) in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence. BHOMSHETTI JISAPPAHETTI v. UMARAI

[I. L. R., 21 Bom., 223]

12. — *Civil Procedure Code (Act XIV of 1852), s 80.—Ex-parte decree.—Substituted service of summons.*—A decree was passed *ex-parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, s 101, to be heard in answer to the suit, now preferred a petition under s 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants. *Held*, as it appeared from the serving officer's return, that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house. SANKARANINGA MCDALI v. RATHAPPAHAPATI MCDALI

[I. L. R., 21 Mad., 324]

13. — *Serves on railway company.*—For the purposes of summons a railway company must be deemed to dwell at its

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principal office. HANLEY v. IYER BRANCH RAILWAY COMPANY . . . 1 Hyde, 197

14. — *Service in foreign territory.*—*Act VIII of 1859, ss 69 and 65.*—A summons cannot be sent by post to any place to which letters are not registered by a post office. A special taluk cannot be sent to serve civil process in a foreign territory. KASIM AHM DUTLAH v. KADIR MOHAMMED RAUFCHA . . . 2 R. L. R., A. C., 59

S. C. KASIM AHM DOOLAY v. KASIM MAHMOOD BALOOCHA . . . 10 W. R., 349

15. — *Service by post.*—*Return through the post of packet containing the summons endorsed "refused."*—*Civil Procedure Code (1852), s 82.*—A small Cause Court having forwarded the summons to the defendant in a registered packet through the post office, the packet was returned endorsed "refused," the small Cause Court held the service of the summons to be good service and passed an *ex-parte* decree against the defendant. *Held* that the delivery of the summons by the post to a person who was not shown to be the defendant was not good service. JAGANNATH BRAHMBHAI v. FASSOOK . . . I. L. R., 18 Bom., 603

16. — *Where a summons was sent by the sheriff by registered letter to the defendant at Colombo, Ceylon, and delivered by the postman in the presence of a witness who knew the defendant and his address, and who saw the letter delivered to the defendant who refused it, it was held a sufficient service of the summons.* ADITHYAN v. CORUNNIA JAFFERIE . . . 1 C. W. N., 56

17. — *Affixing summons to place of business.*—*Civil Procedure Code, 1852, s 55.—Query.*—Whether the affixing of a summons to the outer door of the place of business of a defendant was good service upon him under s 55 of the Code of Civil Procedure. CHANDRABABU NIN SANGAPPA v. MAINABA NIN MAHANTHET

[7 Bom., A. C., 136]

18. — *Civil Procedure Code, 1877, s 57, cl (a).—Non-resident.—Recognized agent.*—The term "non-resident" in s 57, cl (a), of the Code of Civil Procedure (Act V of 1877) covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term; that, where a Marwadi had resided for forty years at Pen. and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent upwards of four months. It was held that he was "non-resident" within the local limits of the jurisdiction of the Pen. Court, and that a person holding a general power of attorney from him was a recognized agent within the meaning of the section. RAMCHANDRA SAKHARAM v. KESHAV DURGAI

[I. L. R., 6 Bom., 100]

19. — *Service on agent.*—*Suit to obtain relief respecting immovable property.*—*Civil Procedure Code (Act XIV of 1852), ss 16 and 77.*—In a suit for foreclosure or sale of immovable property, it appeared that the mortgagee



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had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises. *Held* that the service was sufficient, the suit being one to obtain "relief respecting immovable property" within the meaning of s. 16 of Act XIV of 1842. *MICHAEL v AMEENA BIBI*

[L. L. R., 9 Cal., 738; 13 C. L. R., 161]

20. ———— *Service of summons on agent—Principal and agent—Civil Procedure Code (Act X of 1877), ss. 76 and 37, cl. (c)—Carrying on business*—To satisfy the conditions of s. 76 of the Civil Procedure Code (Act X of 1877) as to service of summons on an agent there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of such work, that is, business either actually itself carried on by the agent or manager, or forming part of the business in the *sense* of a connected course of transactions to the management of which he has been duly appointed. S. 76 and s. 37, cl. (c), are to be construed together, and are intended to carry out the scheme of relief which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceedings that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, albeit subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent. The firm of *G S* carried on business at Agra. It had no place of business in Bombay, but it employed *G* as its agent in Bombay, in certain dealings which it had with the plaintiff. The letters and telegrams of the firm to *G* were sent to the plaintiff's place of business, or addressed to *G* as an individual, not in the name of the firm. *G* did not himself initiate any business or in any way stand between his employers' firm and the plaintiff. *Held* that *G* was not the defendants' manager or agent within the meaning of the Civil Procedure Code, s. 76, and that in an action against the defendants service of summons upon him was not due service. *G* in particular instances drew hundis on the firm of *G S* which that firm duly accepted and paid. *Held* that he might reasonably be deemed their agent or manager for this particular kind of business, if for no other, and service on him might probably suffice in the case of a plaintiff suing on hundi transactions as with the firm through him. Service unduly made under s. 76 does not become effectual by reason of the fact of service being subsequently notified to the parties really interested as defendants. *Semble*—Service duly effected under s. 76 is effectual without reference to the circumstances of its being or not being com-

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municated to the real defendants. *GOKULDAS v. GANESHLAL* . . . L. L. R., 4 Bom., 418

21. ———— *Agent to whom ship is consigned—Matters connected with ship*—Service of a summons on an agent to whom a ship is consigned is good service on the owner in respect of matters connected with such ship. *RAJABAI GOVINDRAM v. BROWN* . . . 7 Bom., O. C., 97

22. ———— *Civil Procedure Code, 1859, s. 17—Recognized agent—Carrying on business in name of principal—Ship's agents*—Messrs *R S & Co.*, European merchants, carrying on business in Bombay, received a letter from the owner of the ship *Rialto* by which Messrs. *R S & Co.* were constituted agents to obtain freight for the *Rialto* on a voyage from Bombay to Liverpool, the ship being placed in their hands for that purpose. Acting on this letter, Messrs *R S & Co.* obtained freight for the *Rialto*, signing the shipping orders in their own name as agents for the master of the *Rialto*. Messrs *R S & Co.* held no other authority from the owner of the *Rialto* than that contained in the above letter. *Held* that Messrs *R S & Co.* did not carry on business for, and in the name of, the owner of the *Rialto*, and were not therefore his recognized agents within the meaning of s. 17, cl. 2, of the Code of Civil Procedure, to accept service of a summons on his behalf in respect of a cause of action that arose out of the loading of the *Rialto*. Whether, in order to constitute a recognized agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business. *Quare—Semble*—A Bombay firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners of such ship. *RATANSI PANCHAM v. SAUNDERS* . . . 8 Bom., O. C., 159

23. ———— *Civil Procedure Code, 1859, s. 49—Agent*—Persons merely looking after the affairs of a defendant are not agents on whom service of summons will be sufficient under s. 49, Act VIII of 1859. *RAM SOONDUREE DASSIA v. SHRUT SOONDUREE DEBIA* . . . 17 W. R., 33

24. ———— *Service on co-partner for partner*—Service of a summons intended for one partner upon another partner of the same firm is not a sufficient service. Partners are not the recognized agents of each other within the meaning of cl. 2, s. 17, Act VIII of 1859. *LUCHMEPUT DOGARE v. SIBNARAIN MUNDLE* . . . 1 Hyde, 97

25. ———— *Services on partner for co-partner—Agent—Act VIII of 1859, s. 17, cl. 2*—Service of summons on one partner for his co-partner is a good service. *Luchmeput Dogare v. Sibnarain Mundle*, 1 Hyde, 97, dissented from. *RAMCHANDRA BOSE v. SENAID*

[7 B. L. R., Ap, 58]

26. ———— *Service on partner for co-partner*—Service of summons on one partner for his co-partner is not sufficient service unless the

**SUMMONS, SERVICE OF—continued**

service is effected at the place where the partnership business is carried on. **KUSTOOR MULLY JOSEPHAM** [11 B. L. R., Ap., 23]

27. — *Brothers living in the same house*—Where an *ex-parte* decree had been given against three brothers, and it was shown that there had been only one summons, and that the serving officer had merely posted the summons on the door of one of them without attempting to serve it personally on him.—*Held* that the notice had not been properly served even on the one brother, a bill less on the two others, and that the defendants were entitled to have the suit restored on their application. **SERBOO ROY v. KASHER ROY**. 25 W. R., 394

28. — *Substituted service—House—Dwelling house*—A moffussil Judge stated in his return to the Sheriff of Calcutta, that substituted service had been effected by fixing a copy of the summons to the "house" of the defendant. *Held* that the return was insufficient, and that the word "dwelling house" must be expressly mentioned. **BUDDOO BADOO v. LAKSHODAR MULLICK**

[1 Hyde, 132]

29. — *Substituted service—Defendant not found and not heard of for some years*—In an application for substituted service it was shown that diligent inquiries and attempts to find the defendant had proved futile; that at the house where the defendant had last ordinarily resided his relatives informed the serving officer that the defendant had left the house some years ago and they did not know where he was residing, and that the defendant had not been heard of for two years. **JENNINS, J., and SAKE J.**, followed the procedure in the English case of *Wolterhampton and Staffordshire Banking Co. v. Bond* 29 W. R. (Eng.) 599, and ordered substituted service to be made by affixing a copy of the summons on the notice-board of the Court house by affixing another copy on the outer door of the house in which the defendant was known to have last resided, and by advertising the summons in such of the newspapers as the Registrar should direct. **RAJNARAIN GHOSH v. TEER LAL SHARMA** 1 C. W. N., 104

30. — *Substituted service—Person not found, but serving officer saying he knew where he was—Civil Procedure Code 1882 s. 80*—Where the return of the picon of the service of a summons upon a witness was in these terms "The remaining witness No. 1 being in Calcutta, the copy of summons in his name has been hung upon the wall of the kitchen house of the defendant's residence"—*Held* that the circumstance that the picon could not find the witness, when he says he knew where the witness was, is not sufficient *per se* to warrant the picon in affixing a copy of the summons to the house of the witness, so as to constitute good substituted service under a 80 Civil Procedure Code. **KALINARAIN ROY CHAUDHURI v. BAJOO** [3 C. W. N., 307]

31. — *Issue of summons—Summons transmitted to local Court for service—Return of local Court when sufficient evidence*

**SUMMONS, SERVICE OF—continued**

*of service—Form of return to be made by Civil Court*—Where the service of summons has been effected on a defendant by affixing a copy of the summons on the door of his dwelling house, the Court must decide whether the summons has been duly served by such affixing or not and if it decides in the negative, a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service, it must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service. Where a summons has been transmitted by one Court to another for service by the latter, the transmitting Court is not bound, in every case, to satisfy itself that the law as to service has been strictly followed. The presumption in favour of the proceedings of a Court of justice is that every thing has been duly performed, and if the return made by the Court serving the summons states that the summons has been duly effected, that presumption must prevail unless the return discloses some patent irregularity or clear divergence from the law. As a rule, on a return from a competent Court that summons has been duly effected, it may be presumed that either personal service has been effected or substituted service under s. 82, or under ss. 80 and 82 combined, of the Civil Procedure Code (Act XII of 1907). As proof of due service of summons, a return from the Court of Small Causes at K was relied upon in the High Court. The return was in the following words "Head bailiff's endorsement on the back of the process stating that the summons has been affixed to the defendant's house on the 22nd December 1884, at 9 A.M.; and proof of the same having been duly taken by me it is ordered that the summons be returned." *Held* that there was no sufficient service. The return itself proved the insufficiency. There was no statement under the hand of the Judge, that the summons had been duly effected and it did not appear that anything had been done beyond fixing the summons on the defendant's door. That affixing was not sanctioned after inquiry by the local Court, as required by s. 82. All that appeared to have been done was the affixing prescribed by s. 80 which was insufficient until confirmed under s. 82. **Reg. v. Talyari, I L. R., 1 Bom., 214** **NUSSER MAHOMED v. KALBAI** [1 L. R., 10 Bom., 203]

32. — *Summons transmitted to local Court for service—Question of sufficiency or otherwise of service of summons—Civil Procedure Code (1882), s. 85—Practice*—When a summons is issued by one Court to persons resident outside its jurisdiction, and is sent to another Court for service to be effected, it is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not. **Nasser Mahomed v. Kalbai, I. L. R., 10 Bom., 202**, disapproved. **ROMAYATH BURAL v. GUNGOONANDAN SEV** I. L. R., 23 Cal., 869

33. — *Sufficiency of service—Evidence of service—Substituted service—Evidence of serving picon*—The evidence of the serving picon that he endeavoured to serve the summons on the

**SUMMONS, SERVICE OF—continued.**

defendants, and that, not being able to serve them personally, he affixed a copy of the summons on the outer door of their dwelling-house, if believed by the Judge, is perfectly legal evidence of the fact that these defendants were served. **RAMCOOMAR SINGH v. RAMSOONDUR SINGH** . . . 17 W. R., 362

34. ————— *Evidence of service—Peon's return of service.*—A Collectorate peon's return of service is not admissible as legal evidence. **MOINOOLLAH v. GOLUCK MONEE CHOWDRAIN** . . . 15 W. R., 270

35. ————— *Army Act of 1881, ss. 114, 151—Civil Procedure Code, s. 468.*—In a suit against a soldier to recover a debt not amounting to £30. *Semble*—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him. **MAHOMED v. AGGAS** . . . I. L. R., 10 Mad., 319

36. ————— *Military officer*—Service of summons on a military officer was effected by transmitting a copy by post to the Commanding Officer at Secundrabad, where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it, and with a certificate that it had been duly served, but there was no affidavit of service: service was held to be sufficiently proved. **HARRISON v. HOPE** . . . 11 B. L. R., Ap., 43

37. ————— *Army Act, 1881, s. 144—Sub-Conductor, Ordnance Department, is a soldier—Civil Procedure Code, s. 468.*—A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover Rs 153-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action. *Held* that the Commissary of Ordnance was bound to serve the summons, under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act. 1-81. **ABRAHAM v. HOLMES** . . . I. L. R., 11 Mad., 475

38. ————— *Return by Nazir*—*Proof of service of notice*—A return by the Nazir to the effect that the peon swears that a notice has been served is insufficient in law to prove the service without the deposition on oath of the serving peon taken before a competent authority. **RAJ KISHORE DUTT v. BYDONATH SHAHA** . . . 12 W. R., 365

39. ————— *Nazir's report.*—A Nazir's report of service of summons or of issue of proclamation is not legal evidence on which to punish a witness failing to attend a Court of justice when duly summoned. **IN THE MATTER OF THE PETITION OF NILEKANT BHUTACHARJEE** [W. R., 1864, Mis., 9

**OKHOY CHUNDER DUTT v. ERSKINE** [3 W. R., Mis., 11

**SUMMONS, SERVICE OF—continued.**

**SREENATH THAKOOR v. WATSON**

[4 W. R., Mis., 4

**RAM SOONDUR CHUCKERBUTTY v. KALEE KOMUL DUTT** . . . 6 W. R., Act X, 92

**KOONDUN LALL v. NOOR ALI** . . . 10 W. R., 3

*See* **MEAH KHAN v. NARAIN CHUNDER CHOWDREY** . . . 18 W. R., 197

40. ————— *Civil Procedure Code, 1852, s. 80—Affidavit of service of summons—Practice.*—An affidavit in support of service of a writ of summons under s. 80 of the Civil Procedure Code should show that proper efforts have been made to find out when and where the defendant is likely to be found. **COHEN v. NURSING DASS AUDDY**

[I. L. R., 19 Calc., 201

41. ————— *Civil Procedure Code (Act XIV of 1852), ss. 79, 80—Affidavit of service of summons, Sufficiency of.*—Where a defendant cannot be found, the affidavit of service must show (1) that proper efforts were made to find him, and (2) that the copy of the summons was affixed on the door of the house in which the defendant ordinarily resided at the time of service. Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances. **RAJENDRO NATH SANJAL v. JAN MEAH** . . . I. L. R., 26 Calc., 101

[2 C. W. N., 574

42. ————— *Mad. Act III of 1869, ss. 2, 3.*—Where a summons to a witness, issued under Madras Act III of 1869, was shown to a person and taken back, *Held* that the summons had not been served. **IN RE KUPPAH**

[I. L. R., 11 Mad., 137

43. ————— *Discretion to issue second summons—Absence of return to first summons.*—When there is no return of service to a summons, the law gives a Court full discretion either to issue a second summons or to take or not take stronger measures. It is not imperative on one Court to take measures to expedite the service in another Court, but it is the business of the party interested to move the Court to do what is necessary. **DOWLET MUKDUR v. OMRAO SINGH RANA** . . . 14 W. R., 336

44. ————— *Civil Procedure Code, 1852, ss. 99A and 72 Application for fresh summons—Limitation.*—An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is within the period prescribed by s. 49A of the Civil Procedure Code (Act XIV of 1852), if made within one year from the date of the nazir's countersignature below the bailiff's endorsement of non-service, the nazir being the proper officer of the Court to whom under s. 72 of the Code the summons is delivered for service, and who is to return it to the Court if unserved. **PARSOTAM VITHAL v. ABDUL REHMANBHAI**

[I. L. R., 18 Bom., 500

45. ————— *Irregular service—Ground for objecting to decree—Joint promissory note.*—An irregular service of summons on two out of three

# SUPERINTENDENCE OF HIGH COURT—continued.

Col.

3. CHARTER ACT (24 & 25 VICT., c. 104),  
 s. 15 . . . . . 9002  
 (a) CIVIL CASES . . . . . 9002  
 (b) CRIMINAL CASES . . . . . 9026  
 4. CIVIL PROCEDURE CODE, s. 622 . . . . . 9031

See BOND . . . . . 5 B. L. R., 167

See CALCUTTA MUNICIPAL CONSOLIDATION ACT (1868), s. 135

[I. L. R., 28 Calc., 74  
 3 C. W. N., 70]

See HIGH COURT, JURISDICTION OF—  
 BOMBAY—CIVIL . . . . . 9 Bom., 249

See LAND ACQUISITION ACT, 1870.  
 [15 B. L. R., 197]

See CASES UNDER REVISION—CIVIL CASES  
 —SMALL CAUSE COURT CASES

———— Criminal Cases.

See CASES UNDER REVISION—CRIMINAL CASES.

## 1 ACT XXIII OF 1861, S. 35.

1. ————— Exercise of superintendence  
 —Orders of Court of first instance and Appellate Court.—The High Court could interfere, under s. 35, Act XXIII of 1861, with the order of the Court of first instance, as well as of the Appellate Court where the orders of both the Courts appeared to be without jurisdiction. *SHAO DYAL SINGH v. MAHOMED KAMIL* . . . . . 3 Agra, Mts., 2

2. ————— Case tried in two Courts without jurisdiction.—Where a case properly cognizable by a Small Cause Court had been heard and determined by the Subordinate Judge, and on appeal by the District Judge, the High Court, in the exercise of its extraordinary jurisdiction, annulled the proceedings of the two lower Courts. *BRIMBAT JIVAJI v. BRIMBAT GOVIND* . . . . . 11 Bom., 194

3. ————— Trial with jurisdiction—Error in decision on facts.—The High Court cannot, where an inferior Court has jurisdiction to try a case, and has tried it, merely because there is an error apparent in the decision on the facts, alter that decision, where the law allows no appeal. *IN THE MATTER OF THE PETITION OF PEARRE LALL SAHOO* . . . . . 7 W. R., 130

4. ————— Courts of Revenue officers—Courts acting without jurisdiction.—The provisions of s. 35 of Act XXIII of 1861 extended to the Courts of Revenue officers' acting without jurisdiction under Act X of 1859. *HURPERSHAD v. LALU* [3 N. W., 60; Agra, F. B., Ed. 1874, 246]

5. ————— Act X of 1859, s. 103—Sale by Deputy Collector—Appeal.—A Deputy Collector sold an under-tenure in execution of a

# SUPERINTENDENCE OF HIGH COURT—continued.

## 1. ACT XXIII OF 1861, S. 35—continued.

decree for rent. An appeal was made to the Collector on the ground that the tenure could not be sold unless execution had been previously issued against the movable property of the judgment-debtor. The Collector affirmed the decision of the Deputy Collector, but on review set aside his former order, on the ground that he had no jurisdiction, the sale having taken place under the provisions of Act X of 1859. An application was made to the High Court under s. 35 of Act XXIII of 1861 to set aside the order of the Collector, on the ground that the Collector had no power to review his own judgment, and consequently his first order stood, which the High Court ought to set aside, and pass such order as it might think right, and reverse the order of the Deputy Collector. The question was referred to a Full Bench whether s. 35 applied to the order of the Collector. The Full Bench refused to consider the question referred, on the ground that it was the intention of Act X of 1859 that the sale by the Deputy Collector should be final. *IN THE MATTER OF THE PETITION OF DOGOWRI KAZI* . . . . . B. L. R., Sup Vol., 517 [6 W. R., Act X, 53]

6. ————— Order illegally made—Appeal entertained without jurisdiction.—In execution of a decree, the District Munsif made an order which he was not legally authorized to make at the instance of the purchaser of the property sold in execution. No appeal could be made against the order, but the Civil Judge entertained an appeal and reversed the order of the District Munsif. The High Court set aside the order of the Civil Judge under s. 35, Act XXIII of 1861, but, by virtue of the powers given by the section, the order of the District Munsif was also annulled. *SUBRAYA GOVIND v. VENKATAGIRI AYYAR* . . . . . 6 Mad., 22

7. ————— Court exceeding its jurisdiction—Appeal heard without jurisdiction.—The true construction of s. 35 of Act XXIII of 1861 was, that the High Court might call for the record in any case in which a subordinate Court exercised a jurisdiction when it had none or exceeded it when it had jurisdiction. The words in s. 35, "the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right," meant that, where a Court exceeds its jurisdiction, the High Court may set aside that part of the order which is in excess of jurisdiction, and that, where the decision of the subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether. If an appeal be heard by a subordinate Court which has no jurisdiction to hear it, when it ought to be heard by another subordinate Court which has jurisdiction to hear it, the Court may set aside the decision of the Court which had no jurisdiction, and may, if it think right, refer the case to the Court which had jurisdiction, even if it be too late to prefer a fresh appeal to that Court. The Judge having entertained an appeal where none lay,

# SUPERINTENDENCE OF HIGH COURT—continued.

1 ACT XVIII OF 1861, S 35—continued.

is no ground for interfering with a decision which the Legislature is intended to be final. JACKSON J. differed. IN THE MATTER OF THE PETITION OF SUBJAN OSTAQUE

[B. L. R. Sup Vol, 531 8 W. R., Mts., 77

8 — — — — — Power to call for record—Discretion of Court—Under a 35 of Act XXIII of 1861 there was a discretion in the Court to call for the record or not; and in cases where the application was made a considerable time after the decree the Court refused to call for it BOODHEE & ALLEN HYDER

[1 N. W., Ed 1873, 271

9 — — — — — Appeal from order refusing to rectify a decree—The general powers of the High Court do not enable it to hear an appeal from an order of a Zillah Judge refusing to rectify a decree. MAHOMED BISHWEECOLLAL CHOWDHURY & LAKSHY CHOWDHURY 9 W. R., 394

10 — — — — — Application to transfer appeal—*La hes*—An application to the High Court under s. 5 of Act XVIII of 1861, to order a subordinate Court to receive an appeal, which in ordinary course ought to have been received within fifteen days of the original decision (in this case to transfer an appeal from a Court which had dealt with it without jurisdiction) ought to be made either immediately upon the quashing of the order of the subordinate Appellate Court or promptly and without any avoidable delay. IN THE MATTER OF RUSICK LALL CHATTERJEE 15 W. R., 518

11 — — — — — Appeal preferred in Court having no jurisdiction—Extension of time for appealing—When an appeal had been preferred by the plaintiff to the Judge which ought to have been preferred to the Collector the Court made an order giving the plaintiff thirty days within which to prefer his appeal to the Collector instead. ADHI RASHI NARAIN KUMARI PAIRANI OF BUDWAN & PUKRIT PATTRA

[7 B. L. R., Ap, 15 15 W. R., 428

12 — — — — — Decision by Collector as to genuineness of deed—Where a Collector decided upon the genuineness of a deed of sale he was held to have exercised his authority and his order could be set aside by the High Court under s. 35, Act XXIII of 1861. TOULUCKOWATHY VEDAR & BALUCHRAM DOS 15 W. R., 1884, Act X, 28

13 — — — — — Illegal order of Deputy Collector—Where a Deputy Collector, who had decreed a suit for ejectment on proof of arrears due held afterwards in execution that as the arrears had been paid up within fifteen days the tenant could not be ejected in accordance with s. 78, Act X of 1859 his order in execution was declared to be *ultra vires* and illegal and was set aside by the High Court under its general powers of revision. DEEN DYAL PURANAMICK & RAMCOMAR CHOWDHURY 10 W. R., 345

# SUPERINTENDENCE OF HIGH COURT—continued

1 ACT XXIII OF 1861, S 35—continued

11 — — — — — Order of Collector affecting *guntidar*—Where a *guntidar* on the suit of the *pattidar* was ejected from his holding, notwithstanding a right of occupancy independent of his *ganti* an appeal lay to the Collector whose order could only be questioned by a civil suit, and not under s. 35 Act XXIII of 1861. IRONCOXATH MITTAR & WOOMANATH CHOWDHURY

[W. R., 1864, Act X, 47

15 — — — — — Extraordinary jurisdiction of High Court—Power to deal with order staying execution—Where a Subordinate Judge in consequence of a fresh suit by the plaintiff, stayed the execution of a decree which was passed in the defendant's favour for costs the High Court, in exercise of its extraordinary jurisdiction, reversed the stay order. GAMBHIRMAL & CHAMAL JODHMAL

[11 Bom., 151

18 — — — — — Refusal to set aside Collector's order made without jurisdiction, where it reversed an illegal order—A rule having been issued calling on a judgment debtor to show cause why an order of the Collector in appeal, reversing an order made by a Deputy Collector in execution, should not be set aside, the rule was discharged with costs, inasmuch as although the Collector had no jurisdiction to make the order which he made, the Deputy Collector's order was wrong, being a violation of the provisions of s. 92 of Act X of 1859 and could not be upheld. TARACHUD MEN DUL & BIKRUD CHUNDER CHUCKERBUTTY

[15 W. R., 551

17 — — — — — Right of appeal—Sale for arrears of rent, irregularly made—A Civil Court had no power, under s. 35 of Act XXIII of 1861 to reverse a sale for arrears of rent under Act X of 1859 on account of irregularity or damage, without the assent of a grievor having first appealed to the Commissioner of Revenue. Act XXIII of 1861 gave no power to the High Court to consider the legality or otherwise of the Collector's order without such appeal. SUNDAR GOLAN SINGH & PAM BUDH SINGH

[1 Ind. Jur., N. S., 1 4 W. R., Act X, 28

18 — — — — — Setting aside sale in execution—Courts exceeding jurisdiction—If the Judge exceeded his jurisdiction in hearing the appeal from the order of the Sudder Ameen setting aside a sale in execution, on the ground of the non-payment of the purchase-money within the proper time—Held that it was competent for the High Court, exercising its power under s. 35, Act XXIII of 1861, to set aside the order of the Sudder Ameen. AMANER BEGUM & KOORBAN ALI 3 AGRA, 204

MAHESH PANDY & BALDUT PANDY [3 AGRA, Rev., 10

19 — — — — — Act XXIII of 1861, s. 35—Order made without jurisdiction—Interference with order of lower Courts—Petitioner bought at a Court-sale certain property which had

# SUPERINTENDENCE OF HIGH COURT—continued.

## 1. ACT XXIII OF 1861, S. 35—concluded.

been attached in O. S. No 30 of 1860 on the file of the District Munsif's Court. Before, however, the sale certificate was issued to him, the plaintiff in O. S. No. 79 of 1866 presented a petition praying for a re-sale of the property, on the ground that it had been sold at an undervalue. On this petition the Munsif cancelled the former sale and ordered a re-sale. Before this re-sale took place, the property was sold in execution of the decree in suit No 3 of 1866 on the file of the Civil Court, and purchased by the plaintiff in that suit. Thereupon petitioner applied to the Munsif to re-sell the property in satisfaction of his claim. The Munsif refused to do so, and the Civil Judge, upon appeal, confirmed the Munsif's order. *Held*, on special appeal, that the Munsif's first order, annulling the sale, was a nullity, and the subsequent attachment and sale under the decree in O. S. No. 3 of 1866 was inoperative against the property; that consequently the appellant was entitled to have these proceedings set aside and the validity of his sale upheld, if the respondent's objection that the orders were not open to question in the High Court should not prevail. Upon the latter point,—*Held* that no right of appeal existed, but that therefore the Civil Court had no jurisdiction to entertain the appeal to that Court, and, giving effect to the petition of special appeal as a petition under s. 35 of Act XXIII of 1861, that the orders of the lower Courts should be annulled and certificate petitioner declared entitled to an order and certificate perfecting his title. **ANNAMALAI CHETTI v. MUTHULINGA PILLAI** . . . . . 6 Mad., 380

20. ———— *Order remanding suit—Application to set aside order from which appeal could have been brought.*—Where a Judge on regular appeal by a defendant had remanded a case for re-trial to the Court of first instance,—*Held*, on a miscellaneous petition to the High Court, that, as it was competent to the petitioner to have presented an appeal from the order of the Judge remanding the case, the High Court had no power under s. 35, Act XXIII of 1861, to entertain a miscellaneous application to set aside the Judge's order. **TURKEE ALI v. SAADUT ALI** . . . . . 5 N. W., 14

21. ———— *Power of Judge to interfere with order sanctioning complaint in offence against public justice.*—The District Judge having reversed on appeal the order of the Subordinate Judge sanctioning the prosecution of the defendant in a suit in his Court for an alleged false statement, the High Court set aside the Judge's order under the provisions of s. 35 of Act XXIII of 1861. **IN THE MATTER OF THE PETITION OF PULWANT RAI** [6 N. W., 124

22. ———— *Power of High Court.*—Under this section, the High Court should not only reverse the illegal order, but pass the order that should have been made. **ADURMONER DOSSEE v. KAMNEE SONDUREE DEPTIA** [3 W. R., Act X, 145

**RAJ CHUNDER ROY CHOWDERY v. GRESH CHUNDER ROY** . . . . . 5 W. R., Mis., 45

# SUPERINTENDENCE OF HIGH COURT—continued.

## 2. BOMBAY REGULATION II OF 1827.

23. ———— *Plaint, Presentation of—Return of plaintiff for presentation to proper Court—Jurisdiction of Subordinate Judge—High Court, Power of, to interfere under Bom. Reg. II of 1827, s. 5, cl. 2.*—A second class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The first class Subordinate Judge, to whom the plaint was then presented, also returned it for presentation in the proper Court on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the second class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review. The plaintiff applied to the High Court under its extraordinary jurisdiction. *Held* that the case was one in which the High Court ought to interfere under cl. 2, s. 5 of Bombay Regulation II of 1827. The order of the second class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation. **GIRDHARLAL HARGOVANDAS v. LALU JAGJIVAN** [I. L. R., 20 Bom., 50

## 3. CHARTER ACT (24 & 25 VICT, C. 104), S. 15.

### (a) CIVIL CASES.

24. ———— *Functions of High Court under s. 15 of the Charter Act—Nature of superintendence.*—*Held* (per STUART, C.J.) that under s. 15 of 24 & 25 Vict., c. 104, the power of superintendence to be exercised by the High Court is not merely administrative or ministerial, but also judicial. **BIJEE KOOR v. DAMODUR DASS** [5 N. W., 55

25. ———— *Object of superintendence.*—It was not the intention of s. 15 of the Charter Act to confer any rights upon litigant parties, its whole object being to give the High Court some control over the Courts subject to its appellate jurisdiction. **DOSSEE v. SREENIBASH DEY** [12 W. R., 74

26. ———— *Beng. Act VIII of 1869, s. 102.*—The Court held that in a suit for rent, even if no appeal lay under s. 102, Bengal Act VIII of 1869, the Court on special appeal could interfere under s. 15 of Act 24 & 25 Vict., c. 104. On appeal under the Letters Patent,—*Held* that the power conferred by that section ought not to be exercised in such a way as to do indirectly that which the law forbids to be done directly. **KABIR SHEIKH v. MUKHODA SOONDREY DASSER** [15 B. L. R., 111: 23 W. R., 268

Reserving decision in **MUKHODA SOONDREY DASSER v. KUREEM SHAIKH** . . . . . 23 W. R., 11

## SUPERINTENDENCE OF HIGH COURT—continued

3 CHARTER ACT (24 & 25 VICT., C. 104) S 15  
—continued27 ———— *Existence of remedy by suit*—Where the applicant has a remedy by regular suit the Court is reluctant to interfere. MADHUB CHANDER GIRI & SHAM CHAND GIRI IN THE MATTER OF THE PETITION OF MADHUB CHANDER GIRI. I. L. R., 3 Cal., 243MAHASAYAN HARISAYAN & VALINHAU UMAYI  
[8 Bom., A. C., 174]

BISHNO CHUNDER BHATTACHARJEE &amp; SHOSHEE MOHEN PAL CROWDHRY 23 W. R., 277

HURENTH MOOKERJEE & NOBEN CHUNDER DOSS  
[20 W. R., 202]28 ———— *Existence of remedy by suit*—The High Court cannot interfere under s. 15 of the High Courts Act where the lower Court has not acted without jurisdiction or where there is a remedy by a regular suit. HONORED ALI & CROWDHRY WARD ALI 15 W. R., 170

DOORNA SCANDREE DESAI &amp; KASHEE KANT CHATURVEDI 14 W. R., 212

29. ———— *Existence of other remedy*—Where a petitioner had his remedy under s. 22 Act VIII of 1859 and the Munsif had whether right or wrong acted within his jurisdiction, the Court held it had no power to interfere under s. 15 of the Charter Act. HIR KISHORE ADIPRIYAT & SHROF CHUNDER NUDER  
[17 W. R., 80]30 ———— *Existence of remedy by regular suit*—D was adjudicated an insolvent in the Insolvent Court, Calcutta. R thereupon deposited in the Court at Bahabad a sum for which S had obtained a decree against him. This decree had been attached by T under a decree obtained by him against S, and they applied to the Bahabad Court for satisfaction of their decree out of the property deposited by R. The Official Assignee opposed the application, which was granted. The Official Assignee petitioned the High Court to interfere under s. 15 of 24 & 25 Vict., c. 104 but the Court refused to interfere on the ground that there was a remedy by regular suit. T's injunction and application decided by the High Court under s. 22 Act VIII of 1859. C. 72 note: 12 W. R., 10312 W. R., 103. *Delay in making*  
BALDEEM DOS 23 W. R., 52313. ———— *Where parties who were chargeable had decreed a suit for ejectment* RADHA MONY  
[23 W. R., 523]

Deputy Collector A Where A had decreed a suit for ejectment, held afterwards in execution, had been paid up within fifteen days, not be ejected in accordance with the order of 1850, his order in execution was—Where the Court High Court under its general powers, and, after passing DYAL PURANASTICK &amp; DERT

## SUPERINTENDENCE OF HIGH COURT—continued.

3 CHARTER ACT (24 & 25 VICT., C. 104), S 15  
—continued.share of the execution-debtor, the High Court, in the exercise of its extraordinary jurisdiction, refused to interfere, in consequence of the laches of the applicant in neglecting to avail himself of an opportunity which the Lower Appellate Court had given him, of showing that the partition which had been made was injurious to him. MATRURADAS GOVIL DHANDAS & PATMA ULKA BHOAM  
[5 Bom., A. C., 63]33 ———— *Order of Judge under s. 259, Civil Procedure Code, 1859—Entirely once to delivery of possession in execution of decree*—The Court declined to interfere under s. 15 of the Charter Act in order to set aside an order lawfully made by a Judge under s. 259, Act VIII of 1859, upon a complaint made to him of resistance or obstruction to the delivery of possession under s. 261 and stated that it would not have interfered even if the order had been made without jurisdiction after the delay that had taken place, the petitioner remedy being to bring a regular suit to establish his right. ZUHOOR BLOOM & MANOHAR WARD  
[18 W. R., 5]34. ———— *Laches in the exercise of another remedy*—Petitioner, a decree-holder, allowed another decree-holder to obtain a decree against a regular suit declaring him entitled to what was his property in dispute in execution of his decree, and did nothing even after that decree was set aside and another decree-holder applied for the same property. The sale of the properties in execution of the decree of the lower Court having all the parties before it, and having passed an order rejecting the petitioner's application, petitioner, after many days (the period limited for an application) invoked the aid of the High Court under s. 15 of the Charter Act; but the Court declined to exercise its jurisdiction, leaving the petitioner to his remedy in a regular suit. HARE KISHORE SEN & WISE  
[17 W. R., 477]35 ———— *Order rejecting claim of attorney to lien on document for his costs—Existence of other remedies*—A firm of solicitors, having been summoned to produce certain documents before the Court, objected to do so claiming a lien upon them for costs due to them from the party at whose instance the documents were called, and their objection having been overruled, they moved the High Court under s. 15 of the Charter Act. Held that the High Court is not compelled to use the power of superintendence created by the Charter Act unless, in the interests of justice it finds it necessary to do so, and that in the present case there is no danger of any such failure of justice as would render it necessary for the High Court to interfere, specially having regard to the fact that the loss of this particular remedy, assuming the attorney to be entitled to it, does not involve the loss of his costs, as he still has all the other remedies, for the recovery of his claim. Semble—The power of superintendence under s. 15

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

would be exercised by the High Court to correct judicial errors where, in the interest of justice, it is necessary to do so. *SWINHOR & CHUNDER v. HERA LAL SIKKAR*. . . . . 2 C. W. N., 727

36. ———— *Effect as to merits of case of rejection of claim to exercise of extraordinary jurisdiction*—The extraordinary powers conferred on High Courts by s. 15 are only exercised when, firstly, there has been a capital error in the judgment of the lower Court; or secondly, the plaintiff has entitled himself to special interference. The rejection of an application under s. 15 does not necessarily amount to a decision on the merits. Where a suit for rent was thrown out by a Munsif and subsequently thrown out by a Small Cause Court and in either case the High Court refused to interfere under s. 15, but a different Munsif interpreted the second order of the High Court as a variation of the first, and entertained the suit, — *Held* that, though the action of the High Court did not affect the merits, yet, as plaintiff had a substantial claim, the second Munsif did right in receiving it. *SHOOVANEKURRY DABEE v. DWARKA NATH MOOKERJEE* [25 W. R., 344]

37. ———— *Giving appeal where none lies—Order doing injustice*—The High Court should not, in the exercise of its extraordinary powers, give an appeal in a case where the law provides none. Nor should the Court in the exercise of those powers interfere when such interference would have the effect of working an injustice. *NARAYANBHAI LALBHAI v. GANGAKRISHNA BAL-KRISHNA*. . . . . 4 Bom., A. C., 87

38. ———— *Exercise of jurisdiction—Giving appeal where none lies*—The High Court cannot admit an appeal which Act VIII of 1859 and s. 11, Act XXIII of 1861, do not allow. S. 15 of the Charter Act held not to apply to the question. *GOBINDNATH SANDYAL v. RAM COOMAR GHOSE* [9 W. R., 115]

39. ———— *Party bringing appeal without right of appeal—Per BIRCH, J.*—A party who has preferred an appeal to the High Court when the law gave him no right of appeal is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict., c. 104. *IN THE MATTER OF THE PETITION OF SOORJA KANT ACHARJ CHOWDEY* [I. L. R., 1 Cal., 383]

40. ———— *Admission of appeal after time—Appeal, Delay in filing—Act X of 1859, s. 25*—The High Court, under its general power of superintendence, set aside an order of a lower Appellate Court admitting an appeal filed beyond time, on the ground that the lower Appellate Court had no jurisdiction to entertain an appeal passed by the Collector under s. 25, Act X of 1859. *SHUTAR* [2 B. L. R., Ap., 35]

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

S. C. OMRA NUSHTO v. GUGUN SHOOTUR [11 W. R., 130]

41. ———— *Appeal withdrawn without authority—Application to set aside order refusing to restore appeal*—An appeal which had been preferred to the Judge was withdrawn the next day through another pleader. Shortly after an application was made to have the appeal restored, on the ground that the second pleader had no authority to withdraw the appeal. The Judge refused the application. *Held* that no appeal lay from that order, and the High Court refused to interfere under s. 15, 24 & 25 Vict., c. 104, as under the circumstances they thought the Judge should not be directed to take further action in the matter. *MUDHOOMUTTY DEBIA v. DHANPUT SINGH* [13 W. R., 167]

42. ———— *Order releasing property from attachment*—An order of a competent Court releasing property from attachment after investigation of a claim put forward ought not to be interfered with on any ground of mere irregularity, unless a failure of justice has occurred. *BISHNO CHUNDER BRUTTACHARJEE v. SHOSHREE MOHUN PAL CHOWDHRY*. . . . . 22 W. R., 277

43. ———— *Illegal arrest in Court of Magistrate*—The High Court declined to exercise the extraordinary powers described in s. 15 of the High Courts Act, where a Magistrate did not interfere with the arrest in his Court, under a civil process, of a person who had been accused before the Magistrate, but was acquitted at the time of his arrest. *IN THE MATTER OF THE PETITION OF GUZERE LALL*. . . . . 13 W. R., 393

44. ———— *Award under the Nawab Nazim's Debts Act, 1873, on matter already decided by decree*—Where certain judgment-creditors submitted a decree of Court to the Commissioners appointed under the Nawab Nazim's Debts Act, 1873, as if it were a new and unascertained claim and the Commissioners expressed their opinion on the matter involved in it (although it had been already determined), the High Court held it had no authority to inquire into their award. *OMRAO BEGUM v. COMMISSIONERS UNDER ACT XVII of 1873*. . . . . 24 W. R., 394

45. ———— *Power over Collectors*—Under s. 15 of the High Courts Act, the High Court had a power of superintendence over Collectors' Courts, and could interfere to restrain a Collector from exercising a jurisdiction which properly belongs to a Zillah Judge. *BIHAR CHUNDER CHUNDER v. SHAMA SOONDER DEBIA* [6 W. R., Act X, 68]

*Contra, HURO MOHUN MOOKERJEE v. KEDARNATH DOSS*. . . . . 5 W. R., Act X, 25

46. ———— *Setting aside decree made ultra vires*—Where a decree is ultra



# SUPERINTENDENCE OF HIGH COURT—continued

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 continued.

where the debtor's remedy is either by an application for review or by an application to the High Court to exercise its powers under the Charter Act, s. 15 DOORGA DOB'S RANDAL & PANCHOO RAM MUNDUL [23 W. R., 271]

47. — *Refusal of application under Act VIII of 1859, s. 119—Ex parte decree.* Judgment was passed *ex parte* against a defendant who had not appeared. The defendant failed to show cause for setting aside the judgment under s. 119 of Act VIII of 1859. He then applied to the High Court under s. 15 of 24 & 25 Vict., c. 104, to set aside a portion of the decree as having been passed without jurisdiction. The Court refused to interfere IN THE MATTER OF THE PETITION OF LESLIE

[10 B. L. R., 68; 18 W. R., 474]

48. — *Discretion of Municipality—Rates for cleaning tank.*—Case in which the Municipality held that the Municipality had expended more money than was necessary in cleaning the petitioner's tank, and the Judge on appeal set aside the Municipality's decision and gave the Municipality a decree, on the ground that under the law the matter was purely within the discretion of the Municipality. Held that, even though the rates charged by the Municipality were higher than those which could be obtained by other persons, that was no ground for the interference of the High Court. IN THE MATTER OF JOGESH CHUNDER DEY

[18 W. R., 285]

49. — *Exercise of discretion under Act XX of 1863, ss. 4 and 5. Refusal of jurisdiction.*—Where an application by a petitioner under Act XX of 1863 s. 5 to be appointed manager of a religious endowment, was rejected by the Judge after hearing both sides, on the ground that there had been no transfer of the property by the Local Government under s. 4 the Court refused to interfere under s. 15 of the Charter Act, holding that the Judge had not declined to accept jurisdiction in the case, and that he was right in refusing to exercise the jurisdiction vested in him by s. 5. ASHUTOSH HOSSAIN v. HAZARA BROUM

18 W. R., 396

50. — *Order rejecting document under s. 129, Civil Procedure Code, 1859.*—The High Court refused to interfere under s. 15 of the Charter Act to set aside an order rejecting a document made by a Court under Act VIII of 1859, s. 129, an appeal from such order being barred by s. 363. IN THE MATTER OF ERSKINE 18 W. R., 511

51. — *Error of law.*—Where in a conflict between a Judge's order and a direction of law ground for the High Court to exercise its powers of interference? DOSSER v. SREENIVASH DEY

12 W. R., 74

52. — *Error of law.*—Case where no appeal lies to High Court—Mere errors of law committed by a lower Appellate Court

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued

in cases in which the High Court has no appellate jurisdiction do not give the latter Court power to interfere under s. 15 of the Charter Act, its interference being restricted to cases in which the lower Court exercises a jurisdiction which it has not refused to exercise a jurisdiction which it has. KALER HIR DASS v. HOODHEESCH CHUCKRABARTY [15 W. R., 90]

ISSER CHUNDER PODDAR v. SHOMER DUTT SIK [18 W. R., 299]

53. — *Court acting without jurisdiction—Error in law.*—The interference of the High Court under s. 15, 24 & 25 Vict., c. 104, should be confined to cases in which the lower Court has acted without jurisdiction, or has improperly declined jurisdiction, and should not be extended to cases in which the Court, though competent in respect of the subject matter, has misconceived the law in deciding a case. IN RE KANIMATH ROY CHOWDREY

7 B. L. R., 148 note

S. C. KASHINATH ROY CHOWDREY v. SHAMTERR SOONDERR DOSSER

11 W. R., 402

54. — *Error in law—Injustice, Prevention of.*—Where there has been a manifest error of law, and to prevent manifest injustice, the High Court in the exercise of its extraordinary jurisdiction will remand a case to the lower Court, though the value of the claim may be under Rs 500 and the case may be one in which a special appeal is not allowed. RAMANAI v. THIRAK KANESHI DESAI

9 BOM., 293

55. — *Erroneous order in law made in consequence of false statement of party.*—The High Court will interfere, under s. 15 of the Charter Act, with an order made by a lower Court which is merely contrary to law, when that order has been passed in consequence of a witness's false statement made by the opposite party. KODDUR ANANDU LALL v. MONESH LALL

3 C. L. R., 137

56. — *Wrong decision where no special appeal lay.*—Where the lower Court's decision was fundamentally wrong in law, and the liability of the defendants in the essential matter of the suit had not been properly tried, the High Court, although not warranted in interfering in special appeal (by reason of the suit being a money claim under Rs 50), was justified in interfering under its general powers of supervision. SHANDAYAR v. BROODU RAM

22 W. R., 44

57. — *Refusal of order of confirmation of sale—Error of law.*—A decreed purchaser of property sold in execution of a decree applied to the Judge for an order of confirmation of sale, and was refused. Held that the High Court had no power to interfere with the Judge's decision, even though erroneous on a point of law, upon a matter entirely within his jurisdiction, and from

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

which there was no appeal. IN THE MATTER OF THE PETITION OF DURGA CHARAN SIRCAR

[2 B. L. R., A. C., 165

S. C. DOORGA CHURN SIRCAR v. DOORGA CHURN GHOSAL . . . . . 11 W. R., 23

58. ————— *Error of law.*—The High Court will not, under s. 15 of 24 & 25 Vict., c. 104, interfere with judgments, decrees, or orders of a lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers. MADHUB CHUNDER GIREE v. SHAM CHAND GIREE. IN THE MATTER OF THE PETITION OF SHAM CHAND GIREE . . . . . I. L. R., 3 Calc., 243

59. ————— *Error of law.*—*Revision of judicial proceedings—Jurisdiction.*—The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 & 25 Vict., c. 104, to interfere with the order of a Court subordinate to it, on the ground that such order has proceeded on an error of law or an error of fact. Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale on a ground not provided by law, and the auction-purchasers applied under the abovementioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere. TEJ RAM v. HARSUKH . . . . . I. L. R., 1 All., 101

60. ————— *Revision of judicial proceeding—Jurisdiction of High Court—Civil Procedure Code, s. 622.*—*Held* by EDGE, C.J., and OLDFIELD and BRODHURST, JJ., that under s. 15 of 24 & 25 Vict., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction. *Held* by STRAIGHT and TRELL, JJ., that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last-mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

declared by law to be final. *Tej Ram v. Harsukh, I. L. R., 1 All., 101; Girdhari Singh v. Hardeo Narain Singh, L. R., 3 I. A., 230; and In the matter of the petition of Mathra Parshad, I. L. R., 1 All., 296, referred to. The judgment of PETHERAM, C.J., in Badami Kuar v. Dina Rai, I. L. R., 8 All., 111, explained. MUHAMMAD SULEMAN KHAN v. FATIMA*

[I. L. R., 9 All., 104

61. ————— *Civil Procedure Code (1892), s. 622—Failure of duty by a Subordinate Court.*—Where a subordinate Court had signally failed to do its duty, and there had been no patent neglect on the part of the petitioner,—*Held*, on an application for revision, that it is competent for the High Court under the general powers of supervision vested in it by s. 15 of 24 & 25 Vict., c. 104, to direct the subordinate Court to do its duty, and complete the case according to law. *Muhammad Suleman Khan v. Fatima, I. L. R., 9 All., 104, referred to. ABDULLAH R. SALAR*

[I. L. R., 18 All., 4

62. ————— *Error of law—Rejection of claim to attached property without decision on necessary questions.*—Where it was found that the Court below was wrong in disallowing the claim without determining certain questions of law which it should have determined, the error was held to be not such that it ought to be rectified by the High Court in the exercise of its power of revision under s. 15 of the Stat. 24 & 25 Vict., c. 104, or under s. 622, Civil Procedure Code. S. 15 of the Stat. 24 & 25 Vict., c. 104, gives the High Court, in general terms, power of "superintendence over all Courts which may be subject to its appellate jurisdiction." The law having advisedly and wisely left this power unlimited, it is not desirable to limit it by any hard-and-fast rule, and it is not every error of law that would be a ground for the exercise of this power, and a party's claim to the interference of the High Court is very much weakened when he has another remedy provided for him by law. *Madhub Chander Giree v. Sham Chand Giree, I. L. R., 3 Calc., 243, and Tejram v. Harsukh, I. L. R., 1 All., 101. BHAGWAN RAMANUJ DAS v. KHETTER MONT DASSI . . . . . 1 C. W. N., 617*

63. ————— *Superintendence as to execution of order.*—The High Court has jurisdiction to direct a lower Court in what manner its own (the High Court's) decree or order shall be carried into effect by that Court, and to see that the lower Court does not pervert the order or do that which was not intended to be done, even when such order constitutes a part of the order in execution of a decree which the lower Court ought to have passed. *KALEE DOS SANDAL v. ROY LUCHMEET DOSSEE*

[14 W. R., 145

64. ————— *Act X of 1824, s. 151—Execution proceedings.*—When a Deputy Collector refused to entertain an application by a

# SUPERINTENDENCE OF HIGH COURT—continued

3. CHARTER ACT 24 & 25 VICT., C 104, S 15—continued.

defendant for realisation of costs awarded by a Court of appeal as for refund of the amount which the plaintiff had realised from the defendant in execution of the decree of the lower Court, but which had been disallowed by the Court of appeal, and where on appeal the Judge held that no appeal lay under s. 11 of Act X of 1859—*Held* that the High Court had power, under 24 & 25 Vict., c. 104, s. 15 to order the Deputy Collector to enforce realisation of the amount realised from the defendant in excess of the amount allowed by the Court of appeal, and also to execute that part of the decree which awarded costs to the defendant. **IN THE MATTER OF THE PETITION OF GOVIND KUMAR CHOWDREY** B L R., Sup Vol., 714

(2 Ind Jur., N S., 189 7 W R., 520

85 *Order of Collector giving possession. Petition of*—Where a Collector having passed an order for possession of a certain tenure in favour of the applicant on his purchase thereof at a sale for arrears, reversed such order at the instance of an objector who had already purchased the same at a sale under Bengal Act VIII of 1859 for arrears of rent due upon it, and had been put in possession in the High Court refused to exercise its powers under s. 15 of the Charter Act. **NARA YASH DATT DEBI & CHANDI CHARAN CHOWDREY** [3 B. L. R., Ap., 65

**S. C. NARAYAN DABER & CHUDRE CHUKY CHOWDREY** 11 W. R., 512

86 *Letters Patent, et al.*—Release of person imprisoned in execution of decree—Where in execution of a summary decree for rent obtained under Regulation VII of 1799 in 1851 against the father of the petitioner and another the petitioner was arrested and lodged in jail in January 1867.—*Held* by the majority of the Court (NORMAN J. dissenting) that the High Court could not, under the general powers of superintendence vested in it by s. 15 of the High Courts Act or s. 16 of the Letters Patent, interfere to order the release of the petitioner. **GOPAL SINGH & COURT OF WAHDA** 7 W R., 430

87. *Assignment of decree—Civil Procedure Code 1859 ss 246 265—Duty of Judge*—Where a judgment-creditor seeks to attach and sell a decree on the allegation that the assignment of it was not a *bona fide* conveyance, and the conveyance purports to be one of property specified in s. 65, Act VIII of 1859 it is the duty of the Judge under s. 246 to enquire whether the assignee of the decree was or was not in *bona fide* possession of the property. If the Judge inquires into the facts, no appeal lies from his order; but if he refuses an inquiry, the High Court, under its general powers of superintendence, can and ought to require the Judge to make the inquiry. **GRANDE CHUDRE LALORE & KASHINATH DEBIA** 8 W. R., 28

88. *Execution of decrees for rent—Act X of 1859, ss 23, 77, and 150.*

# SUPERINTENDENCE OF HIGH COURT—continued.

3. CHARTER ACT (24 & 25 VICT., C. 104, S. 15—continued

Whether a decree for rent, under Act X of 1859 made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction" under 24 & 25 Vict., c. 104, s. 15. **MUNSHI HASAN DRO & TARAYATH MUKERJEE**

[I. L. R., 8 Calc., 295; 12 C. L. R., 331  
I. L. R., 9 I. A., 174

89 *Acting in excess of or refusal of jurisdiction.*—A party dissatisfied with a legitimate finding under s. 15, Act XIV of 1859 has a special remedy by a writ in a Civil Court and cannot claim the High Court's interference under s. 15 24 & 25 Vict., c. 104, except where the Judge has exercised a jurisdiction which he has not or has refused to exercise a jurisdiction which he has. **DOORAJ SOOMNATH DEBIA & KASHI KANT CHATTERJEE** 14 W R., 212

70 *Order exempting debtor from liability on ground of limitation.*—S. 15 of the 24 & 25 Vict., c. 104, does not enable the High Court, by way of motion, to deal with an order made by a lower Appellate Court in cases where the latter has jurisdiction, and the law declares that its order should be final. An order exempting a debtor from liability on the question of limitation, even though erroneous, is an exercise of jurisdiction. **SHYAMNATH DOSSET & MANICK RAM CHOWDREY** [9 W. R., 338

**KALSH PERSAUD CHOWDREY & RAM SOOMNATH SINGAR** 12 W. R., 129

71 *Postponement of execution sale without taking security*—Where, in a case under Bengal Act VIII of 1859 a Munsif, on a claim being preferred to property attached in execution, postponed the sale of it without taking security or having the amount of the decree deposited.—*Et al.* that his proceeding, though erroneous, was in a case in which he had exercised jurisdiction and that his decision ought not to be set aside under the 15th section of the Act 24 & 25 Vict., c. 104. **IN THE MATTER OF THE PETITION OF BAGRAM** [20 W R., 10

72. *Execution of decrees, Refusal to stay—Allegation of fraud and finding against it*—If a decree against A in the Court of the Sudder Ameen, and in execution attached certain property of the judgment-debtor J, who had a decree against the same judgment-debtor in the Court of the Principal Sudder Ameen, applied to the Court of the Sudder Ameen to stay its proceedings, on the ground that A's decree had been obtained by fraud. The Sudder Ameen refusing the application J appealed to the Judge, who saw no ground for the imputation of fraud. *Held* (by HOLMES J.) that the Judge's judgment was on the face of it good and in a case within his jurisdiction, and that it did not call for an exercise of the

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15** —continued.

extraordinary power given to the High Court by s. 15 of the Charter Act. **JUMAL ALI v. WANED ALI** . . . . . 11 W. R., 97

**73. ——— Order within jurisdiction—Suit for arrears of rent and ejectment.**—A suit for arrears of rent, where the plaintiff contained also a prayer for ejectment, having been dismissed by the first Court, an appeal was preferred to the Collector, who heard the case without any objection as to jurisdiction, and decreed it solely upon the question of the extent and character of the land and the arrears of rent thereupon. *Held* that, as the Collector exercised a jurisdiction which he had, no question of ejectment having been decided by the first Court, and no appeal having been made to him upon that point, the High Court refused to exercise the power they had to interfere under s. 15 of 24 & 25 Vict., c. 104. **DURSEN BRUGUT r. MAHOMED ALI** . . . . . 13 W. R., 438

**74. ——— Suit brought in wrong Court.**—The plaintiff brought a suit, which was cognizable by a Small Cause Court, in a Munsif's Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court. He obtained a decree, but the decree was reversed on appeal. On special appeal the Court, though holding that no special appeal would lie, set aside the decrees of both the lower Courts as having been passed without jurisdiction. **TAMINI CHARAN MOOKERJEE r. PURNA CHANDRA ROY** . . . . . 16 B. L. R., 717; 15 W. R., 397

**75. ——— Order made without jurisdiction.**—The High Court exercised its powers of superintendence to set aside a judgment of a Judge reversing a judgment of a Munsif passed in accordance with the award, the Judge's order being without jurisdiction. **IN THE MATTER OF LALJI BUX** . . . . . 5 B. L. R., Ap., 75

**S. C. ELAHEE BUKSH v. HAJOO** 14 W. R., 33

**76. ——— Order made without jurisdiction—Appeal in rent suit to wrong Court.**—A suit to recover Rs254 as arrears of rent having been decreed by the Deputy Collector for Rs49, the defendant appealed to the Judge but plaintiff appealed to the Collector. The Judge dismissed the defendant's appeal, and the Collector gave plaintiff a decree for the full amount originally claimed. The High Court, under s. 15 of the Charter Act, set aside the Collector's decree as made without jurisdiction. **ROOKNEE ROY v. ANKITH LALL** . . . . . 14 W. R., 254

**77. ——— Order of Collector made without jurisdiction.**—N sued his gomashtha (M) and M's surety (C) under s. 24, Act X of 1859, and got a decree *ex-parte* as against the surety. Upon N's proceeding to execute the decree, C applied for a revival of the suit, which was granted, and a re-hearing was appointed for the 4th May

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15** —continued.

1869, but subsequently postponed to the 8th, on which date the case was struck off by the Deputy Collector, under the provisions of s. 51. Subsequently N applied for a fresh execution of his original decree to the Collector, who sent the record to the Deputy Collector, with instructions to carry out the execution. Thereupon C obtained a rule from the High Court calling on N to show cause why the Collector's order should not be set aside. *Held* that the Deputy Collector's order striking the case off the file annulled the decree so far as C was concerned, and that the Collector's order directing execution was without jurisdiction and the High Court would set it aside under their powers of superintendence. **GUDADHUR CHATTERJEE r. NUNDLALL MOOKERJEE**

[12 W. R., 406]

**78. ——— Order contrary to law, from which no appeal lay—Civil Procedure Code, 1859, s. 246.**—Where an order was made by a Munsif under s. 246 of Act VIII of 1859, and a regular appeal was preferred, and then a special appeal to the High Court, that Court, while refusing to entertain the appeal, on the ground that the Munsif's order was final, or to set aside the order under s. 15 of 24 & 25 Vict., c. 104, expressed an opinion that the order was contrary to law, and left it to the Munsif to act upon such opinion. **KALI CHURN GIR GOSSAIN r. BANGSHI MOHAN DAS** [6 B. L. R., 727; 15 W. R., 339]

**79. ——— Order contrary to law—Civil Procedure Code, 1859, s. 246—Want of jurisdiction—Act VIII of 1859, s. 246 Order under.**—In a case decided by the Munsif, in which it was found by the High Court that there was no appeal to the Judge, the Judge's order was set aside as passed without jurisdiction, and the Munsif's order was also set aside as not having been passed under s. 246, Act VIII of 1859, under which section the objection had been preferred. **HARRIS CHUNDRA GUPTO v. SHASHI MALA GUPTI**

[6 B. L. R., 721; 15 W. R., 163]

**80. ——— Order passed without jurisdiction—Claim overvalued for purpose of giving jurisdiction.**—The plaintiff brought a suit in the Court of the Subordinate Judge of Dacca, under s. 15, Act XIV of 1859. The defendant pleaded that the Judge had no jurisdiction, inasmuch as, if the suit had been properly valued, it was one cognizable by the Munsif. The Judge found that the value of the property did not exceed Rs500, and that the plaintiff had over-estimated the value of the claim in order to exceed the jurisdiction; but instead of returning the plaint, he proceeded to try the case on its merits, and dismissed the suit. On an application on behalf of the plaintiff to set aside the judgment as passed without jurisdiction, the High Court refused to interfere under s. 15 of 24 & 25 Vict., c. 104. **IN THE MATTER OF THE PETITION OF WISE** . . . . . 10 B. L. R., Ap., 20

# SUPERINTENDENCE OF HIGH COURT cont. next

## 3. CHAPTER ACT (24 & 25 VICT., C. 104) S. 15 —continued—

81. *Order passed with jurisdiction—Reversal of suit—Act X of 1859 ss. 54, 55 and 58.*—A suit for arrears of rent was dismissed by the Deputy Collector for default under a 54, Act X of 1859. Thereupon a fresh suit was brought by the same plaintiff for the recovery of the said arrears, and a decree was obtained. On appeal the Judge reversed the decision of the Deputy Collector and dismissed the suit. The plaintiff then applied under a 58, Act X of 1859 for revival of the former suit, but the Deputy Collector rejected the application. On appeal the Judge held that the suit might be revived, and remanded the case for trial. The High Court, under its general power of superintendence set aside the order of the Judge as passed without jurisdiction holding that although the Deputy Collector had formerly struck off the case under a 54, Act X of 1859, it was in fact an order under a 55, and therefore under a 58, Act X of 1859 no appeal lay to the Judge. **HARIS SOHAN v. MANIVORA NATH POY** 3 B. L. R., Ap., 32 11 W. R., 129

82. *Order made with out jurisdiction—Omission to object to illegal proceed- ing.*—Where a respondent in a Collector's Court applied in special appeal to the High Court to exercise the general powers of superintendence vested in it by s. 35, Act XXIII of 1851 and a 15 of 24 & 25 Vict., c. 104, to set aside the Collector's proceedings as without jurisdiction, it was held that, as he had allowed the appeal to be heard without objection, he was not entitled to the relief sought. **DEBBO MOTER DARE v. BIPIN MUNDOL** 10 W. R., 8

83. *Error in reversing judgment for want of jurisdiction.*—Where the District Judge reversed the decree of the Munsif for want of jurisdiction, although the amount of the claim was under Rs 500 the Court, in the exercise of its extraordinary jurisdiction, interfered. **PATAY SHANKAR KIVASHANKAR v. GURASHANKAR LAL SHANKAR** 4 Bom., A. C., 173

84. *Judge exceeding his powers under a 245 Act VIII of 1859.*—Where a Subordinate Judge, under Act VIII of 1859, s. 245, declared that a decree-holder was entitled to enforce his mortgage lien against certain attached property although that property was in the possession of the claimant on his own account and not on behalf of the judgment-debtor, inasmuch as the claimant professed to derive his title under a *ladasee* executed in his favour by the judgment-debtor—*Held* that the Subordinate Judge had proceeded beyond the authority given him by the section, and the High Court would therefore exercise the extraordinary jurisdiction given by s. 15 of the Charter Act, by setting aside the Judge's order and directing the property to be released. **IN THE MATTER OF KHILLAT CHUNDES GROSS v. GOURCHITRY MOJOMDAR**

(18 W. R., 403)

85. *Improper exercise or improper refusal to exercise jurisdiction—*

# SUPERINTENDENCE OF HIGH COURT —cont. next—

## 3. CHARTER ACT (24 & 25 VICT., C. 104) S. 15 —continued—

The High Court will not exercise its extraordinary powers under the Charter Act, s. 15, except where jurisdiction has been either exercised or refused improperly: it will not interfere under that section even where a wrong decision has been arrived at if the Court which arrived at such decision exercised a jurisdiction which it properly possessed. **KNOWAS RAM BIK SINGH v. BISHENDRAN GITA** - [23 W. R., 402]

86. *Refusal to entertain suit by Court from which there is an appeal.*—When a Court subject to the appellate jurisdiction of the High Court refuses to entertain a suit over which it has jurisdiction, the High Court may under its general power of superintendence, order the Court below to entertain such suit notwithstanding that no appeal would lie to the High Court from the decree in such suit. **HAKDAYAL MANDAL v. THE THANAND THAKUR**

[4 B. L. R., Ap., 29 13 W. R., 34]

87. *Refusal to make inquiry as to possession in claim under a 245, Civil Procedure Code 1859.*—In a case of a claim to attached property where the Subordinate Judge did not consider himself competent to make the inquiry as to the nature of the possession necessary under a 245 Act VIII of 1859 the High Court declined to interfere under the special provisions of the Charter Act, because the decree-holder had a remedy by regular suit. **IN THE MATTER OF HIRSHEN MOOKHERJEE HIRSHEN MOOKHERJEE v. NARAY CHUNDER DOSA** 20 W. R., 203

88. *Decision on irregular procedure under a 230 Civil Procedure Code 1859.*—A decree-holder in execution having got possession of certain property application was made for an investigation under a 230, Act VIII of 1859. The Munsif, without going into evidence, rejected the application, and the Judge, in the same manner, reversed the Munsif's judgment and gave the applicant possession. The High Court on application set aside both decisions as not being decisions on the investigation of a suit within the section. The question still remained for decision whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the defendant. **MOOKHERJEE CHUNDER BOY v. BIRMOO MOOKHERJEE DOSA** 11 W. R., 197

89. *Order setting off application by party dispossessed in execution of decree—Act VIII of 1859 s. 230.*—Whether or not an appeal lies from the decision of a lower Court rejecting an application by a party other than a defendant, under a 230, Act VIII of 1859 disputing the right of the decree-holder to dispossess him, the High Court may under the 15th section of the Charter, compel the lower Court to exercise its jurisdiction. **Gulabnarrain Dutt v. Bischoffs Dossa**

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

1 W. R., 140, referred to and questioned **COLLECTOR OF BOGRA v. KRISHNA INDRA ROY**  
[2 B. L. R., A. C., 301; 11 W. R., 181]

80. ————— *Denial of jurisdiction—Act X of 1859, s. 77.*—A sued B, a raiyat, for arrears of rent C was added as a party under s. 77, Act X of 1859. The Collector on appeal refused to try C's claim under s. 77, because she had not produced her title-deeds. Held that the refusal to try C's claim by the Collector was a denial of jurisdiction on his part, and the High Court sent back the case to the Collector for trial of C's claim. **IN THE MATTER OF THE PETITION OF NASSIR JAN**  
[7 B. L. R., 144; 15 W. R., 418]

81. ————— *Refusal to attach property—Refusal of jurisdiction.*—Where a Munsif refuses to attach property in execution which he is bound to attach, he may be compelled to do so by the High Court in the exercise of its powers of supervision. **MUNOHR PAUL v. WISE** 15 W. R., 248

82. ————— *Refusal to execute decree—Refusal of jurisdiction.*—Where a Deputy Collector who had passed an informal decree refused to execute it on application, the decree-holder was held to be entitled to an order from the High Court, in the exercise of the powers it possesses under s. 15 of the High Courts Act directing the Deputy Collector to do his duty. **KHEMUNKUREE DABEE v. SHUBUT SOONDUREE DABEE** 14 W. R., 9

83. ————— *Refusal of Deputy Collector to sell in execution of decree where plaintiff has obtained declaration of his right in Civil Court.*—If a decree of a Civil Court declares that the plaintiff has a right to bring certain property to sale in a Deputy Collector's Court, and the Deputy Collector, at the instigation of the defendant, declines to proceed with the sale, his declining to do his duty does not give a fresh cause of action for the purpose of obtaining a second declaration, though it may be a good ground for asking the High Court to use its extraordinary powers to put the Deputy Collector right. **RUGHOOONADUN SINGH v. COCHRANE** 20 W. R., 16

84. ————— *Refusal to consider grounds—Review of judgment of predecessor.*—Where a Court subordinate to the High Court rejected an application for a review of judgment, refusing to consider the grounds of the same, because the decree of which a review was sought was given by its predecessor, the High Court, in the exercise of its powers of superintendence under s. 15 of the High Courts Act, directed such Court to consider the grounds. **IN THE MATTER OF THE PETITION OF MATHRA PARSHAD** 1 L. R., 1 All., 296

85. ————— *Refusal to grant application for review of judgment of predecessor—Refusal to exercise jurisdiction.*—Forty-six suits were brought against the defendants and dismissed by the Munsif of B. The plaintiffs in each

# SUPERINTENDENCE OF HIGH COURT—continued.

## 3 CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

case appealed to the District Judge, who reversed the decision of the Munsif. In both Courts all forty-six cases were disposed of in one judgment. Six of the cases being appealable, special appeals in such cases were preferred to the High Court, and pending such appeals an application for a review of the remaining forty cases was made to the District Judge, who ordered that the petition for review should stand over until the result of the special appeal should be known. The High Court having on special appeal restored the decision of the Munsif dismissing the suits, the application for review was renewed before the successor of the former District Judge. He refused to admit the application. Held that the District Judge had not declined jurisdiction or acted beyond his jurisdiction, and that the High Court had therefore no power under s. 15 of the Charter Act to interfere. **RAM LALL SINGH v. JAKET MAHATOON**  
[4 C. L. R., 14]

86. ————— *Wrongly declining to exercise jurisdiction.*—Where a Judge declined jurisdiction on a wrong ground, as that of a question of title having arisen, when even if that were the case he had jurisdiction, the High Court interfered under s. 15 of the Charter Act. **RAM JEEBUN KOYEE v. SHAHAZADEE BEGUM**  
[9 W. R., 336]

87. ————— *Orders of Courts established under Land Acquisition Act (X of 1870).*—The Courts established under Act X of 1870 are subject to the appellate jurisdiction of the High Court, and not the less so because an appeal lies to the High Court from their decisions in certain cases only. The High Court consequently has the power of superintendence over those Courts under s. 15 of the Charter Act. **IN THE MATTER OF THE PETITION OF ABDUL ALI** 15 B. L. R., 197

88. ————— *Dismissal of ministerial officer.*—With reference to the rule that its extraordinary powers of superintendence should not be exercised except for the purpose of protecting a complainant in a matter wherein otherwise he would not be able to obtain redress, and where the applicant showed himself worthy of its interference, the High Court declined to interfere on behalf of a party who complained that a District Judge had acted *ultra vires* in dismissing him from the post of serishtadar of the Munsif's Court, seeing that it was open to the applicant, under the Civil Courts Act, to seek his remedy from the Local Government. **IN THE MATTER OF THE PETITION OF AKBAR ALI**  
[19 W. R., 148]

89. ————— *Dismissal of ministerial officer.*—A Munsif, having charged his serishtadar with carelessness and irregularities, recommended his transfer to some other Munsifi. The Judge, after calling for and receiving an explanation from the serishtadar, dismissed him from office. The High Court refused to interfere in the exercise of its

# SUPERINTENDENCE OF HIGH COURT cont. and

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15  
—continued.

general power of superintendence holding that although the judge had exercised an original power where he had only an appellate jurisdiction, he had done so on a complaint made by the Munsif, and the petitioner, if aggrieved, had a remedy under Act VI of 1871 in an application to the Local Government. **IN THE MATTER OF FAKIR CHAND LALL**

[20 W. R., 470]

100. — *Dismissal of suit in absence as original plaintiff after adding third party to plaintiff* — **PER NORMAN J.** (BYRON KARR, J., dissenting.) — Where a Court added a third party as a plaintiff and, in the absence of the original plaintiff, improperly dismissed the suit, it was held that the suit was still pending and undisposed of by the lower Court as regards the plaintiff and the lower Court was ordered under the High Court's power of superintendence vested in it by the 24 & 25 Vict., c. 104 s. 15 to take up and try the case accordingly. **CHANDER HANT BHUTTACHARJEE v. PINDIA BEN CHUNDER MOOKERJEE** 7 W. R., 277

**C IN THE MATTER OF THE PETITION OF CHUNDER HANT BHUTTACHARJEE**

[B. L. R., Sup Vol., Ap., 43]

101. — *Erroneous order* — *Putting on the record party not a legal representative* — Where a decree had been obtained against a British subject domiciled in India, who subsequently died intestate and an order was made reviving the decree against one of his children and ordering execution to proceed before letters of administration to his estate had been taken out, and without inquiry being made as to who were his legal personal representatives, — *Held* that although no appeal lay against the order yet that, as it was clearly erroneous and as, under the circumstances of the case, it must lead to the greatest confusion and injury to the interests of the parties if the execution was proceeded with, the Court was justified in interfering under s. 15 of the Charter Act. **POGOOZ v. CATCHICK**

[I. L. R., 3 Calo., 708 2 C. L. R., 278]

But see **POGOOZ v. ABHAYSOOLLAR**

[I. L. R., 3 Calo., 710 note]

102. — *Order nisi stating name of purchaser instead of plaintiff* — *jurisdiction of Civil Court* — A Civil Court is not competent to order the name of a purchaser of the rights of the plaintiff in a suit to be substituted for that of the plaintiff or upon the application of the party so substituted, to allow the suit to be withdrawn. Such an order if made is made without jurisdiction and is not an order of that description in respect of which the Legislature intended either to give or to deny the right of appeal. But the order is one which the High Court may set aside in the exercise of the superintendence vested in it by s. 15 of 24 & 25 Vict., c. 104. **JEDOOTUTTER CHATTERJEE v. CHUNDER HANT BHUTTACHARJEE**

[9 W. R., 309]

# SUPERINTENDENCE OF HIGH COURT—continued.

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15  
—continued.

103. — *Power, Exercise of application to sue as—Civil Procedure Code, 1859 s. 304—Case where there is no appeal* — Where a decision (i.e., the rejection of an application under Act VIII of 1859 s. 304) is declared by law not to be subject to appeal the High Court cannot interfere under 24 & 25 Vict., c. 104 s. 15. **BANERJI v. GOYAL LALL** 24 W. R., 62

104. — *Recorder of Moulmein—Act XXI of 1863 at 16 and 17—Suspension of pleader* — The High Court has, under s. 15 of 24 & 25 Vict., c. 104, general superintendence over the Court of the Recorder of Moulmein established under Act XXI of 1863. An order passed by the Recorder of Moulmein under s. 16 or 17 of Act XXI of 1863, granting or withdrawing a license to practise as a pleader in the Small Cause Courts of Moulmein, is an exercise of power which comes under the superintendence of the High Court. **IN THE MATTER OF THOMSON**

[6 B. L. R., 180, 14 W. R., 257]

105. — *Refusal of original Court to entertain application for review—Refusal of leave to sue in forma pauperis* — Under s. 15 of 24 & 25 Vict., c. 104, the High Court set aside an order of a Court of original jurisdiction, refusing to entertain an application to review an order refusing a petition for leave to sue in forma pauperis on the ground that the Court had no jurisdiction to entertain it. **IN THE MATTER OF THE PETITION OF UMASUDAM DESAI**

[5 B. L. R., Ap., 29]

106. — *Review, Admission of, after prescribed time* — The High Court refused to interfere with the order of a Court granting a review of its judgment, although the application for review was not made until three years after the date of the decree the party who preferred the application for the review having, satisfied such lower Court of the existence of just and reasonable cause for his not having preferred his application for review within ninety days. **ABOONISSA BIKER v. SURJA KANT ACHARYA**

[3 B. L. R., A. C., 181, 11 W. R., 56]

107. — *Review, Admission of, after prescribed time* — The lower Appellate Court admitted a petition for review of its judgment after a lapse of ninety days from the date of the decision without recording that just and reasonable cause for the delay had been shown. On an application under s. 15 of the Charter Act to the High Court to set aside the order of the lower Court, on the ground that that Court had no jurisdiction to entertain an application for review after a lapse of ninety days without recording that there was just and reasonable cause for the delay, the High Court refused to interfere. **ABHAYANISSA BHOW v. KANT HOSSAIN** 6 B. L. R., 316, 13 W. R., 439

# SUPERINTENDENCE OF HIGH COURT—*continued.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15  
—*continued.*

108. ———— *Order to compel Court to make sale absolute*—The High Court may, on sufficient cause being shown, make an order upon motion to compel a lower Court to make absolute a sale which had been made by that Court, but which the Court had not confirmed and thought it not expedient to confirm. IN THE MATTER OF THE PETITION OF OODIUT ZUMAN . 8 W. R., 109

109. ———— *Sale made pending inquiry under Act XVII of 1873 (the Nawab Nazim's Debts Act)—Order refusing to confirm sale.*—Certain immovable property having been brought to sale in execution of decrees against Ameer Sahab at the time that the right, title, and interest thereof were under inquiry by commissioners appointed under Act XVII of 1873 (the Nawab Nazim's Debts Act), it was sold with an intimation that the purchaser would purchase an empty title. Subsequently the commissioners came to an actual finding under s. 12, declaring the property to be held by the Government of India, and their opinion that it could not be alienated by the Nawab Nazim. In consequence of this, the Court which had sold it refused to confirm the sale. The High Court refused to interfere under the High Courts Act, s. 15, holding that it was so manifestly right and proper in the interests of all parties to withhold confirmation of the sale in this case that it was unnecessary to inquire whether the order was in strict conformity with the law or not. KALEE MOHUN SINGAR v. HUMAYOON KADER MAHOMED ALI MIRZA BAHADOOR *alias* AMEER SAHEB . 24 W. R., 311

110. ———— *Order setting aside sale made on insufficient application.*—When an application on to cancel a sale does not mention the specific grounds contemplated in ss. 256 and 257, Act VIII of 1859, the absence of such specification does not take away the jurisdiction of the Court to inquire into the matter. Where a Judge in such a case sets aside a sale after finding material irregularity and substantial injury, his finding is final, and cannot be questioned by the High Court in the exercise of its extraordinary jurisdiction. SOOKOONAR SINGH v. KASREE SINGH . 13 W. R., 250

111. ———— *Act VIII of 1859, s. 364—Reversal of sale for inadequacy of price.*—Certain bank shares, the property of a judgment debtor, were sold in execution of a decree. The Sudder Ameen afterwards reversed the sale on the ground of the inadequacy of the price. The Judge having refused to entertain an appeal, the purchaser applied to the High Court. *Held*, the parties being precluded from appealing by s. 364 of Act VIII of 1859, the High Court had no power to grant relief. IN THE MATTER OF THE PETITION OF DACOSTA . . . B. L. R., Sup. Vol, 432

S. C. DACOSTA v. HALL . 5 W. R., Mis., 25

112. ———— *Civil Procedure Code, 1877, ss. 290 and 622—Irregularity in sale*

# SUPERINTENDENCE OF HIGH COURT—*continued.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15  
—*continued.*

*in execution of decree—Order of Judicial Commissioner.*—Certain immovable property was on the 15th day of February 1879 notified for sale under a decree of a Civil Court on the 15th of March following, so that only twenty-nine instead of thirty days elapsed between the day of sale and the notification. The sale having taken place, the execution-debtor applied to the Deputy Commissioner to set it aside, upon the ground that the sale was illegal, the requirements of s. 290 of the Civil Procedure Code being essential to its validity. Upon that ground the sale was set aside as illegal by the Deputy Commissioner. On appeal, the Judicial Commissioner reversed this decision, on the ground that the fact of the sale having taken place twenty-nine instead of thirty days after the notification was merely an irregularity, and that, as the execution-debtor had not shown that he had suffered any damage from the irregularity, the sale ought to be confirmed. An application was then made to a Division Bench of the High Court to set aside the order of the Judicial Commissioner confirming the sale, upon the ground that it was manifestly erroneous, and the Division Bench referred the question to a Full Bench; whether, assuming the requirements of s. 290 to be essential to the validity of a sale, the High Court had any power, either under s. 15 of the Charter Act or s. 622 of the Civil Procedure Code, as amended, to set aside the Judicial Commissioner's order. The Full Bench, without answering the question referred, held that, assuming the requirements of s. 290 to be essential, the High Court had a right, under its summary powers, to set aside the sale itself, notwithstanding (and apart from the question whether it would set aside) the order of the Judicial Commissioner. BUDERAJ KOERI v. GENDH LAL TEWARI . . . I. L. R., 5 Calc., 878

113. ———— *Application to set aside sale in execution of decree—Circumstances disentitling party to relief.*—A party applying to the High Court for relief under s. 15 of 24 & 25 Vict., c. 104, must clearly show that he has not contributed by his own conduct to his being placed in the position he finds himself in. A decree for possession with wasilat of certain lands appertaining to an indigo concern was obtained in a suit against D as manager on behalf of G M & Co., the proprietors of the concern, although no member of G M & Co. was living when the suit was instituted. In execution of this decree, the plaintiff obtained possession of the lands. The executors of M, the last surviving member of G M & Co., having subsequently assigned the concern to A, who also took upon himself the denapanna, the plaintiff applied under s. 210 to execute the decree against A in respect of wasilat, and two successive notices under s. 216 were issued to A to show cause why the decree should not be executed against him. A, being advised that the suit was a nullity, and that under no circumstances could execution be had against him as heir or legal representative of any of the judgment-debtors, neglected to appear, and certain property belonging to him was sold



# SUPERINTENDENCE OF HIGH COURT—continued

## 3 CHARTER ACT (24 & 25 VICT. C 104) § 15—continued.

in execution of the decree without opposition on his part and the sale having been duly confirmed the purchaser who was also the decree-holder, was put into possession. A thereupon applied to the Court executing the decree to have the sale set aside, and, his application being refused petitioned the High Court under s 15 of 24 & 25 Vict. c 104, for the same relief. The High Court however refused to interfere both upon the principle above stated and likewise because the purchaser being also the decree-holder could not successfully oppose a suit by it to have the sale set aside. **IN THE MATTER OF THE PETITION OF COCHRANE**

[14 B. L. R., 330 23 W. R., 310]

114. — *Setting aside order properly made for rateable distribution of sale proceeds—Claim.* Order on—A claim was disallowed to certain property which had been attached in execution of a decree. The property was sold, and after satisfaction on of the decree it was ordered that the surplus proceeds should be rateably distributed among other judgment-creditors who had subsequently attached. On the application of the unsuccessful claimant again preferring his claim to the property the Principal Sudder Ameer made an order setting aside the previous order for distribution so far as it affected some of the creditors. Held that the Principal Sudder Ameer had no jurisdiction to make the latter order. The High Court would therefore interfere to set it aside under its general power of superintendence. **IN THE MATTER OF THE PETITION OF DHIRAJ MAHAJAN CHAND BHANDAR**

[2 B. L. R., A. C., 217]

S C MAHAJAN OF BUNDWALY & NEERALL  
SEAL 11 W. R. 54

115. — *Order giving sanction to prosecution—Grant of certificate of administration to one holding under forged will.* The application of a widow for a certificate having been opposed by a third party (K), who produced an alleged will of the deceased the Judge ordered the grant of a certificate to K. Subsequently the widow petitioned for an inquiry into the genuineness of the will, and the Judge, after examining witnesses, considered there were sufficient grounds for investigating the charge of forgery, and directed that K should be sent to the Magistrate for that purpose. Held that the Judge ought not to have granted the certificate to the party who produced the will unless he was quite satisfied that the will was genuine. As the order, however directing that K should be sent to a Magistrate was made with jurisdiction, the High Court could not interfere. **IN THE MATTER OF KOTJI BEHARJI GHUR** 11 W. R. 171

116. — *Rejection of security offered for stay of execution pending suit brought.*—Where the security offered by a judgment debtor with a view to execution against her being stayed until the decision of a suit for an account which she had brought against the decree-holder was

# SUPERINTENDENCE OF HIGH COURT—continued

## 3. CHARTER ACT (24 & 25 VICT. C 104) § 15—continued

rejected by the lower Court, it was held that the order of rejection could not be interfered with by the High Court under s. 15 of the High Courts Act. **IN THE MATTER OF THE PETITION OF JONON MONTE DOSSER** 11 W. R., 491

117. — *Act XI of 1865. s. 4—Interference with decision of Small Cause Court.*—The powers conferred by 21 & 25 Vict. c 104, s. 15, and Act XI of 1865 s. 4, do not enable the High Court to interfere with the decision of a Court of Small Causes refusing an application on the part of a defendant to send for a copy of a letter which was filed in another suit, and which the defendant desired to put in as evidence. **IN THE MATTER OF THE PETITION OF MCVVOO-MAN** [19 W. R., 306]

118. — *Order made by Acting Judge and set aside by permanent incumbent.*—Where an acting Judge of a Small Cause Court had made an order which the permanent incumbent on his return considered to have been made without authority of law,—Held that the High Court was not competent to take up the case on a reference from the Judge, but that the party aggrieved should apply to the High Court, if he thought fit, to exercise its extraordinary powers under s. 15 of the High Courts Act. **DEEP CHAND & GOUDRA** [13 W. R., 88]

119. — *Cases where no special appeal lies and no question of jurisdiction arises.*—Act XXIII of 1861, s. 27.—Under s. 15 of 24 & 25 Vict. c. 104 the High Court will not interfere with the decision of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII of 1861, and where there is no question of jurisdiction involved. **IN THE MATTER OF THE PETITION OF LUKHYANT BOSH**

[1 L. R., 1 Calc., 180]

S C. KETIKI CHUTHANT & LUKHYANT BOSH  
[24 W. R., 440]

120. — *Interference by High Court in case cognizable by Small Cause Court.*—Act XXIII of 1861, s. 27.—In a suit cognizable by the Small Cause Court, and in which no special appeal lay to the High Court under s. 27 Act XXIII of 1861, the High Court exercised its extraordinary powers and dismissed the suit. **DHIRAJ MAHAJAN CHUND BHANDAR & SHAGOR KUTUP** [5 B. L. R., Ap. 91]

121. — *Want of jurisdiction to determine part of case.*—In a suit of a Small Cause Court nature (to recover the value of produce) which had been decided upon the real issues between the parties the High Court refused to exercise its extraordinary powers under s. 15 of the Charter, merely on the ground that the Civil Court had no jurisdiction to determine a part of the dispute, which was whether the land whose produce

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.**

was claimed was or was not in the British territory.  
**DRUTUL SINGH v. JHOGRA PATNEE** [11 W. R., 508]

**122.** ————— *Stay of suit in India against company being wound up in England.*  
 —The High Court will, in the exercise of its general power, stay the proceedings in a suit in India against a company which is being wound up by order of the Court of Chancery in England under the Companies Act, 1862, where the circumstances are such as to render it proper to do so. **BANK OF HINDUSTAN, CHINA, AND JAPAN v. PREMCHAND RAICHAND. AHMEDDHAI HABIBDHAI v. PREMCHAND RAICHAND** 5 Bom., O. C., 83

**123.** ————— *Recorder of Rangoon, Errors in trial before—Decision against validity of will.*—The mere fact of errors of procedure having been committed in a trial before a Recorder would not warrant the High Court in saying that in pronouncing against the validity of a will after investigation he had acted without jurisdiction or in interfering with his decision. **IN THE MATTER OF MEE TSEI** 15 W. R., 351

**124.** ————— *Order passed without legal evidence—Civil Procedure Code, 1859, s. 246.*—A party to a certain proceeding instituted under s. 246, Act VIII of 1859, having been summoned to give evidence did not attend. The Court, considering that his absence was without lawful excuse, decided the matter before it with reference to the provisions of s. 170 of the Civil Procedure Code. It was then attempted to move the High Court under s. 15 of 24 & 25 Vict., c. 104, to set aside the order as passed without legal evidence. *Held* that such action would be substantially a special appeal, which could not be allowed with reference to s. 246. **DRUTUL SINGH v. INDURCHUNDER DOOGRA** [13 W. R., 121]

**125.** ————— *Execution proceedings—Refusal of party to attend as witness.*—A Principal Sudder Ameen ordered the attendance as a witness of a person seeking by his vakil to enforce the execution of a decree, and, on his refusal to attend, sent him to the Magistrate. On an application to have the order set aside, a Division Bench of the High Court was of opinion that under the circumstances the order of the Principal Sudder Ameen was arbitrary, vexatious, and unnecessary; but being doubtful, in the absence of any provision in the Civil Procedure Code, of its powers of interference under the Charter, referred the point to a Full Bench. *Held* that the Principal Sudder Ameen had power to make the order, and that the High Court ought not to interfere with it. **IN THE MATTER OF THE PETITION OF JANKEE BULLUB SEIN** [B. L. R., Sup. Vol., 718]

**S. C. JANAKEE BULLUB SEIN v. DUKHINA MOHUN CHOWDHRY** 7 W. R., 519

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.**

**126.** ————— *Improper exercise of judicial powers under Legal Practitioners' Act (Act VIII of 1879), as amended by Act XI of 1896, s. 36—Nature of proof required.*—Where a District Judge relying upon an unverified report purporting to come from the Secretary of a Bar Association framed and published the name of the petitioner in the list of touts, —*Held* that the words "proved to his or their satisfaction" in s. 36 of Act XI of 1896 (amending the Legal Practitioners' Act XVIII of 1879) refer to proof by any of the means known to the law of the fact upon which the Court is to exercise its judicial determination, and the Judge had acted without having before him any legal evidence as required by s. 36 of the Legal Practitioners' Act. In such a case the High Court may interfere under the wide powers of superintendence given by s. 15 of the Charter Act. **IN RE SIDDHESHWAR BORAL** 4 C. W. N., 36

**127.** ————— *Order under Legal Practitioners' Act XVIII of 1879, s. 36—Order including a person's name in the list of touts.*—*Held* that in the case of an order passed under s. 36 of Act XVIII of 1879 the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by s. 15 of the High Courts Act, 1861, and that it would not interfere even then, where the sole ground upon which its interference was asked for was that the decision of the District Judge was against the weight of the evidence. **IN THE MATTER OF THE PETITION OF MADHO RAM** I. L. R., 21 All., 181

## **(b) CRIMINAL CASES.**

**128.** ————— *Refusal of High Court to interfere where right of appeal exists.*—*Held per AINSLIE and McDONELL, JJ.*, that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court, instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to. **EMPRESS v. RAJCOOMAR SINGH** I. L. R., 3 Calc., 573

**S. C. RAJCOOMAR SINGH v. DEONATH GHUTUCK** [1 C. L. R., 352]

**129.** ————— *Setting aside valid conviction in case wrongly instituted.*—*Per MACLEAN, J.*—The High Court may without reference to the Local Government set aside a conviction made upon a trial improperly originated. **IN THE MATTER OF NOBIN CHUNDER BANIKYA. EMPRESS v. NOBIN CHUNDER BANIKYA** I. L. R., 8 Calc., 560

**S. C. NOBIN CHUNDER BANIKYA v. EMPRESS** [10 C. L. R., 389]

# SUPERINTENDENCE OF HIGH COURT—continued

8 CHARTER ACT (24 & 25 VICT., C 104), S. 15  
—continued

130 ———— *Order of discharge. Presiding Magistrate Act (15 of 1876), s. 16*—*Case in which there is no appeal*—The only course to be pursued where it is sought to set aside an order of discharge made by a Presiding Magistrate is that laid down in s. 168 of Act IV of 1877, and as by that section there is no appeal allowed to a complainant who is a private individual it is not open to him by invoking the aid of the High Court under s. 15 of the Charter to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal. *IN THE MATTER OF POONA CHURN PAL* I. L. R., 7 Calc., 447

131 ———— *Error in law—Offence not constituted on facts proved in non-appealable case*—Where the High Court was of opinion (in a case in which no appeal lay to it) that the facts found by the Court that tried the prisoners and the Court of appeal from such Court did not constitute the offence of cheating of which the prisoners had been convicted, the High Court, in the exercise of its extraordinary jurisdiction reversed the conviction and sentence. *MEER v. HARGOVINDAS* [9 Bom., 448]

132 ———— *Act V of 1861, s. 17—Order of executive nature*—The High Court, while considering that an order by a Magistrate purporting to act under s. 17 of Act V of 1861 was illegal, refused to interfere on the ground that the order was one of an executive nature. *IN THE MATTER OF THE PETITION OF RAMOHAN BHAKAR* [10 B. L. R., Ap., 4 18 W. R., Cr., 67]

133 ———— *Orders under Criminal Procedure Code, 1872, s. 518—Variation*—The extraordinary powers conferred on the High Court by s. 15 of the Charter Act extend to the reviving of orders passed under the Code of Criminal Procedure s. 518. *GHOSHAIN LUCHMAN PER SHAH POORAN v. PORNOOT NARAIN POORAN* [24 W. R., Cr., 30]

134 ———— *Order under Criminal Procedure Code (Act X of 1872), s. 518—Variation*—The High Court cannot interfere, under s. 15 of the Charter Act with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code. *IN THE MATTER OF THE PETITION OF CHANDER NATH SEN* I. L. R., 2 Calc., 293

135 ———— *Orders under Criminal Procedure Code, 1872, s. 518—Variation*—*Orders in judicial proceeding*—Held that, orders legally made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure, but where an order under that section was illegal, the High Court set it aside under s. 15 of the Charter Act, 24 & 25 Vict., c. 104. *In the matter of the petition of*

# SUPERINTENDENCE OF HIGH COURT—continued.

3 CHARTER ACT (24 & 25 VICT., C 104), S. 15  
—continued

*Chander Nath Sen, I. L. R., 2 Calc., 293, followed. BRADLEY v. JAMESON* [I. L. R., 8 Calc., 560]

*CHANDER COOMAR ROY v. OMESH CHATTERJEE MOJUMDAR* . . . 23 W. R., Cr., 78

*BAWEN MADHUS GHOSH v. WOMANATH ROY CHOWDHURY* . . . 21 W. R., Cr., 38

*SEENATH DUTT v. USKODA CHURN DUTT* [23 W. R., Cr., 34]

136 ———— *Order of Magistrate under s. 518, Criminal Procedure Code, 1872*—The High Court, in the exercise of the jurisdiction given to it by s. 15 of the Charter Act, issued a rule nisi at the instance of the party aggrieved calling upon the opposite party to show cause why an order made by a Magistrate which was complained of should not be set aside for want of jurisdiction, although the matter had already been brought to the notice of the Court on a reference made by the Sessions Judge. *HALE NARAIN ROY CHOWDHURY v. ABDULL GUTTOOR KHAN* . . . 22 W. R., Cr., 24

137 ———— *Criminal Procedure Code (Act X of 1872), s. 144—Order is obtained from certain act*—A Deputy Commissioner passed an order under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either himself or through any of his officers or servants, from the raiyats of two specified pargannas, and also from effecting any sale or putting in hand any transaction with regard to standing trees or selected timbers in an estate, or erecting any adla or kuchari in such pargannas for a period of two months. Upon an application to set aside such order, —Held that the High Court had jurisdiction under s. 15 of the Charter Act to set it aside if it were made without jurisdiction. *ABAYESWARI DEBI v. BIDHESWARI DEBI* . . . I. L. R., 18 Calc., 80

138 ———— *Criminal Procedure Code (Act X of 1872), s. 145, 435—Power of local Legislature—Power of revision by High Court—Order concerning a ferry purporting to be made under s. 145*—The local Legislature has power to overrule a statutory power conferred on the High Court; but this was not the object and result of the legislation expressed in s. 435 of the Criminal Procedure Code of 1893. *EMPEROR v. BURAH, I. L. R., 4 Calc., 172 I. L. R., 5 I. A., 178, referred to.* The terms of s. 435 mean that orders under the exempted sections mentioned in cl (3) must have been passed with jurisdiction. If such orders are challenged as made without jurisdiction, the mere fact of their purporting to be passed under the exempted sections would not bring them within those sections so as to debar the exercise of powers by the High Court under s. 15 of the Charter Act. *ABAYESWARI DEBI v. BIDHESWARI DEBI, I. L. R., 18 Calc., 80; Ananda Chandra Bhattacharyya v. Stephen, I. L. R., 19 Calc., 127, Ecop*

# SUPERINTENDENCE OF HIGH COURT—continued.

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

*Lal Das v. Manook*, 2 C. W. N., 572; and *Queen-Empress v. Pratap Chunder Ghose*, I. L. R., 25 Calc., 852, followed. *HURBULLUBH NARAIN SINGH v. LACHMESWAR PRASAD SINGH* [I. L. R., 26 Calc., 188 3 C. W. N., 49

139. ————— *Criminal Procedure Code, 1898, ss. 145, 439—Dispute as to ownership of land—Non-joinder of necessary parties—Alteration of proceedings by succeeding Magistrate—Making them but dispute as to collection of rents—Matter of jurisdiction of Magistrate.*—Where there was a dispute as to the ownership of lands between certain zamindars and their tenants on the one side and other zamindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zamindars were entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands and in a proceeding under s. 145 of the Code of Criminal Procedure the zamindars only were made parties and not the tenants. *Held* (AMEER ALI and STANLEY, JJ.) that the tenants were necessary parties to the proceeding, and the omission to make them parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. *PRINSEP, J.*—The omission to join the tenants could not vitiate an order as between the zamindars on an objection that it was without jurisdiction, and that no question of jurisdiction arose in the matter. The High Court's powers are under the Charter Act, and these could be exercised only in respect of jurisdiction. Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Procedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land, into a dispute regarding the collection of rent between the persons named therein,—*Held* (AMEER ALI and STANLEY, JJ.) that it was an abuse of jurisdiction on the part of the Magistrate so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter. *AMEER ALI, J.*—The High Court has the power to interfere both under its revisional jurisdiction as also under cl. 15 of the Charter. *Hurbullubh Narain Singh v. Lachmeswar Prasad Singh*, I. L. R., 26 Calc., 188, referred to. *LALDHARI SINGH v. SUKDEO NARAIN SINGH* [I. L. R., 27 Calc., 892 3 C. W. N., 613

140. ————— *Order of remand—Criminal Procedure Code (Act XXV of 1861), s. 224.*—Where a Magistrate had adjourned an inquiry for a cause not contemplated by s. 224 of the Criminal Procedure Code, the High Court, in exercise of the power of superintendence conferred by s. 15 of 24 & 25 Vict., c. 104, set aside the order of

# SUPERINTENDENCE OF HIGH COURT—continued.

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—continued.

remand. *IN THE MATTER OF THE PETITION OF MATHURANATH CHUCKERBUTTY* [9 B. L. R., 354: 17 W. R., Cr., 55

141. ————— *Order by Judge of High Court in its original criminal jurisdiction.*—A Judge of the High Court making an order in the original criminal jurisdiction of the Court is not a Court subject to the control of the High Court under s. 15, 24 & 25 Vict., c. 104. *IN RE GOVERNMENT OF BENGAL. QUEEN v. AMEER KHAN* [7 B. L. R., 250 note: 15 W. R., Cr., 60

142. ————— *Order by Judge of High Court in its original criminal jurisdiction.*—Where an application was made to the Judge sitting on the original side of the High Court to transfer a case from Patna in the exercise of the extraordinary jurisdiction of the High Court, and the application was adjourned, and an order made calling on the Government to show cause why it should not be removed, the High Court on the appellate side, on a petition setting forth that the order was without jurisdiction, as the rules of the High Court had appointed a particular Bench to hear cases from Patna, refused to interfere. *IN RE GOVERNMENT OF BENGAL. QUEEN v. AMEER KHAN* [7 B. L. R., 244 note

143. ————— *Order of Magistrate for warrant without jurisdiction.*—The High Court has power under its general powers of superintendence to quash an order made by a Magistrate without jurisdiction for the issue of a warrant. *IN THE MATTER OF BANKA BEHARI GHOSE* [2 B. L. R., A. Cr., 17: 11 W. R., 23

144. ————— *Power of High Court to revise an order as to sanction under s. 197 of the Criminal Procedure Code—Criminal Procedure Code (Act V of 1898), s. 197 and s. 439.*—A pleader applied to the Chief Presidency Magistrate for sanction under s. 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case and sanction was refused. On application to the High Court,—*Held*, under the revisional powers conferred by the Criminal Procedure Code, the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under s. 197 of the Code, but it has sufficient authority for that purpose under s. 15 of the Charter Act (24 & 25 Vict., c. 104). *NANDO LAL BASAK v. MITTER* [I. L. R., 26 Calc., 852 3 C. W. N., 539

145. ————— *Power of High Court to revise order of Presidency Magistrate dismissing complaint—Letters Patent, High Court, cl. 23—Order for further enquiry.*—The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate, by reason not of cl. 23 of the Letters Patent, 1865, but of

# SUPERINTENDENCE OF HIGH COURT—*cont. need*

## 3 CHARTER ACT (24 & 25 VICT, C 104), S. 15 —*concluded.*

a. 15 of the Charter Act (24 & 25 Vict, c 104) That act on has alwa s been interpreted in a very extended meaning so as to give ample powers of superintendence that is to say powers of revision over proceedings of subordinate Courts But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal passed by a Presidency Magistrate *Colville v Kristo Ashore Base 1 L R, 26 Calc 746*, dismissed from *Opoorba Kumar Sett v Probod Kumar Dass 1 C W N 49* referred to A Presidency Magistrate acting under s 203 of the Criminal Procedure Code dismissed a complaint on the report of the police without examining the complaint and without finding that there was no sufficient ground for proceeding The High Court acting under s 15 of the Charter Act ordered a further inquiry to be made into the matter of the complaint *CHANDRABALA DAREE v BARENDRA NATH MOFAMDAE 1 L R, 27 Calc, 126 [3 C W N., 601]*

*OPCORBA KUMAR SETT v PROBOD KUMARI DASSI [1 C W N., 49]*

## 4 CIVIL PROCEDURE CODE, S 622

140 ————— *Order made by High Court Application to review*—S 622 of the Civil Procedure Code (XIV of 1892) does not apply to a case where the order, of which review is sought, is made by the High Court The Court referred to in s 622 is a Court other than the High Court *1488 PRASAD TRIKUMDAS 1 L R, 17 Bom, 514*

147 ————— *Application where it was found an appeal lay*—Application treated as appeal—Where an application was made for the exercise of its superintendence under s 622 of the Civil Procedure Code and the Court found that an appeal lay in the case, and that therefore it ought not to exercise such superintendence, the application was allowed to be treated as an appeal (the appeal from its value lying to the High Court and the application under s 622 having been made before expiry of the time allowed for an appeal) on the proper Court fees being paid *Mahomed Wazid v Hakimom 1 L R, 23 Calc, 757*, referred to *MAHARAT SOMATAPPADE v PURAMATHAN SOMAYA JIJAP 1 L R, 23 Mad, 101*

148 ————— *Delay in moving Court*—Where an auction purchaser applied to the High Court to set aside, in the exercise of its powers under s 622 of the Civil Procedure Code, an order setting aside a sale of immovable property in execution of a decree, on the ground that such order was illegal such application being made nearly seventeen months after the date of such order, the Court having regard to the time that had elapsed before such application was made, refused to interfere IN THE MATTER OF THE PETITION OF DURGAS PRASAD [1 L R., 4 All, 154]

# SUPERINTENDENCE OF HIGH COURT—*continued*

## 4. CIVIL PROCEDURE CODE, S 622 —*continued*

149 ————— On the question whether the High Court should refrain from exercising its powers under s 622 by reason of the long time which had elapsed from the date of the decree, *—held* that the petitioner was not fairly chargeable with laches *BALMAKUND v SHRO JATAN LAL [1 L R., 6 All, 125]*

150 ————— *Interference without application by a party to suit*—A High Court can interfere under s 622 of the Code of Civil Procedure without an application made to it by a party to the suit *ANTHOBY v DUPONT [1 L R., 4 Mad., 217]*

151 ————— *Interference without application by party to suit—Reference from District Judge*—It is only on the application of a party interested that the High Court can act as a Court of revision under s 622 of the Civil Procedure Code Accordingly, where a Munsif considering that the Subordinate Judge had acted without jurisdiction in setting aside on appeal certain orders made by him brought the matter to the knowledge of the District Judge, who took the same view, and the latter referred the case to the High Court under that section, it was held that the Court had no power to interfere *MAHOMED FOYAL CHOWDHURY v GOLICK DASS 7 C L R., 181*

152 ————— *Revision of order of lower Court—Power of High Court, on the application of a third party—Original order passed for delivery of possession to auction purchaser—Dispossession of auction purchaser by a claimant—Order for registration of name of claimant—Jurisdiction of Court to re-open execution proceedings*—On a dispute arising between two contending parties, A and B, for registration of their names a reference was made to the District Judge under s 55 of the Land Registration Act, and a decision was passed in favour of A, the petitioner, who was put in possession of the property notwithstanding the objection of one C, the opposite party that he held possession of the village as a permanent tenure-holder having acquired a title by auction purchase in execution of a mortgage decree No steps were taken by C to obtain any recognition of his title from the District Judge, but some time after he applied to the Subordinate Judge for an amendment of his sale certificate and having obtained an order of the Court re-opening the execution proceedings he applied for a fresh writ of possession in pursuance of the amended sale certificate The Subordinate Judge issued a fresh writ of possession but A resisted the execution of that writ and possession, could not be given without complaining of the resistance to the Subordinate Judge C applied for and obtained a fresh writ for possession Before any action could be taken upon that writ, the petitioner presented an application to the Subordinate Judge representing his right in and possession of the property, but the Subordinate Judge declined to take any action upon it.

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **4. CIVIL PROCEDURE CODE, S. 622 —continued.**

Several resistances were made to the delivery of possession to the opposite party, and several successive writs of possession were issued by the Subordinate Judge. *Held* that, under the above circumstances, A had sufficient interest in the orders complained against to justify him in moving the Court under s. 622, Civil Procedure Code. *Semble*—Under certain circumstances, the High Court can act under s. 622, otherwise than on the application of a party to the proceedings against which revision is sought to be taken. *Mahomed Foyez Chowdhry v. Goluck Dass*, 7 C. L. R., 191, explained and distinguished. *Raghu Nath Gujrati v. Rai Chattraput Singh*, 1 C. W. N., 633, referred to. That it was not open to the Subordinate Judge to make the original order for delivery of possession over again, and the proceedings of the Subordinate Judge were bad *ab initio*. **GOLAM MAHAMMAD v. SARODA MOHAN MOITRA**

[4 C. W. N., 695]

**153. Case where other specific remedy exists—Bom. Reg. II of 1827, s. 5 Certiorari—Mandamus—Prohibition—Specific Relief Act, I of 1877, Ch. VIII.—A Division Bench (PINHEY and NARAYAN HARIDAS, JJ.) of the High Court referred the following question for the determination of the Full Bench: "Whether the High Court should exercise its extraordinary jurisdiction under s. 622 of the Code of Civil Procedure, or otherwise, on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases in which it appears the law has specifically prescribed another remedy by suit, or otherwise?" *Held* that the question did not admit of a precise categorical reply; that the High Court could not impose on itself limitations without regard to circumstances; but that the general principles governing the exercise, by the High Court, of its visitatorial or superintending powers to be deduced from a general survey of the authorities on the subject might be reduced to the form of the following seven propositions, the fifth of which would ordinarily govern in the class of cases alluded to in the question: (1) The visitatorial or superintending power of the High Court is so necessary and almost indispensable, that it is not to be wholly excluded even by a clause in a statute withdrawing cases under the statute from its control. When such a statute has been made a mere pretext, or has been wholly misapplied, the case will be treated as one not really arising under the statute, but on an evasion or perversion of the statute, and as such subject to the general control of the Court. (2) The Court, having called up the record or proceedings of a subordinate Court, will itself investigate the facts on which a jurisdiction has been assumed or declined; on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all or on the principle to which it has referred the case; or according to which its mode of inquiry or of action may or may not have been in contradiction rather than obedience to the rules of procedure, or the**

# **SUPERINTENDENCE OF HIGH COURT—continued.**

## **4. CIVIL PROCEDURE CODE, S. 622 —continued.**

principles implied in them, to such a material extent as to defeat the purpose of the law. (3) If the Court finds that the external conditions of jurisdiction, of investigation, and of command, have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court in any matter committed by the Legislature to the discretion of such Court. (4) Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure. (5) Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate remedy, or the intended remedy, cannot be had. (6) The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case, or of the principle involved in it of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight is to be given to them, regard being always had to the principles already enunciated. (7) The Court will "sedulously abstain" from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority, provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range. **SHIVA NATHJI v. JOMIA KASHINATH** . L. L. R., 7 Bom., 341

**154. Cases in which appeal lies—"Decree"—Order rejecting memorandum of appeal.—An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the Civil Procedure Code; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code. **GERAP RAY v. MASOLI DAL** . L. L. R., 7 All. 42**

**155. Civil Procedure Code, 1882, s. 351—Order dismissing suit on failure to give security for costs.—Held** by the Full Bench that an order passed under s. 351 of the Civil Procedure Code, dismissing a suit for failure by

# SUPERINTENDENCE OF HIGH COURT continued

## 4 CIVIL PROCEDURE CODE, S. 622 cont. used

the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such and consequently was not open to revision by the High Court under s. 622 of the Code. **WILLIAMS v. BROWN** I L. R., 8 All., 108

158 ——— *Ordering an decree under s. 206 Civil Procedure Code 15 2* —  
*High Court's powers of revision.* — A District Judge by an order passed under s. 206 of the Civil Procedure Code altered a decree passed by his predecessor in the terms "I dismiss the appeal" to read "I accept the appeal" on the ground that his predecessor had obviously meant to say that he accepted the appeal and that the decree as it stood failed to give effect to the judgment. *Per OLDFIELD J.* — That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code because there was an appeal from the amended decree which became the decree in the suit, and superseded the original decree. *Per MAHMOOD J.* — That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 538. Also that in saying that by "dismissed" his predecessor meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206; that he had therefore exercised his jurisdiction "illegally and with material irregularity" within the meaning of s. 622 of the Code; and that the Court was consequently competent to revise his order. **ROGHUNATH DAS v. RAJ KUMAR** I L. R. 2 All. 276 referred to. **SURTIA v. GANGA** I L. R., 7 All., 411

S. C. on appeal under the Letters Patent reverses the judgment of OLDFIELD J., and affirming that of MAHMOOD J. **SURTIA v. GANGA**

[I. L. R., 7 All., 875]

157 ——— *Civil Procedure Code s. 206—Order amending decree in respect of Court fee in pre-emption suit.* — An order as to costs contained in a decree for pre-emption directed that the plaintiff's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code passed an order directing the amendment of the decree by calculating the plaintiff's fees upon the actual value of the property. *Held per OLDFIELD J.* — When an original decree is amended under s. 206 of the Civil Procedure Code it is amended, is the decree in the suit, and an appeal therefore lies from it under the provisions of s. 540, when the validity of the amendment can be questioned. The matter of amending a decree under s. 206 does not by itself constitute a "case" within the meaning of s. 622 of the Civil Procedure Code but forms part of the proceedings

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, s. 622 —continued

in the suit in which the decree is made. *Held* therefore, *per OLDFIELD J.* that where an original decree which was appealable, was amended by the Court of first instance, under s. 206 of the Civil Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code. *Per MAHMOOD J., contra.* **PAUGHNATH DAS v. RAJ KUMAR** I L. R., 2 All., 278

*Held* on appeal under the Letters Patent that the alteration of the decree was improper and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code. An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree and such an order is not appealable under s. 538 of the Code. Such an order therefore can be revised by the High Court under s. 622. The judgment of OLDFIELD J., reversed, and that of MAHMOOD J. affirmed. **PAUGHNATH DAS v. RAJ KUMAR** [I. L. R., 7 All., 876]

158 ——— *Civil Procedure Code s. 208—Amendment of decree—Manifestly illegal but in exercise of jurisdiction.* — The holder of a decree passed in a suit on a hypothecation bond applied under the Civil Procedure Code s. 206, to have the decree amended by bringing the description of the land contained therein into accordance with that contained in the hypothecation bond and the Court made an order accordingly. On a revision petition preferred under the Civil Procedure Code s. 622, by the judgment-debtor — *Held* (reversing the judgment of PARKER J., but on different reasoning by the two learned Judges constituting the Court) that the High Court had no power to interfere on revision. **NARAYANASAMI v. NATHA**

[I. L. R., 18 Mad., 424]

159 ——— *Civil Procedure Code 1882 s. 44—Order refusing leave to join claims—Rejection of plaintiff.* — In a plaint filed in the Court of a Subordinate Judge the plaintiff claimed to recover possession of a house together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave under s. 44, rule (a), of the Civil Procedure Code to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave and returned the plaint with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively in the Court of the Munsif. *Held* that the Subordinate Judge's order was substantially an order rejecting the plaintiff, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immovable property that, although this might have been a misapplication of s. 44, rule (a), of the Code its effect was to reject the plaintiff, that such an order was a decree within the definition in s. 2, and was appealable as such to the District Judge, and that therefore a second appeal lay in the case to the High Court, and that

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622—continued.

Court was not competent to interfere in revision under s. 622. **BANDHAN SINGH v. SOHNU** [I. L. R., 8 All., 191

160. — Case in which

*no appeal lies*—*Calling for record in case*—**PEARSON, J., OLDFIELD, J., and STRAIGHT, J.**—When, under s. 622 of Act X of 1877, the High Court has called for the record of a case in which no appeal lies to it, it may, under that section, pass any order in such case which it might pass if it dealt with the case as a second appeal under Ch. XLII of that Act. **Per STUART, C.J.**—The High Court may, under that section, pass in such case any order, whether in regard to fact or law, as it thinks proper. **IN THE MATTER OF THE PETITION OF MEHAMMAD R. HUSAIN** . . . I. L. R., 3 All., 203

161. — Case in which *appeal lies*.—A tenure having been sold in execution of an *ex-parte* decree for rent due in respect of it, the judgment-debtor made an application, to which the purchaser was not made a party, to set aside the decree, and the decree was set aside. The decree-holder thereupon applied under s. 622 of the Civil Procedure Code to set aside the order of the Munsif. **Held** that, inasmuch as an appeal lay, under s. 558 (cl. 6), from the order of the Munsif, the Court ought not to interfere under s. 622. **RAM KRISHN ROY v. NAIK TARA DASS** . . . 12 C. L. R., 449

162. — Interference of *High Court where no appeal lies*.—Where an appeal preferred to the District Court against an order refusing an application for execution of a decree for costs was allowed, the High Court, on a second appeal being instituted, held that no appeal lay either to the District Court or to the High Court, but entertained the matter under s. 622 of the Civil Procedure Code, and upheld the order of the District Court. **BHOVRUP CHUNDER DOSS v. WAJEDUNNISA KHATOON** . . . 6 C. L. R., 234

163. — Objection to attachment of property—Objection allowed—Costs—Suit to establish right—Appeal—Refund of costs—Civil Procedure Code, 1882, ss. 244, 280, 283.—An objection to the attachment of property attached in execution of a decree was allowed, the decree-holder being ordered to pay the costs of the objector. The decree-holder thereupon brought a suit to contest the order allowing the objection. He did not seek in this suit relief in respect of the costs. He obtained a decree setting aside the order allowing the objection. He then applied to the Court which had made the order to order a refund of the amount of the costs which had been paid to the objector. **Held** that, the application being regarded as one with regard to a portion of an order made under s. 280 of the Civil Procedure Code, the Court was *functus* in the matter, and could not make or enforce such an order as was sought for; and that its order disallowing the application was not appealable, as it was not one made under s. 244, and if taken to be one passed with

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622—continued.

reference to s. 280 an appeal was barred by s. 233: the Court therefore would interfere under s. 622 of the Civil Procedure Code. **IN THE MATTER OF THE PETITION OF RAGHU NATH DAS. RAGHU NATH DAS v. BADRI PRASAD** . . . I. L. R., 6 All., 21

164. — Arbitration—

*Illegal procedure on arbitration—Invalid award.*—Where two of five arbitrators nominated by the parties to a suit and appointed by the Court had not consented before, and, after appointment, declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties to the suit, and the appointment of the new arbitrators was not warranted by the provisions of s. 510 of the Code of Civil Procedure, and the order of reference to such arbitrators, the award made by them and the decree passed upon the award were consequently illegal. **Held** that the High Court could set aside the decree under the powers given by s. 622 of the Code of Civil Procedure. **PUGARDIN RAYTAN v. MOINDASA RAYTAN** . . . I. L. R., 6 Mad., 414

165. — Arbitration—*Order refusing to file an award.*—Where an order is made refusing to file an award, no appeal lies from it, but the High Court can interfere under s. 622 of the Civil Procedure Code. **MANA VIKRAMA v. MALLACHERRY KRISHNAN NAMUDURI** [I. L. R., 3 Mad., 68

166. — Arbitration—*Order setting aside award for misconduct of arbitrator.*—An order under s. 521 of the Civil Procedure Code, setting aside an award, made on a reference to arbitration in the course of a suit, under Ch. XXXVIII of the Code, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by s. 622 of the Code. **CHATTAR SINGH v. LEKHRAJ SINGH** . . . I. L. R., 5 All., 293

167. — Arbitration—*Act VIII of 1859, s. 318—Award made after time allowed by Court.*—An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the Court refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure, on the ground that it was not valid. The plaintiffs then petitioned the High Court under s. 622 of the Code of Civil Procedure. **Held** that the award was invalid, and the Court had not failed to exercise jurisdiction within the meaning of s. 622 of the Code of Civil Procedure. **SIMSON v. VENKATAGOPALAM** [I. L. R., 9 Mad., 476

168. — Arbitration—*Award—Error of procedure—Relief refused on equitable grounds.*—**R. M.**, party to a suit, having authorized his agent to conduct the suit, the agent consented to the case being referred to arbitration by



# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, S. 622—continued

the Court. The submission was carried on to the knowledge and with the assent of R. M. On an application by R. M. under s. 622 of the Code of Civil Procedure to set aside the award made by the arbitrator, on the grounds (1) that his pleader had not been authorized to writing as required by s. 506 of the Code to apply for arbitration and (2) that he himself had not consented to the reference.—*Held* that under the circumstances P. M. was not entitled to relief. **LYSIRAMAN v. CHATHAN**

[I. L. R., 9 Mad., 451]

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, S. 622—continued.

as 130 357—*Interlocutory orders.*—Under s. 622 of the Code of Civil Procedure, interlocutory orders passed under s. 307, refusing applications for the issue of a commission to examine witnesses, or under s. 130 directing the production of documents cannot be revised. **IN RE NIZAM OF HYDERABAD**

[I. L. R., 9 Mad., 258]

172. — *Decree Construction of—Order misconstruing decree.*—Where in a case of the execution of a decree in which no second appeal lay to the High Court, the Appellate Court held on the construction of the decree, that it awarded interest on the principal amount of the decree to the High Court, under s. 622 of Act X of 1877, holding that the Appellate Court had misconstrued the decree, and that the decree did not award such interest, modified the order of the Appellate Court accordingly. **IN THE MATTER OF THE ESTATE OF MUHAMMAD HUSAIN**

I. L. R., 3 All., 203

173. — *Decree—Order reversing refusal to set aside ex-parte decree.*—After a decree had been made ex-parte, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge. *Held* that no appeal lay so would the Court interfere under s. 622 of the Civil Procedure Code. **ABUWAH CHUDER MOOKLISH v. MARTIN**

I. L. R., 8 Cal., 832

174. — *Discretion, Interference with exercise of—Collector—Hereditary Offices Act (Bomb.) III of 1874, s. 10—Collector's certificate.*—The Collector, when granting a certificate under s. 10 of the Bombay Hereditary Offices Act (III of 1874), exercises a judicial function, and is subject to the supervision of the High Court, but the High Court will not interfere with his discretion, unless there is violent misuse of authority, obvious bad faith or reckless disregard or wilful perversion of the law on his part. **COLLECTOR OF THANA v. BHASKAR MAHADEV KETH**

[I. L. R., 8 Bom., 294]

175. — *Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—N. W. P. Rent Act (XII of 1881) ss. 163, 199.*—The High Court has no power to revise, under s. 622 of the Civil Procedure Code, an order passed by a Collector under s. 183 of the N. W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. **HAR FORSHAD v. LALA, S. A. W. 60**, distinguished. **RAY DAVAL v. RAMADHIN**

I. L. R., 13 All., 189

176. — *Discretion, Interference with exercise of—Refusal to grant certificate of sale under Madras Real Recovery Act—Civil Procedure Code 1892, s. 4.*—A sale of the tenant's interest in certain land having taken place under ss. 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a certificate to the purchaser, on the ground that the sale

## 169. — Arbitration—Award—Application to file award, Objection to—

*Decree on award Finality of—Private arbitration—Reasonable powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1852), ss. 620 21 525 526 and 622.*—Certain disputes between parties were referred under a written agreement to an arbitrator who, in due course made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds (1) That the value of the property in suit was Rs. 100 only, and therefore that the application should have been made in the Munsif's Court and not in that of the Subordinate Judge (2) That the agreement of submission was vague and indefinite, and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay and that, if it did, it lay to the District Judge, and not to the High Court. *Held* that, assuming that on a proceeding under ss. 525 and 526 the Court has power to consider such objections as are mentioned in ss. 520 and 521 the above objections did not fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it and for that purpose to take evidence regarding the value of the property and that, even if no appeal lay, the High Court could interfere under its revisional powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence. **BYNASSUR PERSHAD SINGH v. JASKIN PERSHAD SINGH**

[I. L. R., 16 Cal., 482]

170. — Attachment—Power to set aside order for attachment by another Court.—No Court, other than a Court of appeal or a High Court acting under s. 622 of the Code of Civil Procedure, can discharge an order of attachment issued by another Court. **ILLATH NARAYAN v. KOLAKSHETTI ILLATH ULAKANDAN**

I. L. R.,

171. — Order refusing issue of—Civil Code,

Code,

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

had been irregularly conducted. *Held* that the High Court had no power to review the proceedings of the Deputy Collector under s. 622 of the Code of Civil Procedure. *VELI PERIA MIRA RAVUTHAN v. MOIDIN PADSHA RAVUTHAN*

[I. L. R., 9 Mad., 332]

177. ————— *Madras Rent Recovery Act (Mad. Act VIII of 1865), ss. 10 and 76.* The defendant in a suit under the Madras Rent Recovery Act was evicted in pursuance of an order made under s. 10. That order having been reversed on appeal, he applied to be replaced in possession, but the Sub-Collector dismissed that application. *Held* that the High Court could not interfere in revision under the Civil Procedure Code, s. 622. *APPANDAI v. SEIHARI JOISHI*

[I. L. R., 16 Mad., 451]

178. ————— *Madras Rent Recovery Act (Mad. Act VIII of 1865), s. 76.* Orders passed by a Collector under the Madras Rent Recovery Act are not open to revision under s. 622 of the Civil Procedure Code. *Velli Peria Mira v. Moidin Padsha, I. L. R., 9 Mad., 332*, followed. *VENKATANARASIMHA NAIDU v. SURANNA*

[I. L. R., 17 Mad., 298]

179. ————— *Discretion, Interference with exercise of—Admission by District Court of appeal presented out of time.*—Where a District Court admitted an appeal presented out of time, on the ground that the appellant, having filed an application for review within the time allowed for an appeal, was entitled to exclude the time occupied in prosecuting the review, — *Held* that the High Court could not interfere on revision. *VASUDEVA v. CHINNASAMI*

I. L. R., 7 Mad., 584

180. ————— *Error in law—Civil Procedure Code, 1882, s. 32—Interpleader suit, Application to be made a party to—Power of High Court on revision—Erroneous construction of Act*—A merely erroneous construction of the provisions of an Act is not a ground for relief under s. 622 of the Civil Procedure Code. *M J* instituted an interpleader suit against two rival claimants, *N* and *A*, in respect of a sum of ₹20,000. *R* subsequently claimed a portion of the money and applied to be made a party to the suit, but was opposed by *M J* and *N*. The Subordinate Judge refused the application, on the ground that, though it was probably made under s. 32 of the Civil Procedure Code, *R*'s right or claim not having been admitted by the plaintiff, nor asserted to his knowledge, she was not a necessary party under the special provisions of Ch XXXIII of the Civil Procedure Code, and referred her to a regular suit. *Held* that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law. *RABBARA*

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4 CIVIL PROCEDURE CODE, S. 622 —continued.

*KHANUM v. NOORJAHAN BEGUM alias DALIM SHAHIDA* . . . I. L. R., 13 Calc., 90

181. ————— *Error in law—*

*Dismissal of suit by Small Cause Court—Legal Practitioners' Act.*—A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a suit, on the ground that such a suit would not lie, because it was based on an oral contract, and such contract could not be enforced by reason of the provisions of the Legal Practitioners' Act, the High Court, under s. 622 of the Code of Civil Procedure, reversed the decree of the Small Cause Court. *RAMA v. KUNJI*

[I. L. R., 9 Mad., 375]

182. ————— *Error of law—*

*Application to bring decree into conformity with judgment.*—A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code to set aside this order, — *Held* that the High Court could not interfere. *JIVRAJI v. PRAGJI* . . . I. L. R., 10 Mad., 51

183. ————— *Court acting*

*without jurisdiction—Suit for rent entertained by Small Cause Court under erroneous impression it was due under a contract.*—A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears. *Held* that, under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree. *Amir Hassan Khan v. Sheo Balsh Singh, I. L. R., 11 Calc., 6*, discussed and explained. *MANISHA ERADI v. SITAM KOYA* . . . I. L. R., 11 Mad., 220

184. ————— *Material irre-*

*regularity—Small Cause Court, Motion for new trial of case in.*—The defendant contracted to sell to the plaintiffs a quantity of rapeseed, April May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery order for the seed given him by *L M & Co.*, which plaintiffs presented to *L M & Co.* On the 26th April and on three or four subsequent occasions, *L M & Co.* refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May *L M & Co.* failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from *L M & Co.*, and demanded it of him. The defendant failing to deliver, the plaintiffs sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, S 622 continued

Facts and before evidence was gone into, ruled that the demands were assessable as of the 25th April on which day it was admitted the market rate was as high or higher than the contract rate. The plaintiffs on this ruling went on going into their case further accepted judgment for nominal damages and took out a rule for a new trial, on the ground that the Judge was in error in assigning the 25th April and not the 31st May as the date which ruled the question of damages. On the argument of the rule the Full Court decided against the plaintiffs, not on this point which they did not decide one way or the other but on another point altogether viz. that the plaintiffs ought to have given a final notice of *L. M. & Co's* refusal to give delivery on the 25th April and not having done so could not call on the defendant to deliver. The plaintiffs now moved the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1877) to set aside the order of the Full Court of the Small Cause Court as one which at that stage of the proceedings that Court had no right to make. *Held* that in making the order in question under the circumstances of the case and the state of the record, the Full Court had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code and that the case must be remanded to be dealt with according to law. *PALLI v. PARAMANAND JEWELL*

[I. L. R., 18 Bom., 642]

## 185. Execution of decree—Application for execution of decree—

Civil Procedure Code 1877, s. 244—Registration Act 1866, s. 53—An application was made to a District Munsif on the 16th July 1877 to issue execution on a decree dated 6th November 1869 obtained on a bond registered under s. 53 of the Registration Act of 1866. He made an order refusing execution, the decree being one passed, not in a regular suit, but in a summary suit, and governed by the period of limitation prescribed by art. 166, sch II Act IX of 1871. On appeal the Subordinate Judge reversed the order of the Munsif, holding that art. 167, sch II of Act IX of 1871, applied. *Held* that under s. 622 of Act X of 1877, the High Court could not interfere, as the Subordinate Judge had jurisdiction to hear the appeal. *SURESHPRASAD RAU v. VAISHYA SANTYASI RAO*

[I. L. R., 1 Mad., 401]

## 186. Execution of decree—Civil Procedure Code 1882, s. 335—

Resistance to execution of decree.—An order under s. 335 of the Civil Procedure Code is subject to revision by the High Court under s. 622 of that Code. *Shree Nathaji v. Joma Aashikath*, I. L. R., 7 Bom., 341, followed. *SERODAI SINGH v. BAWARI DAS*

[I. L. R., 8 All., 172]

## 187.

Order for possession on application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Civil Procedure Code (1882), s. 335.—

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, S 622 continued

In a suit for sale upon a mortgage the plaintiff, having obtained a decree, assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgage of the property which had been a party to the suit, and in whose favour the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon the assignee, auction-purchaser applied in revision to have the order restoring the usufructuary mortgagee to possession set aside. *Held* that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure and, being unappealable, an application for revision thereof might lie. See *Shreeji Singh v. Bawari Das*, I. L. R., 6 All., 172. *SARAIYAT v. SHI GOPAL*

[I. L. R., 17 All., 202]

## 188.

Jurisdiction. Exercise of—Erroneous decision in suit tried with jurisdiction—Act XII of 1879, s. 92—A Court that has decided a suit after which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally or with material irregularity, within the meaning of s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879. *AMIR HASSAN KHAN v. MUHAMMAD BAKSH SIKH*

[I. L. R., 11 Cal., 6. I. L. R., 11 I. A., 237]

## 189.

Discretion of Court exercised with jurisdiction—S. 622 of the Code is one of very limited operation; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions. *AMIR HASSAN KHAN v. SHIR BAKSH SIKH* I. L. R., 11 Cal., 6, followed. *KRISHNA MOHINI DOSSETT v. KEDARNATH CHUCKRABARTY*

[I. L. R., 15 Cal., 448]

## 190.

Decision by competent Court—A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code. *MUHAMMAD YUSUF KHAN v. ABDEL RAHMAN KHAN*

[I. L. R., 16 Cal., 748  
[I. L. R., 16 I. A., 104]

## 191.

Jurisdiction, Interference with exercise of—Civil Procedure Code, 1882, s. 320—Transfer of decree to Collector for execution—Rules made by Local Government.—A decree passed by a Subordinate Judge upon a bond in which certain immovable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. The Court held that the Subordinate Judge had jurisdiction to decide the question. *Held* that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji v. Joma Kashinath, I. L. R., 7 Bom., 341, and Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Calc., 6, referred to SUNDAR DAS v. MANSA RAM, I. L. R., 7 All., 407*

## 192. — Jurisdiction.

*Interference with exercise of—Limitation.*—A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section *Amir Hassan Khan v. Sheo Raksh Singh, I. L. R., 11 Calc., 6, and Magni Ram v. Jiwa Lal, I. L. R., 7 All., 386, commented on by MAHMOOD, J. Per MAHMOOD, J.*—The term “jurisdiction” as used by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority. *HAR PRASAD v. JAFAR ALI, I. L. R., 7 All., 345*

## 193. — Erroneous decision on point of limitation.

—The fact that a Court having power to decide whether or not a certain matter was barred by limitation wrongly decided that it was not barred, and proceeded to deal with it, affords no ground for revision under s. 622 of the Code of Civil Procedure. *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Calc., 6 : I. L. R., 11 A., 237, and Sarman Lal v. Khubani, I. L. R., 17 All., 422, referred to. SUNDAR SINGH v. DORU SHANKAR, I. L. R., 20 All., 78*

## 194. — Where the lower

Courts have entertained an application which is on the face of it barred by limitation, without advertent to the question of limitation the High Court can interfere under s. 622 of the Civil Procedure Code.

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

*Semble*—In dealing with a case under s. 622 the High Court can look into the evidence and itself investigate the facts. *KAILASH CHANDRA HALDAR v. BISSONATH PARAMANIO, 1 C. W. N., 67*

## 195. — Jurisdiction.

*Question not relating to—Alleged errors in decision of suit for pre-emption.*—In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgage-deed. The Court of first instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed; and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds: “(i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii) Because the finding of the lower Court is based on conjecture.” *Held*, on the question whether, such grounds not being grounds on which a second appeal is allowed by Ch. XLII of the Civil Procedure Code, the appeal should not proceed rather under Ch. XLVI, s. 622, of that Code, that the appeal could not proceed under s. 622 of the Civil Procedure Code, in consequence of the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Calc., 6*, that only questions relating to the jurisdiction of the Court could be entertained under that section *MAGNI RAM v. JIWA LAL, I. L. R., 7 All., 386*

## 196. — Jurisdiction.

*Interference with exercise of—Second class Subordinate Judge—Subject-matter of suit under Rs. 5,000 and within jurisdiction—Amount of decree with accumulations of interest exceeding Rs. 5,000—Application for execution—Second appeal.*—The plaintiffs obtained a decree in the Court of a second class Subordinate Judge for a sum less than Rs. 5,000, which with accumulations of interest subsequently exceeded Rs. 5,000. The plaintiffs applied in execution to recover the total amount. The application was rejected by the Subordinate Judge, on the ground that the Court had no jurisdiction under s. 24 of Act XIV of 1869. On appeal the District Judge made an order confirming the decision of the Subordinate Judge. The plaintiffs filed a second appeal in the High Court. *Held* that no second appeal lay to the High Court from such an order; but as the Subordinate Judge was wrong in refusing to exercise his jurisdiction, the High Court would give relief under the extraordinary jurisdiction conferred by s. 622 of the Civil Procedure Code (Act XIV of 1859). The subject-matter of the suit was within the jurisdiction of the Subordinate Judge, and his jurisdiction continued, whatever might be the result of the suit, in all such matters in the suit as were within his cognizance, amongst which were matters in execution in the suit. The mere circumstance that the amount

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, S 622

—continued

actually due by process of accumulation exceeded Rs 600 could not vest him from the jurisdiction he hitherto had over the suit. **CHAMRAY PANDORI v. NIMONI AWATI** I L R., 10 Bom., 200

187 ———

Jurisdiction, In

*interference with exercise of—Error of Mamladar in accessory suit in a Mamladar's Court—* The opponents had obtained a decree for the possession of certain land against the brother and father of the applicants in the Court of the Mamladar at Karad, in the Satara district. The applicants were not parties to the suit. The decree was executed, and the opponents were put into possession. Thereupon the applicants on the 18th May 1884 presented a petition in the Mamladar's Court under s. 4 of Bombay Act III of 1876, alleging that they had been in actual possession of the lands and had been ousted from them in execution of the decree, and praying that they might be again put into possession. The Mamladar was of opinion that the matter was *res judicata*, and dismissed the petition. He relied on a circular of the Executive Government as his authority. The applicants applied to the High Court under its extraordinary jurisdiction. *Held* that it was not a case for the exercise of the extraordinary jurisdiction of the High Court. The Mamladar was no doubt guilty of a formal error. In the exercise of his judicial functions he was bound to be governed by the law as he understood it or as it had been expounded by superior judicial authority not as it was understood or expounded by unjudicial persons. This however was merely an irregularity on the part of the Mamladar not apparently involving an injustice to the applicants, who might bring a suit on their title if they had a title. **NASA BAYAT v. PANDURANG VASDEV** I L R., 9 Bom., 97

188 ———

Jurisdiction, In

*interference with exercise of—Civil Procedure Code, 1882 s. 315—* Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court.—*Held* that under s. 622 of the Code of Civil Procedure the High Court could set aside the order, because the judgment debtor having been found to have a saleable interest, the lower Court had no power to order a refund. **KUNHAMED v. CHATRU** I L R., 9 Mad., 437

189 ———

Jurisdiction, In

*interference with exercise of—Excess of Jurisdiction—Arbitrators exceeding jurisdiction.*—In any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available. **DAGUESA TILGHMAN v. BHUKAN GOVIND SHET** I L R., 9 Bom., 83

200 ———

Judge putting

*erroneous construction on section of Act—Civil Procedure Code, 1882, s. 329—* Where a Judge took an

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S 622

—continued.

erroneous view of s. 329 of the Civil Procedure Code and proceeded on such erroneous construction to make orders which on a proper construction of the *section* he would have no jurisdiction to make.—*Held* that it was a proper case for the exercise of the power given to the High Court under s. 622 of the Code. **SALAMBA v. MARTTAYA** [I L R., 18 Bom., 711 not

See also **SHANKARHAR PANDIT v. VASDEV PANDIT** I L R., 18 Bom., 70

a case where his erroneous construction of s. 2 of Bombay Regulation VIII of 1827 resulted in similar action being taken by a Judge

201 ———

Jurisdiction, In

*interference with exercise of—Civil Procedure Code, 1882 s. 492—Civil Procedure Code, 1882 s. 492—Injunction to stay sale pending suit to establish title.*—A claim by A to certain property which had been attached by B in the course of execution proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, B instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civil Procedure Code to stay the sale of the property attached by B in the execution proceedings; but that application was rejected, and B thereupon applied for and obtained from the Court of the First Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held* in an application under s. 622 of the Code to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have a wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "in danger of being wrongfully sold;" if the circumstances justified it, an order could have been obtained under that section from the Court of the Second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided, and no express provision in the Code for stay of execution by a Court exercising a decree on the application of a third party, the order of the First Subordinate Judge was made without jurisdiction, and should be set aside. *IN THE MATTER OF THE PETITION OF BROJENDRA KUMAR RAI CHOWDHURY BROJENDRA KUMAR RAI CHOWDHURY v. RUP LALL DOS I L R., 12 Cal., 615*

202 ———

Jurisdiction—

*Sale set aside on account of irregularity only—* Where a Court, professing to act under s. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant.—*Held* that such order was passed without jurisdiction within the meaning of s. 622 of the said Code. **LAKSHMANA NAJIMUDIN** I L R., 9 Mad., 145

203 ———

Sale in execution

*of decree set aside—Material irregularity—*

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

*Inadequacy of price—Exercise of jurisdiction by District Judge.*—A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published and that it referred to only 5 bighas instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved, and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment debtor, having appealed to the High Court against the order of the District Judge and failed in such appeal by reason of no second appeal lying from such order, applied to the High Court under the provisions of s. 622 of the Code to have the order set aside. *Held* that, the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section. **GOPAL KOERI v. GOPI LAL**.

I. L. R., 21 Cal., 799

204. ————— *Jurisdiction, Interference with exercise of—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.*—Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim. The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, S applied for restitution, but his petition was rejected by the District Judge. In an application under s. 622 of the Civil Procedure Code to revise the Judge's order, on the ground that he refused to exercise his jurisdiction to restore S to possession,—*Held* that the order of the District Judge confirming the sale was passed without jurisdiction, and that the District Judge had no power to restore possession to S. The High Court therefore could not interfere under s. 622. The remedy of S was by a separate suit. **SUBBAYA v. YALLAMMA**.

I. L. R., 9 Mad., 130

205. ————— *Jurisdiction, Interference with exercise of—Trial of case cognizable only by Small Cause Court.*—S instituted a suit against T in the Court of an Assistant Collector of the first class, who dismissed the suit. On appeal by S the District Court gave her a decree. On second appeal by T the High Court held that, as the suit was one of the nature cognizable in a Court of Small

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

Causes, a second appeal would not lie in the case, and dismissed it. T thereupon applied to the High Court to set aside, under the provisions of s. 622 of Act X of 1877, the proceedings of both the lower Courts, on the ground that both those Courts had exercised a jurisdiction not vested in them by law. *Held* that the High Court was competent to entertain such application and to quash the proceedings of both the lower Courts, under the provisions of s. 622 of Act X of 1877, and the proceedings of both those Courts should be quashed. Observations by STUART, C.J., on the powers of revision of the High Court under s. 622 of Act X of 1877. **SARNAM TEWARI v. SAKINA BIBI** [I. L. R., 3 All., 417]

206. ————— *Jurisdiction, Interference with exercise of—Beng. Reg. XVII of 1806—Redemption of mortgage.*—After a mortgage had been foreclosed under the provisions of Regulation XVII of 1806, the representative of the mortgagor deposited the mortgage-money in Court. The District Judge ordered that the money should be paid to the mortgagee, on the ground that the mortgagor had not been personally served with the notice required by s. 8 of that Regulation, and that it did not appear that she had been aware of the foreclosure proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the terms of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under s. 622 of Act X of 1877. *Held* that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction and should be set aside. **HAZARI LAL v. KHERU RAI**. I. L. R., 3 All., 578

207. ————— *Jurisdiction, Interference with exercise of—Improper refusal of jurisdiction.*—Where a Munsif improperly refused to investigate a claim under ss 278-280, Civil Procedure Code, 1877, he was held to have refused to exercise jurisdiction he was bound to exercise, and the Court set aside his order and ordered the investigation to be made. **JAMMELA v. LUCHMIN PANDAY** [4 C. L. R., 74]

208. ————— *Appeal against appellate decree by party to suit who did not appeal against original decree.*—S, having mortgaged land to K as security for a debt, sold it to P, who undertook to pay the debt. K, alleging that C had undertaken either to make P pay the debt or to execute a mortgage of his own land to secure its repayment, and that P had dispossessed him, sued S, P, and C to recover the debt by sale of the land mortgaged, mesne profits from P, and costs from S, P, and C. The District Munsif decreed payment against S; mesne profits, and, in default of payment by S, a sale of the land against P; and costs against S, P, and C. P and C appealed against this decree. The Subordinate Judge found that the debt had been paid, and held that, even if the debt had not been paid, K had

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, S 622

—continued

no cause of action against *F* or *S* but if at all, against *C* and dismissed the suit as against *F*. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against *S* and saw no reason to interfere with the decree against *C*. *S* appealed against this decree. Held that even if *S* was not entitled to appeal in order to have the decree against him set aside the error of the Subordinate Judge could be corrected under s. 622 of the Code of Civil Procedure by a direct order to exercise the discretionary power given by s. 544 of the said Code. **SESHADRI v. KRISHNAN** I L. R., 8 Mad., 192

209

*Jurisdiction*

*Interference with exercise of—Act XL of 1959 (Bengal Minors Act) s. 3—Refusal to admit person with certificate of administration to defend suit on behalf of minor*—Under s. 3 of the Bengal Minors Act (XL of 1959) the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act to defend a suit on the minor's behalf as guardian of such minor. Where a Subordinate Judge had so acted.—Held that the High Court has no power to revise his order under s. 622 of the Civil Procedure Code. **BALDEO DAS v. GOVIND SHANKAR** I L. R., 7 All., 914

210

*Jurisdiction*

*Interference with exercise of—Decree Refusal to amend*—Where a Court improperly refused to amend a decree which was at variance with the judgment.—Held that in so acting the Court had acted in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code and its order was consequently subject to revision under that section. **BALMAKEND v. SHEKHAN LAL** I L. R., 6 All., 125

211

*Jurisdiction*

*Interference with exercise of—Material irregularity affecting merits of case*—The words 'material irregularity' in s. 622 of the Code of Civil Procedure include an irregularity of procedure materially affecting the merits of the case. An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. **Magnus Ram v. Jiva Lal** I L. R., 7 All., 338 observed on. **SZW BUX BOGLA v. SHRI CHANDER** 13 I L. R., 13 Cal., 225

212

*Jurisdiction*

*Interference with exercise of—Illegality*—*Material irregularity*—A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs 40 being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person and that consequently the case before him raised a question affecting the title to property exceeding Rs 1000 in value held that he had no jurisdiction to entertain the suit, and accordingly

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, S 622

—continued

returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code. Held by the Full Bench that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs 40; that he had consequently failed to exercise a jurisdiction vested in him and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code. The result of **Amir Hassan v. Shao Bakht Singh** I L. R., 11 Cal., 6, and **Magnus Ram v. Jiva Lal** I L. R., 7 All., 338 is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts, but that when no appeal is provided its decision on questions of both kinds is final. **PER STRAIGHT and TYRELL, JJ.**—Clauses (a) and (b) of s. 544, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word 'illegally' that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law or failed to determine some material issue of law or usage. CL (c) of s. 551 indicates the meaning of the words 'material irregularity' in s. 622—i.e. some material irregularity in procedure 'which may possibly have produced error or defect in the decision of the case upon the merits'. **Multanabad v. Hussain** I L. R., 3 All., 203, referred to. **BADAM KHAN v. DINU RAI** [I L. R., 8 All., 111]

213

*Jurisdiction*

*Interference with exercise of—Meaning of "jurisdiction"*—*Amendment of decree—Civil Procedure Code, s. 206—Act X of 1977, sec II No 178*—In execution of a decree for partition of immovable property passed in 1872, a dispute arose as to the execution in reference to portion of the property and in 1881 it was finally decided that the decree was defective in its description of the property and therefore incapable of execution. In May 1885, on application by the decree-holder the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment debtor applied to the High Court for revision of this order on the grounds that the amendment of the decree was barred by limitation and that the decree itself being barred by limitation and finally pronounced to be incapable of execution the Court had acted beyond its jurisdiction in amending it. Held that the application for revision must be rejected. **PER OLDFIELD, J.**, that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code with reference to the decision of the Privy Council in **Amir Hassan**.

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4 CIVIL PROCEDURE CODE, S. 622

—continued.

*Khan v. Sheo Baksh Singh, I. L. R., 11 Calc., 6*, and of the Full Bench in *Badami Kuar v. Diru Rai, I. L. R., 8 All., 111*; and further that, upon the facts stated, the Court ought not to interfere. *Per MAHMOOD, J.*, that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Calc., 6*; *Badami Kuar v. Dinu Rai, I. L. R., 8 All., 111*; *Raghunath Das v. Raj Kumar, I. L. R., 7 All., 876*; *Surtia v. Ganga, I. L. R., 7 All., 411*; *Magni Ram v. Jira Lal, I. L. R., 7 All., 336*; *Har Prasad v. Jafar Ali, I. L. R., 7 All., 345*, referred to. *Bhagwant Singh v. Jageshwar Singh, Weekly Notes, All., 1886, p. 57*; and *Abu Saib Khan v. Hamid-un-nissa, Weekly Notes, All., 1886, p. 39*, dissented from. The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy, either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe v. Edwards, L. R., 3 P. D., 103*, and *Creppe v. Durden, 1 Smith's L. C., 8th Ed., 711*, referred to. *Held* also *per MAHMOOD, J.*, that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity" within the meaning of s. 622. *Lucas v. Stephen, 9 W. R., 301*; *Oomanund Roy v. Sultish Chunder Roy, 9 W. R., 471*; *Zuhoor Hossein v. Syedun, 11 W. R., 142*; and *Goluck Chunder Munsant v. Ganga Narain Munsant, 20 W. R., 111*, referred to. *DEAN SINGH v. BASANT SINGH. I. L. R., 8 All., 519*

**214.** ————— *Dismissal of suit without considering merits on technical ground—Suit by sole partner for partnership debt.*—A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover partnership debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiff. *Held* that it was the Judge's duty to hear and determine the suit which was brought by the person legally entitled to bring it

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

alone in his Court, and in declining to entertain it on the merits he had failed to exercise his jurisdiction, and had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code. *Muhammad Suleman Khan v. Fatima, I. L. R., 9 All., 103*, and *Dhan Singh v. Basant Singh, I. L. R., 8 All., 519*, referred to. A suit should not be dismissed on merely technical grounds when the merits are proved and no injustice by surprise or otherwise will be done. *GOBIND PRASAD v. CHANDAR SEKHAR [I. L. R., 9 All., 486]*

**215.** ————— *Failure to exercise jurisdiction.*—Where a Subordinate Judge wrongly held that a suit was one of the nature contemplated by s. 539 of the Civil Procedure Code, and returned the plaint for presentation to the District Judge,—*Held* that the High Court had power, under s. 622 of the Code, to interfere, the Subordinate Judge having failed to exercise a jurisdiction vested in him by law. *VISHVANATH GOVIND DESHMANE v. RAMBHAT. I. L. R., 15 Bom., 148*

**216.** ————— *Jurisdiction, Interference with exercise of—Alleged irregularity by District Judge in decision of suits.*—*A* and *B*, both of whom set up a claim to certain land, brought separate rent suits against the tenants. In none of these suits did the amount claimed exceed Rs. 100. After the institution of the rent suits, *A* sued *B* to establish his title to the land in dispute. The District Judge before whom the rent suits came on appeal allowed them to stand over until the decision in the suit between *A* and *B*. That suit was decided in favour of *B*, and the Judge then decided the rent suits instituted by *B* in his favour, and dismissed the suits instituted by *A*. *Held* that there was no such irregularity on the part of the District Judge in the course which he pursued, of making his decision in the rent suit depend upon the decision in the suit to establish title as would justify the Court in interfering under s. 622 of the Civil Procedure Code. *DOORGA NARAIN SEN v. RAM LALL CHHUTAR*

[I. L. R., 7 Calc., 380]

*S. C. DURGA NARAIN MISSEER v. GOURDHUN GHOSE. . . . . 9 C. L. R., 86*

**217.** ————— *Jurisdiction, Interference with exercise of—Sale in execution of decree against estate of deceased—Suit against representatives of deceased husband's estate—Order releasing property from attachment.*—In 1862 a suit for mesne profits was brought against certain persons as being the heirs of one Romanath Lahiry, deceased, among whom were his widow and two infant sons. During the pendency of this suit the two infant sons died, and the widow was made a defendant as representing the estate of her deceased sons. The suit was decreed in favour of the plaintiffs in 1875, and on the plaintiffs applying for execution the widow objected that  $\frac{1}{16}$ ths of the properties, against which execution was sought, was the property of her



# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE S 622

—continued

adopted son whom she alleged to have adopted in 1854. The adopted son was not made a party to the suit this objection was overruled, but the same objection was taken by the adopted son through his natural father as his guardian and next friend, and the Court released the 1/5th share from attachment and allowed the objection. Against this order some of the plaintiffs appealed, but pending the appeal another of the plaintiffs applied to the High Court under s. 622 of the Code of Civil Procedure to have the order set aside. The Court refused to interfere with the order inasmuch as there appeared to be no material irregularity therein. **SCOTISH CHURCH LARIBY & NAIL COMUL LARIBY**

[I. L. R., 11 Cal., 45]

218

—Jurisdiction

*Interference with exercise of—Civ. Procedure Code 1902 s. 30—Party added after decree.* A Subordinate Judge having permitted the junior widow of a Hindu to be made a party to the proceedings in execution of a decree obtained by the senior widow as a co-tenant of the deceased husband the High Court declined to interfere under s. 622 of the Code of Civil Procedure. **LINGAMMAL & CHINNA EVKATAMMAL**

I. L. R., 6 Mad., 227

219

—Jurisdiction

*Interference with exercise of—Death of sole defendant. Application to add representative.*—In a suit for the recovery of land against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant the plaintiff applied to the Court to enter on the record the legal representative of the deceased defendant. On the 2nd November 1880 the Court rejected the application under the provisions of art. 171B of Act XV of 1877 and ordered the suit to abate. On the same day the plaintiff applied to the Court to set aside the order directing the suit to abate but the application was also rejected on the 20th September 1881. On appeal to the High Court.—*Held* that no appeal lay against the latter order and an appeal against the order of November 1880 was out of time but that the High Court would take cognizance of the case under s. 622 of the Civil Procedure Code. **BESOU MOHINI CHOWDHURY & SHARAT CHANDER DUTY CHOWDHURY**

[I. L. R., 8 Cal., 837]

10 C. L. R., 449 12 C. L. R., 421

220

—Transfer of

*Interest pending suit—Lis pendens—Application to bring transfer upon the record—Civil Procedure Code s. 244.*—A decree of the High Court, giving possession of certain shares in a bank to the plaintiff, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realised by the plaintiff. Upon being ordered to produce the shares, he made an application to the Court, professedly under s. 244 of the Code in which he alleged that,

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4, CIVIL PROCEDURE CODE, S. 622

—continued

the Privy Council, he had transferred the shares to G his counsel in the case, who had failed to restore them and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on G to show cause why he should not be called upon to restore the shares made over to him by R and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was the purchaser for value. The Court passed an order directing that G's name should be placed on the record, so that the decree might be executed against him. *Held* that the application by R was meant to be and actually was one praying that, in respect of the scrip restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might in addition to himself in so far as such interest had passed from him, be brought under the operation of the execution proceedings; that this was an application under s. 37 of the Civil Procedure Code; and the order passed on it, being appealable under s. 558 (21) was not open to revision by the High Court under s. 622. **RAYSON & MURDOCK BANK**

I. L. R., 7 All., 681

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—A t. XX of 1903

*s. 18—Order refusing permission to sue.*—An order passed under s. 18 of Act XX of 1903, refusing leave to sue, is not appealable nor is the Judge who exercised his discretion, liable to revision under s. 622 of the Code of Civil Procedure. **ISAR VANKARWARA**

I. L. R., 10 Mad., 88

See ANONYMOUS

I. L. R., 10 Mad., 88 note

222

—Revision of inter-

*locutory order when appeal lies from final decree.*—*Power of High Court.* There is nothing in s. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word "case" in that section is wide enough to include such an order and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order. **Omrao Mirza v. Jones** 12 C. L. R., 149 **Barrow & Singh v. Mahomed Raza** I. L. R., 4 All., 91; **Chattar Singh v. Lekhraj Singh** I. L. R., 5 All., 233; **Farid Ahmad v. Dulari Bibi**, I. L. R., 6 All., 233, dissented from. **DRAPI & BAN PRASAD**

[I. L. R., 14 Cal., 768]

223

—Application

*and purpose of s. 622—Civil Procedure Code (1883), s. 591—Interlocutory orders.*—An application under s. 622 of the Civil Procedure Code cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591 which provides that they may be made a ground of objection in the appeal against the final decree. The purpose with which s. 622 was framed was to enable a party to a suit to get a decree or order of a lower Court rectified by the High Court

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

where there would otherwise be no remedy. **MOTILAL KASHIBHAI v. NANA**. I. L. R., 18 Bom., 35

**224.** ————— *Interlocutory order—Rejection of application to appeal as a pauper.*—An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected. *Held*, on an application to the High Court for revision, that s. 622 of Act X of 1877 did not apply to a proceeding of so purely an interlocutory character as mentioned in s. 592, and such application therefore could not be entertained. **HARSARAN SINGH v. MUHAMMAD RAZA**. I. L. R., 4 All., 91

**225.** ————— *Rejection of application to sue as a pauper—Refusal on ground of suit being barred.*—An application to sue as a pauper having been refused, on the ground that the suit was barred by limitation, the High Court on revision permitted the applicant to renew his application to the Court below. The Subordinate Judge verbally rejected this second application, stating that he would deliver a written judgment. Before the written judgment was delivered, the applicant offered to pay the usual Court-fees (although not actually tendering them at the time), and asked that the petition might be taken as a plaint filed on the date of the first application: this offer was mentioned and refused in the written judgment. *Held*, on the case coming up to the High Court under s. 622 of Act X of 1877, that the circumstances of the case were not such as would justify the Court in interfering under that section. **RAM SAHAI SING v. MANTRAM**

[I. L. R., 5 Calc., 804; 6 C. L. R., 223]

**226.** ————— *Rejection of application to sue in forma pauperis—"Right to sue"—Limitation.*—Where an application for leave to sue as a pauper was rejected with reference to s. 407 (c) of the Civil Procedure Code, on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue,—*Held* by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. **Amir Hassan Khan v. Sheo Baksh Singh**, I. L. R., 11 Calc., 6, referred to. *Per* MAHMOOD, J.—The word "case" as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. **Phul Singh v. Jagannath**, *Weekly Notes*, All., 18-2, p. 39; **Bhadrachari Das v. Bidiadhis**, *Weekly Notes*, All., p. 69; and **Sital Sahu v. Bachu Ram**, *Weekly Notes*, All., 1882, p. 92, referred to. Also *Per* MAHMOOD, J.—The provisions of s. 407 must be interpreted

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of justice; and an exercise of jurisdiction under that section when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. **Har Prasad v. Jafar Ali**, I. L. R., 7 All., 345, and **Ammal v. Nayudu**, I. L. R., 4 Mad., 323, referred to. **CHATTARPAL SINGH v. RAJA RAM** [I. L. R., 7 All., 661]

**227.** ————— *Res judicata, Erroneous decision on.*—A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1852). **HARI BHIKAJI v. NARO VISHVANATH**. I. L. R., 9 Bom., 432

**228.** ————— *High Court's power of revision—Res judicata—Jurisdiction, Meaning of the term.*—The plaintiff sued the defendant to recover arrears of an annual allowance to which the plaintiff claimed to be entitled under a *snad* dated 1846. The defendant in his defence raised certain points most of which he had raised in a previous suit brought against him by the plaintiff for the recovery of arrears of the same allowance, and which in that suit had been decided against him. The lower Court held that the decision in the former suit operated as *res judicata*, and refused to allow the defendant to put forward any new matter which might and ought to have been urged as a defence in the former suit. A decree was made in favour of the plaintiff. The defendant applied to the High Court, under s. 622 of the Civil Procedure Code (Act XIV of 1852). *Held*, following **Hari Bhikaji v. Naro Vishvanath**, I. L. R., 9 Bom., 432, that the decision, even though wrong, of a question of *res judicata* was not a failure, or a cause of failure, to exercise jurisdiction and did not warrant the interference of the High Court under s. 622 of the Civil Procedure Code. **ANBUTRAY KRISHNA DESPANDE v. BALKRISHNA GANESH AMBAPURKAR**. I. L. R., 11 Bom., 488

**229.** ————— *Sale in execution of decree—Fraud—Setting aside order confirming sale.*—The purchaser at a sale by public auction succeeded, by the exercise of fraud and collusion with the agent of the execution-creditors (though without the creditors' personal knowledge), in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held* that the High Court had power, under s. 622 of Act X of 1877, to rescind the order made by the Court of first instance confirming the sale. **SUBHAJI RAU v. SRINIVASA RAU** [I. L. R., 2 Mad., 264]

**230.** ————— *Sale in execution of decree—Pre-emption—Civil Procedure Code, 1877, ss. 310, 311—Locus standi of pre-emptor in execution proceedings.*—A person claiming to be a co-sharer in certain undivided immovable property, a share of which had been sold in execution of a

## SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, s. 622

—continued

decree objected to the confirmation of the sale in favour of the person recorded as the auction purchaser and prayed that it might be confirmed in his favour with reference to the provisions of s. 311 of the Civil Procedure Code. The Court allowed the objection and confirmed the sale in favour of the auction purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under s. 622 of the Civil Procedure Code *Held* that having been allowed to object to the confirmation of the sale and treated as a party to the proceeding held therein it was competent for him to make such application notwithstanding that he was not one of the persons mentioned in s. 311 of the Code, that there being no appeal in the case so far as he was concerned the High Court was competent to entertain the application under s. 622 of the Code; but that as he was not one of the persons who was competent to sue in any of the provisions of s. 311, he had no right to justify his application to the lower Court. The application for revision must therefore be dismissed. **BISHNESWAR KARAN v. HANU SINGH** I. L. R., 5 All., 42

## 231.

Distribution of

*assets—Application of decree-holder struck off—* Where a rateable distribution was ordered among decree-holders whose applications had been struck off the file prior to realization of assets. *Held* that it was open to the party injured to apply to the High Court under s. 622 to reverse the order. **TIRUCHIT-TAKBALA CHETTI v. SETHUPATHY**

I. L. R., 4 Mad., 383

## 232.

Execution pro-

*cedura—Rateable distribution—Application for further execution—* Notice *A* and subsequently *B* obtained decrees against *X* in execution of which the same land was attached and *B* obtained an order for rateable distribution. Neither decree was satisfied. *A* then applied for attachment of other property and the sale was fixed for 28th September. On 24th September *B* filed a petition for further attachment under s. 207 and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late and then the application under s. 295, because no application for execution was pending. *Held* on appeal that the petition for execution was wrongly rejected but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution. **VENKATARAMAN v. MAHALINGAYAN**

I. L. R., 9 Mad., 508

## 233

Failure to exer-

*cise jurisdiction—Refusal of application for rateable distribution of sale-proceeds—* A debtor *A* got into several decrees had been passed filed his petition in the Insolvency Court at Madras and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had

## SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, s. 622

—continued

obtained an order for sale in a District Court and another decree-holder now applied to the same Court in execution of his decrees for attachment of other property and for rateable distribution of the proceeds of sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both these applications. *Held* that the order rejecting the application for rateable distribution was wrong and that the High Court had power to set it aside on revision under s. 622 of the Civil Procedure Code, the Judge having failed to exercise a jurisdiction vested in him by law. **VIRABHAGAVAT PARASRAMA**

I. L. R., 15 Mad., 373

## 234

*Sanction for prosecution—Act X of 1872 (Criminal Procedure Code) ss. 464, 469—* The discretionary power of a Civil Court, before or against which an offence mentioned in s. 478 or 479 of Act X of 1872 is alleged to have been committed to grant or withhold sanction to the prosecution for such offence is not subject to revision by the High Court under s. 622 of Act X of 1872. **IN THE MATTER OF THE PETITION OF MADHO PRASAD** I. L. R., 3 All., 508

## 235

*Power of revision over Small Cause Court, Calcutta—Alleged excess of jurisdiction by Small Cause Court—Trespass to immovable property—* The plaintiff brought a suit in the Calcutta Court of Small Causes to recover damages for trespass to certain immovable property of which he proved he was in possession. The defendant contended that such a suit was one for the determination of a right to or interest in immovable property, and was therefore not maintainable in the Small Cause Court. The Small Cause Court decided the case, and the High Court on an application under s. 622, granted a rule to show cause why the judgment should not be set aside as being without jurisdiction. *Held* on such application, that the Court had jurisdiction to entertain such a suit. **PEARY MONTU GHOSH v. HARBAY CHUNDER GANGOOLY** I. L. R., 11 Cal., 281

## 236

*Civil Procedure Code, 1852 s. 43—Cause of action—Splitting a claim—Separate suits for rent due for successive years—* Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limits of the Court's jurisdiction. The suit for the rent of the first year was dismissed under s. 43 of the Code of Civil Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent. *Held* in an application under s. 622 to the High Court to set aside the order that although s. 43 did prevent the maintenance of the two suits yet as the petitioners had no intention of abandoning either claim, the proper course was to allow them

# SUPERINTENDENCE OF HIGH COURT—continued.

## 14. CIVIL PROCEDURE CODE, S. 622 —continued.

to withdraw both suits and file a fresh suit in a competent Court *ALAGU v. ABDULLA*

[I. L. R., 8 Mad., 147

237. — *Civil Procedure Code, s. 25, Order under, for transfer of suit.*—Held that an order under s. 25 of the Civil Procedure Code, transferring a suit in which an appeal would lie from the decree made therein, was not subject to revision by the High Court under s. 622. *FARID AHMAD v. DELAKI BIBI* . I. L. R., 6 All., 233

*MUHAMMAD SAFFAR HUSEN v. PURAN CHAND*  
[I. L. R., 20 All., 395

238. — *Court Fees Act, 1870, s. 6, and sch. II, art. 17 (1)—Stamp—Valuation by subordinate Court—Practice—Civil Procedure Code (Act XIV of 1882), s. 622, and Bom. Reg. II of 1827, s. 5.*—A decision by a subordinate Court on a question of valuation, determining the amount of a Court-fee, is, notwithstanding its declared finality, subject to revision by the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882) and s. 5 of Regulation II of 1827. *VITHAL KRISHNA v. BALKRISHNA JANARDAN* . I. L. R., 10 Bom., 610

239. — *Order dismissing suit for insufficient stamp.*—In a suit instituted upon a ten-rupee stamp for an account, the removal of the original trustee and the appointment of a new trustee, where the value of the trust property was 5 lakhs of rupees, the Court below directed that the stamp should be calculated upon the value of the trust property, and ordered that the deficiency should be made up within a particular time. Before the time expired, a rule was obtained from the High Court under s. 622 of the Civil Procedure Code to show cause why the order should not be set aside. Held that the rule must be discharged, inasmuch as, if the suit had been dismissed on the expiration of the time limited, on the ground that the relief was not properly valued, there would have been an appeal. *OMRAO MIRZA v. JONES* . 12 C. L. R., 148

240. — *Order made without jurisdiction under Act XIX of 1841, ss. 3 and 4.*—Where a District Court, purporting to act under s. 4 of Act XIX of 1841, directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622 of the Code of Civil Procedure as made without jurisdiction. *ABDUL RAHMAN v. KUTTI AHMED*  
[I. L. R., 10 Mad., 68

241. — *Act XIX of 1841, ss. 2, 3, 5, 15—Order of District Court on petition by Court of Wards.*—On a petition presented by the Agent of the Court of Wards, a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist. Held the order of the District Court was illegal, and was subject to revision under s. 622 of the Code

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4 CIVIL PROCEDURE CODE, S. 622 —continued.

of Civil Procedure *PAPAMMA v. COLLECTOR OF GODAVARI* . I. L. R., 12 Mad., 341

242. — *Bengal Tenancy Act (VIII of 1885), ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622—Order of Special Judge as to settlement of rents.*—The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents. *SHEWBARAT KOER v. NIRPAT ROY* . I. L. R., 16 Calc., 598

243. — *Bengal Tenancy Act (VIII of 1885), s. 174—Deposit, Nature of—Jurisdiction—Application under s. 622 of the Civil Procedure Code.*—The deposit under s. 174 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. Where, therefore, the Court accepted a deposit partly of cash and partly of a Government Promissory Note, and notwithstanding the objection of the auction-purchaser gave the judgment-debtor the benefit of s. 174 and set aside the sale, the High Court set aside such order under s. 622 of the Civil Procedure Code. *RAHM BUX v. NUNDO LAL GOSWAMI* . I. L. R., 14 Calc., 321

244. — *Bengal Tenancy Act (VIII of 1885), s. 188—Suit for rent—Co-sharers, Suit by—Joint undivided estate—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 622.*—A District Judge, in deciding a rent-suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit. Held, on an application under s. 622 of the Civil Procedure Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside. *Prem Chand Nuskur v. Mohshoda Debi*, I. L. R., 14 Calc., 201, and *Umesh Chunder Roy v. Naskar Mullaek*, I. L. R., 14 Calc., 203 note, followed. *Amir Hassan Khan v. Sheo Balsh Singh*, I. L. R., 11 Calc., 6—L. R., 11 I. A., 237, distinguished. *JUGBUNDU PARTUOK v. JADU GHOSSE ALKUSHI* . I. L. R., 15 Calc., 47

245. — *High Court's power of interference with order of Special Judge—Rules under Bengal Tenancy Act, Ch. VI, No. 25—Power of Local Government to make the rule—Bengal Tenancy Act, ss. 104, 108, and 189.*—A number of tenants were joined as defendants in a proceeding for settlement of rents under s. 104, cl. 2, of the Bengal Tenancy Act, and an appeal preferred by the landlords under s. 108, cl. 2, from the Revenue Officer's decision making all or nearly

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, s 622

—continued

all the tenants respondents. The appeal was dismissed by the Special Judge, on the ground that as many Court fees of Rs 10 each as there were tenants defendants had not been paid, and the appellants petitioned the High Court to set aside the order under s 622 of the Civil Procedure Code. *Held* by a Full Bench (1) that the Special Judge refused to exercise a jurisdiction vested in him by law; (2) that the Court of Special Judge is a Court subordinate to the High Court, and the High Court had power to interfere under s 622 of the Civil Procedure Code. *Sheeborai Koor v Narpal Poy*, 1 L. R. 18 (Cal., 1896) dissented from. (2) That the Local Government acted within the powers conferred by s. 1-9 cl. 1, of the Bengal Tenancy Act in making rule 25 of Ch VI of the Government rules under the Act by which a landlord is authorized to join as defendants several tenants in the application for settlement of rents. *UPADHYA THAKUR v PERSIDH SINGH* 1 L. R. 23 Cal., 723

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*Refraining*

from exercise of jurisdiction—Special Judge acting under Bengal Tenancy Act (VIII of 1885), s 107, 108. Boundary dispute—Decision of settlement officer acting as survey officer under Bengal Survey Act (Beng Act V of 1873).—Where the Special Judge under the Bengal Tenancy Act (VIII of 1885) in a case of a boundary dispute which had been tried and decided by a settlement officer acting as a survey officer under Part V of the Bengal Survey Act (V of 1873), dismissed an appeal on the ground that no appeal lay to him: such a case, the High Court declined to interfere under s. 622 of the Civil Procedure Code. *Held* of opinion that the settlement officer had power under s. 189 (6) of the Bengal Tenancy Act, and rule 1 Ch VI of the Government rules under the Tenancy Act to act as he had done, and that therefore in holding that no appeal lay to him, the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised. *ISHAD ALI CHOWDHURY v KAVTA POK SHAD HAZARE* 1 L. R., 21 Cal., 935

247

*Special Judge.*

Discretion of—Dekkan Agriculturists' Relief Act (XVII of 1879)—Finding of fact.—When the Special Judge under the Dekkan Agriculturists' Relief Act XVII of 1879 entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous, and exercises his discretion on setting aside the decree the High Court will not, in its extraordinary jurisdiction, interfere with that discretion except under most exceptional circumstances. *RATACHAND NATACHAND v RAHIM DAI* 1 L. R., 18 Bom., 347

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*Recessory*

power of the Special Judge—Cases in which failure of justice appears to have taken place—Jurisdiction—Discretion of Court—Dekkan Agriculturists' Relief Act, s 53—S. 622 of the Civil Procedure Code (Act XIV of 1882) gives to the High Court

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, s 622

—continued

jurisdiction to interfere only where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity." Under s. 53 of the Dekkan Agriculturists' Relief Act (XVII of 1879), the Special Judge has a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction. *Shidhi v Bali*, 1 L. R. 15 Bom., 1-0, dissented from. *GUN BASATA v CHANMALAPPA* 1 L. R., 19 Bom., 296

249. *Mamlatdar's Courts Act (Bom Act III of 1876), s 15, cl (4), sub-cl. (1) and (2), s 19—Execution of decrees for possession against a third party—Jurisdiction of Mamlatdar—A obtained an order in a Mamlatdar's Court against G for possession of a house, and in execution B who was found in possession of the house and who was reported by the village officers as holding possession for G, was evicted by order of the Mamlatdar. A then applied to the High Court. *Held* that the Mamlatdar's order was, strictly speaking, beyond his authority, but that, as A's petition to the High Court contained no distinct denial that he was occupying merely on behalf of the defendant, the High Court would not interfere in its extraordinary jurisdiction. *NATHANA v ANURU ALLI* 1 L. R., 18 Bom., 449*

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*Irregular decrees*

of Mamlatdar made by consent of parties—Subsequent refusal by Mamlatdar to order execution of decrees—Questions of fact.—The applicant brought two possessory suits against the opponent in the Mamlatdar's Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months, the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to possession. The applicant, thereupon applied to the High Court in its extraordinary jurisdiction and alleged that the money had not been duly tendered. *Held* that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdar's Act (Bombay Act III of 1876), and the consent of parties could not give him power to do so. *Held* also that the High Court would not go into the question as to the due tender of the money. It was not open to the High Court, in the exercise of its extraordinary jurisdiction, to go into this question of fact, nor would it be proper to further the execution of an irregular decree, especially as the applicant had a clear remedy

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

by suit. RAMRAO TATTAJI PATIL v. BABAJI DHONDI BIVE . . . I. L. R., 20 Bom., 630

251. ——— *Mamlatdar, Jurisdiction of*—The plaintiff sued in a Mamlatdar's Court for possession of certain lands, alleging that the defendants held them under a lease, the time of which had expired. The Mamlatdar found the execution of the lease proved, but held it to be colourable, and that the defendants did not hold under it. He therefore rejected the plaintiff's claim. The plaintiff applied to the High Court in its extraordinary jurisdiction and obtained a rule to set aside the order, contending that the Mamlatdar had no jurisdiction to decide that the lease was colourable, and that he ought not to have admitted evidence upon that point. *Held* (discharging the rule) that the matter was not one for the extraordinary jurisdiction of the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). The Mamlatdar had not declined jurisdiction. He had considered the materials laid before him, and had come to a conclusion. That conclusion, if erroneous, ought to be corrected in a regular suit and not by an application to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). KASHINATH SAKHARAM KULKARNI v. NANA . . . I. L. R., 21 Bom., 731

252. ——— *Dispossession of a third person not a party to suit—Remedy of person so dispossessed—Mamlatdar acting without jurisdiction.*—G got a decree for possession against P in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of P, who was in possession, and who was not a party to the decree. *Held* that the Mamlatdar's order for the execution of the decree by the ouster of P was without jurisdiction, and that it should be set aside under s. 622 of the Civil Procedure Code (Act XIV of 1882). CHINAYA v. GANGAVA . . . I. L. R., 21 Bom., 775

253. ——— *Order of District Judge acting under Bombay District Municipal Act (Bom. Act II of 1884), s. 23—Application to set aside a Municipal election—Order made as to costs—"Court," Meaning of.*—A District Judge acting under s. 23 of the Bombay District Municipal Act (Bombay Act II of 1884) is not a "court" within the meaning of the word in s. 622 of the Civil Procedure Code (Act XIV of 1882), and the High Court has no jurisdiction to revise his order refusing to set aside an election, nor can it interfere with an order made by him that the applicant shall pay the costs incurred by the opponent. BABAJI SAKHARAM v. MERWANJI NOWROJI . . . I. L. R., 21 Bom., 279

254. ——— *Revision—Illegality in exercise of jurisdiction—Judge's duty to decide secundum allegata et probata.*—The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for Rs 200 and the other for Rs 99-15 annas. The defendant in his written state-

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

ment, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of the consideration. The Subordinate Judge held that the bond for Rs 200 was not proved, but awarded the claim upon the other bond. On appeal, one of the issues raised by the Assistant Judge was—were the bonds in suit proved? He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*. On an application to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882),—*Held*, reversing the decision of the lower Court, that the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution. The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration. GORAKH BABAJI v. VITHAL NARAYAN JOSHI

[I. L. R., 11 Bom., 435]

255. ——— *Passing decrees unsupported by proof—High Court's powers of revision—Bailment—Negligence*—A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under s. 622 of the Civil Procedure Code. *Moulti Muhammad v. Syed Husain, I. L. R., 3 All., 203, and Harnam Tewari v. Sakina Bibi, I. L. R., 3 All., 417, referred to.* S hired a horse from W, and while it was in his custody, it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that for some time previously it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care and had thus caused the animal's death. The Court accordingly decreed the claim. *Held* by EDGE, C.J., that if the burden of proof was originally upon the defendant, it was

# SUPERINTENDENCE OF HIGH COURT—continued

## 4. CIVIL PROCEDURE CODE, S. 622

—continued

shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable, and that the decree of the lower Court, being unsupported by any proof and based on speculation and assumption was one which that Court had no jurisdiction to pass and should consequently be set aside in revision under s. 622 of the Civil Procedure Code. *Per BROTHURST J.* that as the decree was not only unsupported by proof but opposed to the evidence on the record the lower Court had acted in the exercise of its jurisdiction illegally within the meaning of s. 622. *Collins v Bennett* 46 New York Rep. 498; *Byrnes v Boodle*, 2 H and C. 722; *Ge v Metropolitan Railway Company*, L. R. 8 Q. B. 261; *Scott v London Dock Company*, 3 H & C 595; *Max v Dwyll*, 6 Q. B. D. 143; *Cotton v Wood*, 8 B & S. 659; *Dwyll v London and South Western Railway Company*, 12 Q. B. D. 40; *Max v Dwyll*, 11 C. B. 583 referred to. *SHIBDS v WILKINSON* L. L. R., 9 All., 398

## 250. — Civil Procedure

Code 1852 s. 516—Material irregularity—Omission to give notice of proceedings—A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure. *Held* that the District Munsif acted with material irregularity within the meaning of s. 622 of the Code of Civil Procedure. *RAYGASAM v MUTTASANI*

[L. L. R., 11 Mad., 144]

## 251. — Civil Procedure

Code (1852) s. 156—Decree passed upon an award filed in Court without a copy of its filing having been sent to the parties—*Held* that it was a good ground for revision of a decree based upon an award filed in Court that no notice of the filing of the award was given by the Court to the parties as required by s. 516 of the Code of Civil Procedure, even though the applicant in revision might have received information *aliquando* that the award had been filed. *RAYGASAM v MUTTASANI*, L. L. R. 11 Mad., 144 followed. *CHATTABU DAS v GASTAN RAM*

[L. L. R., 20 All., 474]

## 252. — Error of law—

Material irregularity—Personal decree against minors for debt of deceased Hindu father—In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor of whom two were minors. *Held* that, under s. 623 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants. *BRANTYAM v JAYARAM*

L. L. R., 11 Mad., 303

## 253. — Civil Procedure

Code, s. 373—Leave given by District Court on appeal to withdraw suit—Material irregularity—A District Judge having dismissed a suit, plaintiff

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, S. 623

—continued.

appealed to the District Court, and at the same time applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order. *Held*, under s. 623 of the Code of Civil Procedure, that the District Court had acted with material irregularity. *TIRUPATI v MUTTA* L. L. R., 11 Mad., 323

## 250. — Immoveable

property—Right of fishery—Possession—Deposition—Specific Relief Act, I of 1877, s. 9—Civil Procedure Code (Act XIV of 1852), ss. 30 and 621—Objection under s. 30 where suit is under s. 9 of Specific Relief Act—The plaintiffs were fishermen belonging to the village of the defendant. They claim in the suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagotha Creek between high and low water marks, within certain limits set forth in the plaint, and, under s. 9 of the Specific Relief Act, I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendants then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section. *Held* that the first Court did not act without jurisdiction, the right claim coming within the denomination of immoveable property. It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under s. 30 of the Civil Procedure Code (Act XIV of 1852). *Held* that the objection was a good one, but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under s. 623 of the Civil Procedure Code. *RAYGASAM v MUTTASANI*

[L. L. R., 12 Bom., 231]

## 251. — Jurisdiction

Presumption of—*Maxim, omnia presumuntur rite et solemniter esse acta*—Civil Procedure Code, ss. 103, 253, 647—The consideration of an objection under s. 278 of the Civil Procedure Code having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it. *Held* that the High Court, in the exercise of its revisional powers under s. 623 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction; that the proper remedy of the petitioner was an application under s. 103,

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

read with s. 647, or a suit under s. 288, and that the High Court should not interfere in revision. **SHEO PRASAD SINGH v. KASTURA KUAR** [I. L. R., 10 All., 119]

**262.** ——— *Limitation—High Court's revisional powers—Material irregularity.*—On the 29th November 1886 this suit was filed on a bond dated the 29th November 1881, payable in two years. The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November 1883. Against this decision the plaintiff applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882). *Held*, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November 1883, that is, the day of the month corresponding with the day on which the bond was dated. *Held* further that, the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under s. 622 of the Code of Civil Procedure (Act XIV of 1882). Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible, there is no remedy under s. 622 of the Code or under the provisions of s. 15 of Stat. 24 & 25 Vict., c. 104, whatever remedy there may be, in the Bombay Presidency, under cl. 2 of s. 5 of Regulation II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue, which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction. **VENKUBAI v. LAKSHMAN VENKOBIA KHOT**. I. L. R., 12 Bom., 617

**263.** ——— *Civil Procedure Code, s. 407.*—All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of the revisional powers of the High Court under s. 622 of the Code. **Chatterpal Singh v. Rajaram**, I. L. R., 7 All., 661, notwithstanding. In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. **MUHAMMAD HUSAIN v. AJUDHIA PRASAD** [I. L. R., 10 All., 467]

**264.** ——— *Pauper suit—Costs of plaintiff—Right of appeal—Decree omitting to order plaintiff to pay Court-fees—Power*

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

*of Collector to apply under the extraordinary jurisdiction of High Court—Amendment of decree.*—The plaintiff's suit in *forma pauperis* was rejected by the Subordinate Judge. The decree, however, omitted to order the recovery from the plaintiff of the Court-fees payable in the plaint. The Collector applied to the High Court under its extraordinary jurisdiction for the rectification of the decree. It was contended that, as the omission might have been remedied by an appeal or on review, the Collector could not apply under the extraordinary jurisdiction of the Court. *Held* on the authority of **Collector of Ratnagiri v. Janardan**, I. L. R., 6 Bom., 590, that no appeal by Government would lie in the case, and that, in the exercise of its extraordinary jurisdiction, the High Court would rectify the decree by directing the plaintiff to pay the costs of Government. **COLLECTOR OF KANARA v. RAMBHAT** [I. L. R., 18 Bom., 454]

**265.** ——— *Civil Procedure Code, ss. 494, 588—Appeal against order for issue of notice under s. 494—Revision by High Court of an order purporting to be made on appeal from such an order.*—A petition praying for a temporary injunction in a suit was presented by the plaintiff in a subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge, who granted the injunction prayed for. *Held* that no appeal lay from the subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law. **LUIS v. LUIS** [I. L. R., 12 Mad., 186]

**266.** ——— *Civil Procedure Code (Act XIV of 1882), s. 412—Dismissal of suit in forma pauperis without trial—Liability of plaintiff for Court-fee.*—A plaintiff who sues in *forma pauperis* is liable to pay the stamp duty if his suit is dismissed without trial; and where in such a case the Judge decided that the plaintiff was not liable for the Court-fees, it was held that he had by misconstruing s. 412 of the Code failed to exercise a jurisdiction vested in him by law; his order was rectified under s. 622. **COLLECTOR OF VIZAGAPATAM v. ABDUL KHARIM**. I. L. R., 21 Mad., 113

**267.** ——— *Civil Procedure Code, s. 269—Order on appeal affirming order granting application for review of judgment.*—The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the re-hearing. **GOPAL DAS v. ALAF KHAN** [I. L. R., 11 All., 383]

**268.** ——— *Pauper suit—Judge applying to suit a course of inquiry not applicable—Civil Procedure Code (1882), ss. 407,*



# SUPERINTENDENCE OF HIGH COURT *cont. next*

## 4 CIVIL PROCEDURE CODE, S 622

*cont. next*

622.—Where the Judge in the Court below in making an enquiry under cl. (c) of s 407 of the Civil Procedure Code found that the applicant was a pauper but having addressed himself to the merits of the case to the rights of parties and to matters which were entirely foreign to the enquiry that he had to make rejected the application upon the ground that the allegations of the petitioner did not show a right to sue—*Held* that the High Court could interfere under s 622 Civil Procedure Code inasmuch as the Judge of the lower Court applied a course of enquiry to the matter he had to investigate under s 407 Civil Procedure Code which was not applicable to it and he thereby failed to apply to the matter a course of enquiry which was applicable and that upon the allegations contained in the plaint there was nothing to show that the petitioner had no right to sue within the meaning of s 407 Civil Procedure Code. *Mallanar & Sarkar v Umesh Chandra Sarkar* 1 C B N 626 *Amr Hassan Khan v Shro Bahadur Singh* 11 Cal 6 *Sam Buz Bogla v A B Chander Sen* 1 L R 13 Cal 22a *Rahim Buz v Yando Lal Goswami* 1 L R 14 Cal 321 *Jacobandhu Pattick v Jadhav Ghokul* 1 L R 15 Cal 47 and *Birji Mohun Thakur v Ba Umashank Choudhary* 1 L R 20 Cal 8 referred to and explained. *DESO BIAS v RAM CHARAN DAS CHILLA* 2 C W N, 474

269.—*Landlord and tenant but for rent* In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under the Civil Procedure Code, s 622 which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land and made an order reversing the decree as to that and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under the Letters Patent cl. 15. *Held* that even if the Subordinate Judge had failed to give effect to the previous decree the error was not such as to give the Court jurisdiction to revise his proceedings under the Civil Procedure Code s 622. *ANANAGAMUDI v RAMASAMI*

[1 L R, 14 Mad., 408]

270.—*Revision, Powers of High Court in—Jurisdiction, Want of by lower Court* Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record the High Court will not interfere in revision. *MIHAN ALI SHAH v MUHAMMAD HUSEIN*

[1 L R, 14 All., 413]

271.—*Transfer of Property Act (IV of 1882) s 87, Order under—Right of appeal.*—An order under s 8 of Act IV of 1882 extending the time for payment of the mortgage-money by a mortgagor is a "decree" within the

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE S 622

*—continued*

meaning of ss 2 and 244 of the Code of Civil Procedure 1882 and since an appeal lies from it no application will lie under s 622 of the Code for revision of such order. *RAJIMA v NEPAL RAI*

[1 L R, 14 All., 620]

*Ses KUDARNATH v LALJI SAHAI*

[1 L R, 12 All., 61]

272.—*Order made without jurisdiction—Order cancelling sale in execution of decree under s 308 Code of Civil Procedure—Appeal*—A person who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution and to have the purchase-money and the amount due under the decree set off against each other became the purchaser for a sum less than the amount due under the decree. The Court made an order under the Civil Procedure Code s 308 cancelling the sale and ordering a re-sale on the ground that the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under the Civil Procedure Code, s 622. *Held* that the petitioner was the representative of the decree-holder within the meaning of the Civil Procedure Code, s 244 and might have preferred an appeal against the order sought to be revised and that therefore the petition for revision was not maintainable. All bonds under the circumstances above stated, the Court had no jurisdiction to make an order under the Civil Procedure Code, s 308. *SAH MAN MULL v. HANIDA SARAPATHI* 1 L R, 16 Mad., 20

273.—*Erroneous decision with jurisdiction—Success on Certificate Act (VII of 1889) s 4.*—A person applied for leave to sue in forma pauperis to recover assets forming part of the estate of a deceased person. His application was dismissed on the ground that he produced no certificate under Act VII of 1889. *Held* that the application was wrongly dismissed and that the High Court had jurisdiction to interfere on revision under the Civil Procedure Code, s 692. *KAMMATH v MANGAPPA* 1 L R, 16 Mad., 454

274.—*Order allowing withdrawal of suit—Civil Procedure Code s 373—Revision*—A Subordinate Judge in granting the application of a plaintiff before him for permission to withdraw with leave to file a fresh suit in the same matter made an order as to costs in favour of the defendants in the following terms: "As the case has not been contested to the bitter end half the plaintiff's fees are allowed and the process expenses, etc. incurred in the case except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week this to be subject to the decision of the Court after hearing both parties. The application and r s 33 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Cost allowed to defendants as above."

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 623 —continued.

*Held* that the order under s. 373 of the Code of Civil Procedure was not orderable to revision, as it was not open to appeal. **KALIAN SINGH v. LEKHRAJ SINGH**, 1. L. R., 6 All., 211, referred to. **DICK v. DICK**. . . I. L. R., 15 All., 189

**275.** ———— *Order refusing to discharge surety for insolvent judgment-debtor—Civil Procedure Code, ss. 336, 344—Appeal—* One B. M. became surety under s. 336 of the Code of Civil Procedure on behalf of one G. R., a judgment-debtor, to the effect that G. R. would appear before the Court when called on and would within one month file an application to be declared an insolvent. G. R. did so apply, but, on the surety's asking the Court to declare him discharged of his liability, the Court refused to do so. *Held* that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent, and that the order refusing to discharge him was not appealable, and was therefore open to revision under s. 622 of the Code. **BANNA MAL v. JAYNA DAS**  
[I. L. R., 15 All., 183]

**276.** ———— *Transfer of execution proceedings from one subordinate Court to another Discretion of Court.*—The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution-proceedings under a decree from one subordinate Court to another. **KRISHNA VEJJI MARWADI v. BHAT MANSARAM** I. L. R., 18 Bom., 61

**277.** ———— *Judge of Small Cause Court erroneously treating defective service of summons as good—Material irregularity.*—Where a Judge of the Small Cause Court, Bombay, treated the delivery of a summons by post to a person who was not shown to be the defendant as good service and had passed a decree against the defendant, he was held to have acted with material irregularity, and the High Court reversed his decree in the exercise of their powers under s. 62 of the Civil Procedure Code. **JAGANNATH BRAHMBHAU v. SASSOON**  
[I. L. R., 18 Bom., 606]

**278.** ———— *Decision on unstamped hundis.*—Where a Judge acted on hundis which were unstamped and therefore inadmissible in evidence, the High Court set aside his decision under s. 622 of the Civil Procedure Code. **CHEMBASAPPA v. LAKSHMAN RAOCHANDRA** I. L. R., 18 Bom., 389

**279.** ———— *Decision on inadmissible evidence.*—A decision taking into consideration as evidence an unregistered lease was set aside under s. 621. **GURUNATH SRINIVAS DESAI v. CHEMBASAPPA**. . . I. L. R., 18 Bom., 745

**280.** ———— *Construction of document.*—The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

interfere in revision under s. 622 of the Code of Civil Procedure. **DASRATH RAI v. SHEODIN RAI**  
[I. L. R., 16 All., 39]

**281.** ———— *Allowing objection to application in execution of decree by person not party to decree—Failure of exercise of jurisdiction vested by law—Decree against wrong person as representative.* A person not a party to a suit is not entitled to object to the issue of an order for execution of the decree. A Judge having at the instance of a person not a party to a suit refused to pass an order for the execution of decree on the judgment-creditor's application, — *Held* that in omitting to make such an order the Judge failed to exercise a jurisdiction vested in him by law, and that s. 622 of the Civil Procedure Code (Act XIV of 1882) was therefore applicable. **NATHUBHAI MULCHAND v. NANA BABU**. . . I. L. R., 19 Bom., 544

**282.** ———— *Dismissal of appeal "for default of prosecution," appellant and his pleaders being present—Refusal to reinstate appeal—Civil Procedure Code (1882), ss. 556 and 558—Appeal from order rejecting appeal.*—A civil appeal was being heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument one of the pleaders was called away to another Court and remained absent, and, as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under s. 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under s. 558 to reinstate the appeal was rejected. The appellant appealed under s. 558 to the High Court against the order under s. 558. *Held* that no such appeal lay, as the order in question could not have been made under s. 556. But the appellant was allowed to apply in revision under s. 622 against the order under s. 556, and upon that application it was held that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under s. 556. **JAWAHIR SINGH v. DEBI SINGH**. . . I. L. R., 18 All., 119

**283.** ———— *Discretion of Court in exercising revisional powers—Civil Procedure Code, ss. 623 et seqq.—Review of judgment granted on ground not allowed by s. 629.*—A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to s. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's appellate order, it was held that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results. **ABDUL SADIQ v. ABDUL AZIZ**. . . I. L. R., 21 All., 152

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE, s 622—continued

234 — *Land Acquisition Act (X of 1870) as 3, 24 and 25 Exercise of jurisdiction by Judge under the Act—“Material irregularity”—Mistake in regard to the principle of calculation of the value of the land acquired—If a Judge and assessors sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870 have refused to take into consideration any of the matters prescribed by s 4 of that Act, or have improperly taken into consideration any of the matters prohibited by s 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under s 622 of the Code of Civil Procedure. Having regard to the definition of “land” contained in s 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of crops on the land which make it suitable for a salt factory, and even if in making his estimate of the market value of the land he took into consideration the price paid for neighbouring pans and was in error in so doing his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction. *JOSEPH SALT CO I L R, 17 Mad., 371**

235 — *Power to call for record of cases not appealable to High Court—When a Court can be said “to have acted in the exercise of its jurisdiction illegally or with material irregularity”—A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point and admitted other appeals after they had become time-barred. Held by the majority of the Full Bench that where a subordinate Court having applied its mind to a question of law or procedure, arrives at an erroneous decision such decision is not by itself any ground for the exercise by a High Court of the powers given by s 622 of the Code of Civil Procedure. *AMIR HUSSAN KHAN v SHEO BAKSH SINGH I L R, 11 Cal. 6* followed. Held further (PERB and DAVIDES JJ dissenting) that the case contemplated by the words “act illegally or with material irregularity” in s 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision on a question where it is a conscious departure from some rule of law or procedure. *PERB, J*—The words in question of s 622 of the Code are applicable to illegalities or irregularities which are the result merely of ignorance of law or carelessness and the disposal of a suit on a point taken by the Court itself on appeal without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure but in the meaning of s 622 and that the inadvertent admission of an appeal that is not barred is an illegality in procedure within the meaning of that section. *PER DAVIDES J*—The clause of s 622 in question is applicable*

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4 CIVIL PROCEDURE CODE s 622—continued

only to errors of procedure and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case. *KRISHNAIA NAIDU v CHAPA NAIDU [I L R, 17 Mad., 410]*

236 — *Error of procedure—Mode of applying powers of appellate jurisdiction of Court under s 622—The words “acting with material irregularity” in the third clause of s 622 Civil Procedure Code imply only the committing of an error of procedure, but “acting illegally” does not mean the same thing. The third clause of s 622 Civil Procedure Code, is intended to authorize the High Court to interfere and correct gross and palpable errors of subordinate courts as to prevent grave injustice in non appealable cases and the question whether any circumstances under the clause has to be determined with reference to the grossness and palpableness of the error complained of and to the gravity of the injustice resulting from it. *Krishnaia Naidu v Chapa Naidu I L R, 17 Mad., 417* dissented from. *AMIR HUSSAN KHAN v SHEO BAKSH SINGH I L R, 11 Cal., 6* explained. *BIHARWAL RAMANUJ DAS v KHETTER MOVI DASSI [I C W N., 617]**

237 — *Succession Certificate Act (VII of 1889), s 9—Order granting certificate on the applicant’s furnishing security—Discretion of Court—The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889), the Judge ordered the certificate to issue on the applicant’s furnishing security under s 9 of the Act. Held that such an order was within the discretion of the Judge, and there being shown to be nothing improper in the exercise by the Judge of his jurisdiction the Court refused to interfere to set the order for a writ nisi. *Mahabab v Pithoba Khan dappa Gulbe 7 Bom. Ap 26* referred to. *BALI DEVKORE v LALCHAND JIVANDAS [I L R, 18 Bom., 790]**

238 — *Decision of Appellate Court as to jurisdiction of lower Court—Reversal of order rejecting plaint—Where a Court of first instance having ordered a plaint presented to it to be returned to the proper Court under s 5, cl (a) Civil Procedure Code the Court of Appeal acts under s 588 cl (6) Civil Procedure Code set aside such order and directed the original Court to hear the cause. Held that the High Court had no jurisdiction to interfere with such appellate order under s 622 Civil Procedure Code for it could not be said that the lower Appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity simply because its decision as to the jurisdiction of the first Court to entertain the suit was erroneous*

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued

law. *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Cal., 6: 11 I. A., 237; Birj Mohan Thakur v. Rai Uma Nath Chowdhry, I. L. R., 20 Cal., 8: 19 I. A., 151; Jugobundhu Pattuck v. Jauu Ghose, I. L. R., 15 Cal., 47; and Kristamma v. Chapa Naidu, I. L. R., 17 Mad., 410, referred to. Held per BANERJEE, J.*—The scope of the third clause of s. 622 Civil Procedure Code, is not limited merely to cases of material irregularity of procedure, for the third clause not only refers to cases where a Court has acted with material irregularity, but also to those in which it has acted illegally. The clause is evidently intended to authorize the High Courts to interfere and correct gross and palpable error of subordinate Courts, so as to prevent grave injustice in non-appealable cases. *Bhagwan Ramanuj v. Khetter Moni Dassi, 1 C. W. N., 617, referred to. Amir Hassan Khan v. Sheo Baksh, I. L. R., 11 Cal., 6, explained. Balami Koer v. Dinu Rai, I. L. R., 8 All., 111, dissented from. Kristamma Naidu v. Chapa Naidu, I. L. R., 17 Mad., 410, disapproved. RAGHU NATH GUJRATI v. RAI CHATRAPAT SINGH, 1 C. W. N., 633*

[I C. W. N., 628

289. *Error in distribution of proceeds of sale in execution of decree—Civil Procedure Code (Act XII of 1882), s. 295—Jurisdiction—Powers of revision by High Court.*—An application by a decree-holder under s. 295 for rateable distribution was refused by the Judge in the lower Court on the grounds (i) that the decree was not a *bona fide* one; (ii) that the decree in favour of the petitioner, which was sent down by the High Court for execution to his Court, was sent down by the High Court with direction merely to hold under attachment the property of the judgment-debtor, but not to proceed to sell the property until further instructions were received, and the petitioner could not be regarded as one who had applied for execution of decree within the meaning of s. 295; and (iii) that the petitioner had not obtained satisfaction of her decree in whole or in part in any of the other districts to which her decree had been simultaneously sent for execution. *Held (per MACLEAN, C.J.)* that, as the Court below had jurisdiction under s. 295. Civil Procedure Code, to divide the assets, and if, with a view to the division of assets, he had made a mistake in the principle upon which they ought to have been divided, such an error was one of law merely, and not subject to review under s. 622, Civil Procedure Code. *Held further* that a mere mistake in law by a lower Court does not bring a case under s. 622, Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Cal., 6, followed. Birj Mohan Thakur v. Rai Uma Nath Chowdhry, I. L. R., 20 Cal., 8, referred to. Held (by BANERJEE, J.)* that the third clause of s. 622, Civil Procedure Code, "acted illegally or with material irregularity," is not limited to cases of procedure only. This clause is intended to empower the High Court to interfere in non-appealable cases with orders or decisions of lower courts where the orders or decisions are vitiated by an error which is so gross and palpable, and which has led to injustice so grave and manifest that it is

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622 —continued.

desirable that the High Court should interfere with them. *Held* that, assuming that the lower Court had no jurisdiction to enter into the question of the *bona fides* of the decree, the order of the lower Court might stand upon the other two grounds, for the error, if any, does not come within the scope of this clause, and having regard to the fact that s. 295, Civil Procedure Code, provides a remedy by a regular suit, the case is not one which, so far as the decision rests upon the second and third reasons, can be said to come within the scope of the third clause of s. 622, Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh, I. L. R., 11 Cal., 6, explained. Balami Koer v. Dinu Rai, I. L. R., 8 All., 111, dissented from. Kristamma Naidu v. Chapa Naidu, I. L. R., 17 Mad., 410, disapproved. RAGHU NATH GUJRATI v. RAI CHATRAPAT SINGH, 1 C. W. N., 633*

290. *Civil Procedure Code, s. 293—High Court's powers of revision—Remedy by suit.*—The High Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the applicant. Where a Subordinate Judge disallowed an application for the release of certain property which had been attached before judgment, *Held* that, there being a remedy by suit under s. 293 of the Code of Civil Procedure, the High Court should not interfere with such order in revision. *Ittiachan v. Velappan, I. L. R., 8 Mad., 451; Sheo Prasad Singh v. Kastura Kuar, I. L. R., 10 All., 119; and Gopal Das v. Alaf Khan, I. L. R., 11 All., 393, referred to. GUISE v. JAISRAJ, [I. L. R., 15 All., 405*

291. *Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, where there is no appeal—Order refusing to make person party to oppose probate.*—Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding that no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application. *KHETTRAMONI DASI v. SHYAMA CHURN KUNDU, [I. L. R., 21 Cal., 539*

292. *Order refusing to amend a clerical error in the form of probate—Probate and Administration Act (V of 1851), s. 86—Succession Act (X of 1855), s. 263.* Where there was a clerical error in the form of probate granted, and the Judicial Commissioner refused to amend it on the ground that the probate was granted by his predecessor, it was held that, though there was no appeal from such an order (either under s. 86 of the Probate and Administration Act (V of 1851), or s. 263 of the Succession Act (X of 1855)), yet the High Court might deal with the case under s. 622 of

# SUPERINTENDENCE OF HIGH COURT—continued

## 4 CIVIL PROCEDURE CODE S. 622

—continued.

the Civil Procedure Code and act as de facto r. *Khetramani D. v. Shriam Charn Khar, I L.R., 21 Cal. 439* owed *GEORGEA HUMAR DAS GUTTA v. RAJESWARI DEY, I L.R., 27 Cal. 5*

223. — *Exec. see of rev. a civil process when there was remedy by separate suit* — *Part of it is — Executing Court delivering decree even if parts not specified in sale-deed certificate* — In execution of a decree against several joint judgment-debtors certain immovable property was proclaimed for sale. The sale proclamation described the property as a many houses and businesses in certain villages amounting to a certain area. The judgment-debtors possessed property in those villages over and above that sought to be sold. The property as above described was sold and certificates of sale were granted which in terms followed the description contained in the proclamation of sale. The decrees to deliver and sell the property were issued and applied for possession thereof but in their application they omitted a detail of the specific shares of property held by the several judgment-debtors over which they prayed for possession. The Court executing the decree went into the question of the specification of shares and ordered possession to be delivered over certain specific shares of the several judgment-debtors. *Held* that, under the circumstances described above the High Court would interfere in revision under s. 622 of the Code of Civil Procedure, although it was possible that the matters complained of might be grounds for a separate suit. *Gaur v. Jauray, I L.R. 15 All. 35* *Gopal Das v. A'af Khan, I L.R., 11 All. 383* and *Prasanna Kumar Sengal v. Kish Das Sen, I L.R. 19 Cal. 663*, referred to. *GHULAM KHADEE v. DWAKA PRASAD, I L.R., 18 All. 183*

224. — *Decision as to admissibility of document—Error in law* — *PER FARUQ C.J.* — When Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence having exercised their judgment upon the question of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not I think an illegal or a material irregularity within the meaning of s. 622 of the Code. *MADHAN RAY GANESHPANT DEE v. GULABRAI JARASWAI, I L.R., 23 Bom., 177*

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*Powers of—Stamp Act (1 of 1879), s. 34 sub-s. (3)* — A certain document, although unstamped, was admitted in evidence by the first Court. Upon appeal the Subordinate Judge refused to admit the document in evidence on the ground that it was unstamped, and on the merits reversed the judgment of the first Court

# SUPERINTENDENCE OF HIGH COURT—continued.

## 4. CIVIL PROCEDURE CODE, S. 622

—continued.

and dismissed the suit. The plaintiff moved the High Court under s. 622, Civil Procedure Code, on two grounds that, under s. 34 sub-s. (3) of the Stamp Act, the document, although unstamped, was admissible in the lower Appellate Court, inasmuch as the first Court admitted the same. *Held* (by *MACLEAY, C.J.*) that s. 622 Civil Procedure Code, did not apply. That an error of law does not amount to acting in the exercise of jurisdiction illegally or with material irregularity within the meaning of s. 622, Civil Procedure Code. *Amir Hassan Khan v. Shera Baksh Singh, I L.R., 11 Cal., 6*, relied upon. *Mathura Nath Sarkar v. Umesh Chandra Sarkar, I C.W.N., 628*, *Mohd. Plaswan Pannoo Das v. Khettie Moori Das, I C.W.N., 617*, referred to. *Held* (by *RAJESWARI, J.*) that the error of the lower Appellate Court in rejecting the document, admitted by the first Court, as not stamped, in contravention of s. 34 of Act I of 1879, comes within that part of s. 622, Civil Procedure Code, which speaks of a Court's acting with material irregularity in the exercise of its jurisdiction. That the rejection of the document is more in the nature of a materially irregular act than an erroneous decision on a point of law. The case of *Amir Hassan Khan v. Shera Baksh Singh, I L.R., 11 Cal., 6* must be taken to have settled that it is not every error of law that will come within the scope of s. 622 Civil Procedure Code, but it does not follow that no error of law will not be also an error of jurisdiction, can come within the operation of that section. That the error in this case was gross and palpable, and it was likely to involve injustice. *Amir Hassan Khan v. Shera Baksh Singh, I L.R., 11 Cal., 6* explained. *Mohd. Plaswan Pannoo Das v. Khettie Moori Das, I C.W.N., 617*; *Mathura Nath Sarkar v. Umesh Chandra Sarkar, I C.W.N., 628*, and *Rogha Nath Gajra v. Rai Chaitratup Singh, I C.W.N., 633*, referred to. *ENAY MOHDEE v. BALORAM DEE, 3 C.W.N., 531*

226. — *Civil Procedure Code (Act XIV of 1859) s. 109—Ex-parte decree setting aside, Effect of, as against contesting defendants who preferred appeal—Jurisdiction of a Court to set aside, under s. 109, Civil Procedure Code, decree of a superior Court* — Plaintiff brought a suit against defendants 1 and 2 for declaration of title to, and for khas possession of, certain land against the other defendants. The suit was contested by defendants 1 and 2 only and plaintiff obtained a decree. Defendants 1 and 2 preferred an appeal to the Subordinate Judge's Court and a second appeal to the High Court, with the result that the judgment of the first Court was upheld, the other defendants, who were not parties to the appeal applied to set aside the ex-parte decree, the Munsif ordered that "the ex-parte decree be set aside and the original regular suit be revived." By a later order defendants 1 and 2 were allowed to defend the suit de novo and to file fresh defences. *Held* that the Munsif had no jurisdiction to set aside the decree as against defendants 1 and 2, which was not an ex-parte decree and was not a decree of his Court, but that of a superior Court, and that the

# SUPERINTENDENCE OF HIGH COURT—concluded.

## 4. CIVIL PROCEDURE CODE, S. 622 —concluded.

High Court had jurisdiction, under s. 622, Civil Procedure Code, to set aside the order of the Munsif. That s. 108, Civil Procedure Code, contemplates the case of a Court setting aside its own decree and not that of another and a higher tribunal. *Mahamed Hamidulla v. Johurennessa Bibee*, 1. L. R., 25 Cal., 155 distinguished. *MONOMOHINI CHOWDHURANI v. NARA NARAYAN ROY CHOWDHURY* . 4 C. W. N., 456

# SUPERSTITIOUS USES.

## Request for—

See WILL—CONSTRUCTION 2 Hyde, 65  
[5 B. L. R., 433  
2 B. L. R., O. C., 148  
1 L. R., 15 Mad., 424

## Statute of—

See ENGLISH LAW—SUPERSTITIOUS USES,  
STATUTE OF . . . 1 Bom., Ap., 4  
[12 Bom., 214

# SUPPLEMENTAL SUIT.

## See COSTS—SPECIAL CASES—PARTITION.

[1 L. R., 21 Cal., 904

Suit in Zillah Court simultaneous with suit in Supreme Court—The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Zillah Court intended to be simply in furtherance of, and supplemental to, the suit in the Supreme Court. *NAZIR ALI KHAN v. OJODHYARAM KUAN*

[5 W. R., P. C., 83; 10 Moore's L. A., 540

# SUPREME COURT, BOMBAY.

## See JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY JURISDICTION.

[5 Moore's L. A., 137

## See JURISDICTION—MATRIMONIAL JURISDICTION . . . 4 W. R., P. C., 91

[6 Moore's L. A., 348

1. Charter of Supreme Court—Construction of statute—Statute limiting prerogative of the Crown—Power to grant leave to appeal in criminal case.—Under the Bombay Charter of the Supreme Court, 8th December 1823, that Court was invested with full and absolute powers to allow or deny an appeal in criminal cases, and no power was reserved to the Crown by such Charter to grant leave to appeal in such cases, such power being only reserved to civil cases. The case of *Christian v. Cowan*, 1 P. W., 329, observed on. *QUEEN v. STEPHENSON* . . . 3 Moore's L. A., 488

*QUEEN v. EDULJEE BYRAMJEE*

[3 Moore's L. A., 468

The Charter, having been granted by the Crown by force of an Act of Parliament, must be construed

# SUPREME COURT, BOMBAY—continued

with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction. *QUEEN v. EDULJEE BYRAMJEE*

[3 Moore's L. A., 468

2. Construction of Charter—Law of limitation—English law.—The Charter of 8th December 1823, which created the Supreme Court at Bombay, provided by s. 29 that "in cases of Mahomedans or Gentoos their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, should be determined, in cases of Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by if the suit had been brought in a native Court," and the 37th section directs that "the Court shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the persons thereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice." Held, upon a construction of these sections, that as the law of limitation is a matter of procedure, and the Supreme Court at Bombay had power to frame its procedure different from the native Courts, the Court was right in allowing the plea of the English statute of limitation in an action between Hindus upon a Hindu contract, as the judgment of the Court on such plea was no determination relating to any right arising out of any contract or dealing involved in the cause of action. *Semble*—The mere allegation in the plaint that the parties are Hindus is a sufficient averment of the fact to raise an objection to the cause being decided by the English law of limitations. *RUCKMAHOKE v. LULLOOBHOR MORTCHEND*

[5 Moore's L. A., 234

3. Jurisdiction—Admission of attorneys.—The Supreme Court, Bombay, had no jurisdiction to admit persons as attorneys and solicitors to practise in the Courts there, except such as were qualified in the manner pointed out in the Bombay Charter and Letters Patent of 1823 establishing the Court, viz., those who had been admitted in the Courts at Westminster or were practising in the Recorder's Court, Bombay, at the time of the publication of the Charter. *MORGAN v. LEECH*

[2 Moore's L. A., 423

4. Suit for partition of property out of jurisdiction.—The late Supreme Court (Bombay) had no power to decree a partition of ancestral property situate beyond the limits of its jurisdiction. *RAMCHANDRA DADA NAIK v. DADA MAHADEV NAIK* . . . 1 Bom., Ap., 76

5. Suit concerning revenue—Government quit rent—Suit against Collector of Revenue for distraint.—By the Charter

**SUPREME COURT, BOMBAY—concluded.**

of the Supreme Court, Bombay, of December 1825, that Court was prohibited from entertaining any suit in any matter concerning the revenue under the management of the Governor and Council or any act done in the collection thereof. In an action of trespass brought against the Collector of Revenue at Bombay for distraining for arrears of Government "quit-rent"—*Held*, reversing the judgment of the Bombay Court, that the "quit-rent" was part of the revenue of the Company at Bombay, and the Court therefore had no jurisdiction. *SPICER v. JEDDOW* [4 Moore's I. A., 353]

**SUPREME COURT, CALCUTTA.**

1. — *Carrying on business*.—An inhabitant of Benares, trading at Calcutta and having a house of business there, held to be subject to the jurisdiction of the Supreme Court. *JANOEY v. S. BINGHATY & SONS*

[3 Moore's I. A., 175]

2. Jurisdiction of Criminal Court.—*Party privy to misdemeanor committed within jurisdiction*—Under the general jurisdiction of the Supreme Court at Calcutta, a person, though resident at Benares was liable to its jurisdiction, if privy to, and co-operating in, a misdemeanor committed within it. Where, therefore, a party resident at Benares was indicted with others before the Supreme Court for a conspiracy in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved to the satisfaction of the jury to have originated with the appellant, it was held by the Judicial Committee that the offence having been completed within the jurisdiction of the Supreme Court at Calcutta, that Court had rightly assumed jurisdiction over the parties privy to it, though from the slight nature of the evidence they directed a new trial. *JANOEY v. S. KING*

[1 Moore's I. A., 87]

**SUPREME COURT, MADRAS.**

*See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL I. L. R., 8 Mad., 24*

L. — *Jurisdiction—Order allowing Registrar to institute suit on behalf of tenants*—*Officer of Court entitled to commission—Personal interest in conduct of suit*—*Stat. 2 & 3 Will. IV., c. 81*.—An order was made on the equity side of the Supreme Court at Madras by which the Registrar, an officer who under the practice of the Court was entitled to a commission of 5 per cent. on all sums of money paid into Court, was allowed by consent of the Court or a Judge to institute proceedings for the benefit of infants where it appeared their property was unprotected. *Held*, in a case in which he was allowed to file a bill on behalf of certain infants, that the order being made under the general jurisdiction of the Supreme Court, and not under the Stat. 2 & 3 Vict., c. 81, was valid, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest. *KERAGOOR v. SEREE*

[3 Moore's I. A., 320]

**SUPREME COURT, MADRAS—continued.**

2. — *Equitable jurisdiction in suits relating to charitable funds*.—The Supreme Court, Madras (established by the Madras Charter, 1800), had an equitable jurisdiction similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England over charities. *ATTORNEY GENERAL v. BRODIE*

[4 Moore's I. A., 180]

**SURBORAKARI TENURE.**

*See LAND TENURE IN ORISSA.*

[I. L. R., 11 Calc., 689]

**SURETY.**

	Col.
1. LIABILITY OF SURETY . . . . .	2083
2. ENFORCEMENT OF SECURITY . . . . .	2084
3. DISCHARGE OF SURETY . . . . .	2093
4. MISCELLANEOUS CASES . . . . .	2094

*See EXECUTION OF DECREE—MODE OF EXECUTION—PRINCIPAL AND SURETY.*  
[I. L. R., 4 Calc., 331.  
I. L. R., 19 Bom., 578]

*See GUARANTEE . I. L. R., 6 Mad., 408*  
[I. L. R., 10 All., 631  
22 W. R., 200]

*See HINDU LAW—DEBTS.*  
[I. L. R., 11 Mad., 373  
I. L. R., 23 Bom., 454]

*See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION . . . . .* 1000, 135

*See CASES UNDER PRINCIPAL AND SURETY.*

*See CASES UNDER RECOGNIZANCE TO APPEAR.*

*See CASES UNDER SURETY FOR GOOD BEHAVIOUR.*

*Agreement to become, on deposit of security.*

*See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.*  
[I. L. R., 1 All., 751]

*Discharge of—*

*See BILL OF EXCHANGE.*  
[I. L. R., 3 Calc., 174]

*See MINOR—BOMBAY MINORS ACT (XX of 1964) . I. L. R., 19 Bom., 245*

*See CASES UNDER PRINCIPAL AND SURETY—DISCHARGE OF SURETY.*

*Liability of—*

*See EODD . . . . .* 9 B. L. R., 384  
[4 Moore's I. A., 68]

*of defaulting tenant, suit against—*

*See RES JUDICATA—PARTIES—PRO FORMA DEFENDANTS . . . . .* 3 B. L. R., 4737

**SURETY—continued****1 LIABILITY OF SURETY—continued**

Procedure Code cases when the proceeding taken in execution of a decree when in the security was for sale of moveables to an end. **1 ALI BHAI v. ONTA SUNDRI MITRA** I. L. R. 14 Cal., 757

**9 ——— Judgment-debtor**

applying to be declared insolvent—*Civil Procedure Code, s. 336 344*—On the 10th January 1886 obtained a decree for a certain sum of money against C. In execution of that decree C was arrested on the 28th January and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Ch. XX of the Code of Civil Procedure and he was thereupon released upon furnishing security under the provisions of s. 333 of the Code. A became surety for C and executed a bond undertaking to produce C at any time when the Court should direct him so to do and in default of so producing him to pay the amount of the decree and standing security for C's application to be declared insolvent. On the 19th February C filed his petition to be declared an insolvent before the District Judge under s. 344 of the Code and on the 11th May 1886 his petition was dismissed on account of his non-appearance & thereupon applied for execution of the decree against A. Held that A was released from his obligation under the bond executed. **KUTLASH CHANDRA SHANKAR v. CHRISTOPHER KIDI** [I. L. R. 15 Cal., 171]

**10 ——— Civil Procedure**

Code, s. 336 344—*Judgment-debtor applying to be declared an insolvent*—A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent is released from his obligation under the bond when the judgment-debtor files his petition under s. 344 to be declared insolvent. **Ayulash Chandra Shanks v. Christopher Kidi**, I. L. R., 15 Cal., 171 approved. **RAMAN v. GHARAD** [I. L. R. 13 All., 100]

**11 ——— Civil Procedure**

Code (1882), s. 336—*Bond for production of insolvent judgment-debtor—Conditions in bond as provided for by s. 345*—Where on a bond under s. 336 of the Code of Civil Procedure binds the usual covenants to produce the judgment-debtor before the Court, and that the judgment-debtor would apply to be declared an insolvent further stipulations were contained as to what should happen if the judgment-debtor's application to be declared insolvent were refused it was held that the latter stipulations were not such as were void under s. 330, and could not be enforced under that section. **JANEY DAS v. RAM PARTAS** I. L. R., 16 All., 37

**12 ——— Civil Procedure**

Code (1-82) s. 336—*Judgment-debtor's application to be declared an insolvent—Release of the surety*—A person standing surety for a judgment-debtor under s. 336 of the Civil Procedure Code (Act XIV of 1882) is released from his obligation

**SURETY—continued.****1 LIABILITY OF SURETY—concluded.**

when the judgment-debtor has applied to be declared an insolvent. **Ayulash Chandra Shanks v. Christopher Kidi**, I. L. R., 15 Cal., 171 and **Raman v. Ghadar** I. L. R., 13 All., 100 followed. **UNAKH DAS PARSHOTAMDAS v. ISABHAI BHATTACHARYA** [I. L. R., 19 Bom., 210]

**13 ——— Surety for minor**

—*Contract Act (IX of 1-72), s. 125*—A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary in his case to be sued on it whether the contract of the minor is considered to be void or voidable. **KISHNA v. SHRIPAT NARSHIV** I. L. R., 19 Bom., 637

**2 ENFORCEMENT OF SECURITY.****14. ——— Mode of enforcement—Act**

**XXIII of 1861, s. 8—Surety-bond—Execution**—A surety bond taken by the Court under s. 8 of Act XXIII of 1861, after judgment had been pronounced, could be enforced under s. 23 of Act VIII of 1859. **ABDUL KARIM v. ABDUL HIRQ HAZIZ** [8 B. L. R., 205; 15 W. R., 21]

**15 ——— Execution of**

*decree against surety—Surety-bond for payment of costs under s. 342*—A bond taken as security for costs under s. 342 of Act VIII of 1859 could be enforced in a summary way by proceedings in execution. **CHUTTERDHAR JALL v. KAVELASHEE KOTE** [I. L. R., 3 Cal., 318; 1 C. L. R., 347]

**16. ——— Civil Procedure**

Code, 1859, s. 204—*Execution of decree against surety—Delay of execution on security being given*—Where a sale in execution of a decree was stayed on the security given by a third party—Held that, on default by the defendant the decree could not be summarily enforced against such surety under s. 204 of Act VIII of 1859. **GAJENDRANARAYAN ROY v. HEMANGINI DAS** [4 B. L. R., Ap., 27; 13 W. R., 35]

**17. ——— Civil Procedure**

Code, 1859, s. 204—*Sureties under Civil Procedure Code, 1859, s. 76, 83—Sureties after decree*—S. 204, Act VIII of 1859 applied to cases such as that of parties who became sureties under s. 76 or s. 83, but not to parties who became sureties after a decree was passed. **RAM KISHAN DOSE v. HIRKHOO BISHN** 7 W. R., 328

Rejecting a review in **HIRKHOO SINGH v. RAM KISHAN** 8 W. R., 44

**18. ——— Civil Procedure**

Code, 1859, s. 204—*Compromise embodied in decree—Execution against surety*—A compromise embodied in a decree was to the effect that defendant should pay to plaintiff the principal sum within a specified period, and that, if he (defendant) were successful in another suit against a different party, he would also pay the late rate. He succeeded in his suit in the first Court but his suit was dismissed on appeal. The judgment-debtor subsequently paid the



**SURETY—continued.****2. ENFORCEMENT OF SECURITY—continued.**

principal, but was afterwards arrested, and *M II* became surety for his production and for the payment of the interest, if the order of the Munsif releasing the judgment-debtor were set aside on appeal. *Held* (by MARKER, J.) that the decree on the compromise was not one upon which execution could be carried out, at any rate for the sum which was only conditionally due, as the inquiry relative to the fulfilment of the condition could only be made in a regular suit; and that execution could not be taken out against *M II*, the surety, the arrangement between him and the judgment-creditor not falling within s. 24, Act VIII of 1859, which applied to persons who had become security for the performance of a decree or any part thereof. *BOZAKKE LALL v. MAHOMED HOSSAIN KHAN*. 14 W. R., 63

**19. — Civil Procedure Code, 1859, s. 204—Surety for performance of decree—Suit on surety-bond.**—When a person has become liable as security for the performance of a decree, s. 204 of Act VIII of 1859 gives a remedy to the decree-holder against the surety in addition to any remedy which he may have on the surety-bond. It does not prevent the decree-holder from bringing a suit on the surety-bond to enforce the contract made with him by the surety, and the lien on the property mortgaged to secure the performance of that contract. *ABDUL KADIR v. HURREE MOHTUN*. 6 N. W., 261

**20. — Civil Procedure Code, 1859, s. 204—Surety executing bond for payment of decree by instalments—Alteration of terms of decree.**—Where, by an arrangement sanctioned by the proper Court, the terms of a decree were varied, and provision was made for its payment by instalments, for the payment of a portion of which instalments a surety executed a bond hypothecating his property, *Held* that at the terms of s. 204 of the Civil Procedure Code were not applicable to such an arrangement. *CHUNDEE DREN v. HUSSUN ALI* [3 N. W., 88

**21. — Civil Procedure Code, 1877, ss. 210, 253—Execution of decree against surety—Payment of decree by instalments.**—A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale, and applied for its postponement, producing a surety and a bond, in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against

**SURETY—continued.****2. ENFORCEMENT OF SECURITY—continued.**

such surety. *Held* that, inasmuch as the decree-holder had not been a party to the proceedings of the sale-officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of s. 210 of Act X of 1877 were not applicable, and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877. *CHANDAN KUAR v. TIRKHA RAM*. I. L. R., 3 All., 809

**22. — Civil Procedure Code, 1882, s. 253—Surety for execution of appellate decree, Remedy against.**—In 1874 the execution of the decree of an Appellate Court was stayed pending an application for review of judgment, upon the judgment-debtor giving security for the execution of the decree, and a surety was accepted on his behalf. *Held* that the judgment-creditor could not proceed summarily against the surety under the provisions of s. 253 of the Code of Civil Procedure, 1882. *BALAJI v. RAMASAMI*. I. L. R., 7 Mad., 284

**23. — Civil Procedure Code, 1882, s. 253—Execution of decree against surety.**—A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety, *Held* that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within s. 253 of the Code of Civil Procedure, and that the liability of the surety could not be enforced in execution. *NARAYANAMMA v. RAMAYYA CHETTI*

[I. L. R., 22 Mad., 268]

**24. — Right to enforce security—Civil Procedure Code, 1859, s. 204—Order cancelling security bond.**—Where a person became a surety in the course of the proceedings on an appeal to pay all such sums as might be decreed against the plaintiff on appeal, the decree when passed could be executed against the surety under s. 204 of the Civil Procedure Code, and an appeal would lie from an order made in execution of such decree against the surety. Where a person became surety, and gave a security bond undertaking to pay all sums of money that might be decreed against the plaintiff on the defendant's appeal, and the appeal was dismissed for default, and on the application of the plaintiff the Recorder made an order cancelling the bond, and returned it to the surety without notice to the defendant, and afterwards the defendant's appeal was on application restored, and a decree passed against the plaintiff, *Held* that the Recorder's order was invalid, and execution could issue against the surety notwithstanding that order. *AKHUT RAMANA v. AHMED YOUSAFFJI*.

[7 B. L. R., 81; 15 W. R., 538]

**SURETY** *contd***ENFORCEMENT OF SURETY** *continued*

25. — *Security for cost*  
*that a sum for costs taken in execution—Re appeal of decree* *Pr y on appeal against—Civil Procedure Code 152 ss 253 543 546—4* 254 of the Civil Procedure Code contemplates a suit being at the instance of a party for performance of the decree and does not apply to a case where the plaintiff in the Courts of first instance and of first appeal has ended his case and a second appeal has been instituted in the High Court when security is given. The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment debtor and paid to the decree-holder and a surety gave a bill which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding on appeal to the High Court and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful and the plaintiff in the execution department to recover the amount from the surety. *Held* that the court executing the High Court's decree laid out costs to execute against the surety. *HAR L DAS & ZAMAN KHAN*

(I L R., 8 All., 639)

26. — *Execution of decree against surety pending appeal* *It is to be noted that in the High Court a decree for certain movable and immovable property was appealed to the Privy Council. While that decree was pending the plaintiff for the execution of her decree, and she became her surety for Rs 10,000. The decree however was not executed. The Privy Council reversed the decision of the High Court and dismissed the suit of the plaintiff. She then sought to execute her decree for costs against the surety. Held that she was not liable in the matter of the PRITHVI OF NAFAR CHAND PAL CHOWDHRY*

(8 H. L. R., Ap., 123)

S C NUFFER CHUNDER PAUL CHOWDHRY & COO  
 KENDRO NATH ROY 14 W. R., 410

27. — *Execution of decree against surety—Civil Procedure Code 1559 s 201*—In consideration of the plaintiff being allowed to proceed with the execution of a decree which they had obtained in the High Court and became surety upon a bond for the payment of what might be due to the defendants by such plaintiffs in the event of the decree being reversed or modified by the Privy Council to which an appeal was then pending. *Held* that the summary procedure under s. 204 of Act VIII of 1879 might be enforced against a cash surety. Compare Act No 15 s 253. *CHUNDER KANT MOOCHERJEE & PAM COOMAR COOMAR*

3 C L. R., 605

28. — *Civil Procedure Code 1877 s 253—Execution of decree against surety* *Execution of decree of Privy Council—Security for costs of respondent—Civil Procedure Code 1877 s 610*—An appeal was preferred to Her Majesty in Council from a final decree

**SURETY—continued****2. ENFORCEMENT OF SURETY—contd**

passed on appeal by the High Court, and Bandaru and other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against Bandaru and the other persons. *Held* by DISTRICT J., PARSLOW J. and OLDFIELD J. that under ss. 610 and 253 of Act No 15 of 1877 such order could be executed against the surety. *See* PARSLOW J. and DISTRICT J.—*Contract* *HANS BAHADUR SINGH & MOUNA PRASAD*

(I L R., 2 All., 604)

29. — *Appeal to Privy Council—Security for costs of respondent at—Execution of decree against surety—Civil Procedure Code (Act VIII of 1879) ss 253 607 608 610*—A plaintiff having preferred an appeal to Her Majesty in Council, was called upon to furnish security. Thereupon and on behalf of the appellant, executed a security bond for the costs of the respondent. The appeal was dismissed with the costs by Her Majesty in Council. On an application (by the respondent in the appeal) for execution to issue against the estate of the surety (who died in the meantime)—*Held* that the liability of the surety under the security bond could not be enforced in execution of the decree of Her Majesty in Council. *Bans Bahadur Singh & Mouna Prasad I L R. 2 All. 604* dissented from. *PADMA PERSHAI SINGH PATILKAT KORA*

I L R., 12 Cal., 402

30. — *Execution of decree against surety—Surety for costs of appeal—Separate suit—Summary procedure—Civil Procedure Code 1552 ss 253 543—2* 3 of the Civil Procedure Code is not applicable to a surety who has become security in an Appeal to Court. A security bond, therefore, executed by a surety on behalf of appellant for the costs of an appeal under s. 543 of the Code cannot be summarily enforced against the surety in the execution proceedings. The remedy is by a separate suit. *Bans Bahadur Singh & Mouna Prasad I L R. 2 All. 604* dissented from. *Radhika Prasad Singh & Phuljari Kuer I L R. 12 Cal. 402* followed. *KALI CHAND SINGH & HAL CHAND SINGH*

I L R., 15 Cal., 497

31. — *Surety for amount of decree pending appeal—Execution of decree—Separate suit—Civil Procedure Code 1877 ss 253 253 and 545*—Where a surety has become security for the appellant in an Appeal to Court under s. 543 of the Code of Civil Procedure the security bond cannot be enforced in execution of the decree under s. 253 but a separate suit must be brought against the surety. *Kali Chand Singh & Hal Chand Singh I L R. 15 Cal. 497* referred to. *TOKHAI SINGH & UDHWANT SINGH*

(I L R., 23 Cal., 25)

32. — *Civil Procedure Code 1877 ss 253 545 552 and 553—Execution of decree—Security for performance of decree*

**SURETY—continued.****2. ENFORCEMENT OF SECURITY—continued.**

*Appellate Court—Method of enforcing such security.*—Where in an appeal security has been given to the Appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner provided for by s. 253 of the Code of Civil Procedure. *Bans Bahadur Singh v. Mughla Begam, I. L. R., 2 All., 604*, followed. *Thirumalai v. Ramayyar, I. L. R., 13 Mad., 1*, and *Venkapa Naik v. Baslingapa, I. L. R., 12 Bom., 411*, approved. *Kali Charun Singh v. Balgobind Singh, I. L. R., 15 Calc., 497*, and *Torhan Singh v. Udwant Singh, I. L. R., 22 Calc., 25*, dissented from. JANKI KUMAR v. SARUP RANI

[I. L. R., 17 All., 99]

**33.** ————— *Execution of decree against surety—Security for due performance of appellate decree, Enforcement of—Civil Procedure Code (1882, as amended by Act VII of 1888), s. 546.*—A security bond given by a third party for the due performance of the decree of the Appellate Court under s. 516 of the Civil Procedure Code cannot be enforced in execution of that decree. *Radha Pershat Singh v. Phuljuri Koor, I. L. R., 12 Calc., 402*; *Kali Charun Singh v. Balgobind Singh, I. L. R., 15 Calc., 497*; and *Tokhan Singh v. Udwant Singh, I. L. R., 22 Calc., 25*, followed in principle. *Venkapa Naik v. Baslingapa, I. L. R., 12 Bom., 411*, dissented from. *Thirumalai v. Ramayyar, I. L. R., 13 Mad., 1*, and *Arunachellam v. Arunachellam, I. L. R., 15 Mad., 203*, referred to. SURJOO DAS v. BALMAKUND DAS

[I. L. R., 23 Calc., 212]

**34.** ————— *Execution of decree—Surety.*—A suit was instituted by C against H in the Hooghly Court, and was dismissed with costs. On appeal by the plaintiff, the defendants obtained an order in the High Court calling on C to give security for costs in the Court below and on appeal, and one R had, as surety, charged his house in Calcutta with the payment of costs to the extent of Rs. 2,000. The appeal was dismissed with costs amounting to more than Rs. 2,000. On an application by the defendants for execution against R under s. 204, Act VIII of 1859, by attachment and sale of the house, the Court granted the application. *HIRALAL SEAL v. CARAFIET. 9 B. L. R., Ap., 17*

**35.** ————— *Civil Procedure Code, ss. 253 and 553—Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Execution-proceedings—Separate suit.*—Under Act VIII of 1859 and the supplemental Act XXIII of 1861, the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject. Reading s. 253 with s. 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety

**SURETY—continued.****2. ENFORCEMENT OF SECURITY—continued.**

under s. 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance. The words "in an original suit" in s. 253 may be treated as a superfluous expression. VENKAPA NAIK v. BASLINGAPA

[I. L. R., 12 Bom., 411]

**36.** ————— *Security for costs—Security-bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1863), s. 6.*—On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force. Held on appeal that the application should have been allowed. ANDER WAHAB v. FAREEDDOONISSA

[I. L. R., 16 Calc., 323]

**37.** ————— *Civil Procedure Code, 1882, ss. 253, 546, 583—Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution of decree.*—When security had been given on behalf of the respondent to an appeal under s. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful, Held that, under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced against the sureties in execution-proceedings. *Venkapa Naik v. Baslingapa, I. L. R., 12 Bom., 411*, approved. THIRUMALAI v. RAMAYYAR

[I. L. R., 13 Mad., 1]

**38.** ————— *Civil Procedure Code, 1880, s. 336—Surety, Liability of—Execution-proceedings.*—The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. D, a judgment-debtor, was committed to jail on the 8th August 1884, and he applied, under s. 333 of the Civil Procedure Code, to be released. On the 16th of November 1881 B and C stood security for him under the provisions of s. 336 of the Civil Procedure Code that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and D was thereupon released. Instead of applying under s. 344 to be declared an insolvent, he applied to have the decree, which had been obtained ex-parte, set aside. This application was disallowed, and the decree-holder was directed to take further steps.

**SURETY—continued****2 ENFORCEMENT OF SURETY—continued**

On the 21st of February 1885 the application for execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties until they should produce the judgment debt in Court. It was held that the power reserved to the Court, under s. 319 of the Civil Procedure Code to realize the security executed on the decree could not be exercised when the execution proceedings wherein the security was furnished was no longer in existence. **LALJI DABOT v. ODOYA SUNDRI MITRA**

(I. L. R., 14 Cal., 757)

33

*Right of sureties*

*to appeal—Extent of their liability—Attachment before judgment—Security under s. 454 of Civil Procedure Code (Act XIV of 1882)—Decree—Stay of execution by Appeal to Court—Fresh security under s. 545 of Civil Procedure Code (Act XIV of 1882)—Liability of original sureties—A surety against whom a decree was made to be enforced under s. 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution proceedings, and A and B became sureties under s. 454 of the Code of Civil Procedure (Act XIV of 1882) for the production of property attached before judgment by the Court of first instance. Under their surety bonds they were bound, in default "to pay to the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favor for Rs. 220 14-0. Against this decree both parties appeal to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security under s. 515 "for the due performance of such decree or order as may ultimately be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favor for Rs. 800 and costs. Thereupon the decree holder sought to enforce the appellate decree against the sureties A and B under s. 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having been reversed in the appellate decree, they were not liable at all under their bond which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security. *Held* that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of first instance was for the satisfaction of its decree, not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the terms on which it would take security for the execution of its own decree. *Held* also that, so soon as the decree of the Court of first instance was made, the liability*

**SURETY—continued****2 ENFORCEMENT OF SURETY—continued**

of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court when required the property specified in their bond or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability, having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the Appellate Court. **SHIVAM v. SHIVAM BILWASI** (I. L. R., 12 Bom., 71)

40

*Surety after passing of decree—Mode of realization of security—Civil Procedure Code, s. 253 Jurisdiction of Revenue Court—Where, after the passing of a decree for arrears of rent, a friend of the judgment-debtor entered into a security bond whereby he rendered himself personally liable and hypothecated a share in certain zamindari property to secure the performance of the decree, it was held that the obligation created by such security bond could not be enforced by a Court of revenue by the sale of the hypothecated property. **BERARI LAL v. JAYRAM DAS DINGAR** (I. L. R., 19 All., 257)*

41.

*Surety under Civil Procedure Code (1882), s. 319—Surety for insolvent judgment-debtor—Default of principal—Liability of surety—Mode of enforcing liability of surety—The Civil Procedure Code (Act XIV of 1882) provides no means for enforcing in execution a surety bond passed under s. 319. The proper course of the plaintiff is to obtain an assignment of the bond with a view to suing on it. **MINGALE ANJON KARS v. RAMCHANDRA BAJE** (I. L. R., 19 Bom., 694)*

42.

*Liability of surety after decree passed in original suit—Civil Procedure Code (Act XIV of 1882), s. 253 Execution of decree against surety—An ex parte decree was set aside on condition that the defendant should find a surety who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. On an application to execute the decree which was subsequently made against the defendant by the decree-holder both against the defendant and the surety, objection was taken to the execution by the surety, and was allowed by the Court below. *Held* that under s. 53 of the Code of Civil Procedure the decree-holder was entitled to take out execution against the surety. **SOMAYYU BHARA v. DINO NATH SHARMA** (I. L. R., 23 Cal., 223)*

(I. L. R., 23 Cal., 223)

3 C. W. N., 258

**3 DISCHARGE OF SURETY.**

43. *Appearance of debtor—Act XXIII of 1881, s. 8 Discharge of defendant on bail—Where a Court during the pendency of an*

**SURETY—continued.****3. DISCHARGE OF SURETY—continued.**

inquiry under Act XXIII of 1861, s. 8, allowed the defendant to be at large upon security for his appearance when called upon; and when the court had concluded the inquiry it was found that the defendant had appeared, the liability of the surety was held to be at an end. *BALMER, LAWRIE & Co. v. HUREE NARAIN PODDAR* . . . 24 W. R., 292

44. ——— Change in circumstances under which security was given—*Guarantee for good conduct of gomashia—Transfer of property guaranteed.*—Where two parties executed a surety bond addressed to J, R, and M, owners of certain property, binding themselves to be answerable for the good conduct and proper discharge of duties of their comishita, B, and the property was afterwards transferred to R alone, it was held that, when J and M ceased to have any interest in the property, there was such entire change in the nature of the service that the sureties' liability did not continue, and they were not liable to be sued upon their bond. *RAJ KRISHN MOOKERJEE v. ISSUR CHUNDER MOOKERJEE* . . . 23 W. R., 90

45. ——— Alteration of position and risk of salt darogah—*Liability of surety for performance of duties.*—When a salt darogah deposits security for the due performance of his duties to be appropriated by Government in case of loss to the State from his failure to perform them, and the Government, without his consent, alters his position and risk, such alteration relieves him from his engagement as surety. *SHIB NARAIN BANERJEE v. GOVERNMENT* . . . W. R., 1864, 139

46. ——— Civil Procedure Code, ss. 336, 341—*Insolvency—Surety for insolvent judgment debtor filing petition.*—One B M became surety under s. 336 of the Code of Civil Procedure on behalf of one G R, a judgment-debtor, to the effect that G R would appear before the Court when called on and would within one month file an application to be declared an insolvent. G R did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court refused to do so. Held that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent. *Koylash Chandra Shaha v. Christophoridis*, I. L. R., 15 Cal., 171, referred to. *BANNA MAL v. JAMNA DAS* . . . I. L. R., 15 All., 183

47. ——— Acceptance of further security—*Security signed by surety—Security-bond.*—A security, voluntarily signed, existing upon the record, and even taken off the file, is a valid and subsisting security. The intentions and motives of the obligor in giving the security must be judged by what is mentioned in the instrument. The acceptance of the separate security of one surety is not invalidated by the acceptance of separate securities of five other sureties. *GOPAL INDER NARAIN ROY v. JAGAR NATH GUPTA* . . . [5 W. R., P. C., 129: 2 Moore's I. A., 311

48. ——— Notice of intention to cease to be surety—*Security for payment of rent.*—A

**SURETY—concluded.****3. DISCHARGE OF SURETY—concluded.**

surety for the due payment of rent by a third person must, if he wish to discharge himself, give notice to the person to whom the guarantee has been given. *GUNESH KOOPER v. OOMPUTOONNISSA BEGUM* [8 N. W., 77

**4. MISCELLANEOUS CASES.**

49. ——— Surety of lessee afterwards becoming his partner—*Suit by surety for illegal ejectment of lessee—Suit for damages.*—Where a person became surety for the due performance by the lessee of the obligations contained in a lease for a term of years, and afterwards became a partner with the lessee, and the lessor evicted the lessee before the expiration of the lease,—Held that a suit would lie by the surety for damages arising from the illegal ejectment, although the surety was not a party to the original contract with the lessor. *BURRODAKANT ROY v. RAM TUNNOO BOSE* . . . 7 W. R., P. C., 15

*S. C. BURDAKANTH ROY v. ALUK MUNJOOREE DASIAH* . . . 4 Moore's I. A., 321

50. ——— Suit by surety after satisfaction of bond—*Cause of action—Limitation.*—The plaintiff executed a bond jointly with a servant of the defendants on 10th July 1861. The proceeds were expended for the defendant on the 30th August 1861. The creditor obtained a decree upon the bond for principal and interest, which the plaintiff satisfied by two payments made on 4th July 1866 and 30th June 1868, respectively. He brought a suit against the defendant for the amount on 22nd June 1869. Held that the plaintiff could maintain his suit against the defendant for the amount paid by him, and that the suit was not barred by the law of limitation. *BHAGIRATH ADHIKARI v. TABINI CHANDRA PAKRASI*

[7 B. L. R., 35: 15 W. R., 413

Reversing on appeal *S. C. BHOTEERUTH ADHIKAREE v. TABINEE CHUNDER PAKRASSIE*

[14 W. R., 174

**SURRENDER OF TENURE.**

See CASES UNDER LANDLORD AND TENANT—ABANDONMENT, RELINQUISHMENT, OR SURRENDER OF TENURE.

See LANDLORD AND TENANT—LIABILITY FOR RENT . . . I. L. R. 19 Cal., 790

See LANDLORD AND TENANT—SURRENDER OF RENT—NON-PAY-DAUGHTERS.

[I. L. R. R., 8 Bom., 86.  
15 B. L. R., 10  
L. R., 2 I. A., 113

**SURVEY.**

1. ——— Survey, INHERITANCE—SPECIAL of Collector to re-open.—AFFILIATED SON, concluded, the map comp [I. L. R., 17 Mad., 48 proceedings brought to ANN—INHERITANCE—SPECIAL has no authority to re-charge. he does so on the appl [I. L. R., 16 All., 191 a notice to the opposit L. R., 21 I. A., 17



**SURVEY AWARD—continued.**

14. ———— *Effect as against decide for possession*—A survey award cannot override the decree of a competent Court awarding possession. **HURO NATH ROY v. ANUND CHUNDER ROY**  
[1 W. R., 329]

15. ———— *Evidence of possession—Evidence of title*.—Survey proceedings are evidence of actual possession, and must be regarded as correct, so far as the appearance of the country is recorded thereon; but if questioned in time, are not conclusive on the question of title. **LEELA UN D SINGH v. MOHENDRO NARAIN SINGH**  
[13 W. R., P. C. 7]

16. ———— *Proof of possession—Suit to set aside survey award*.—In a case for setting aside a survey award which declared the plaintiff and the opposite party entitled to certain chur lands to the extent they had respectively lost by diluvion and the residue to be held jointly according to their shares, *Held* that the opposite party had no right to sue for rents on the plea of joint possession, for he must first have fixed what lands are to be appropriated by him, and what by the intervenor separately, for the loss suffered by each party by diluvion; and after that how much, and what, of the remainder is entitled to be held jointly. **TARINEE KANT LAHOORI v. HANEE MUNDUL**  
[7 W. R., 203]

17. ———— *Award by superintendent of survey—Evidence of title*.—An award by the superintendent of survey is not conclusive evidence of a contested right in a regular suit. **KOYLASH CHUNDER GHOSE v. RAJ CHUNDER BANERJEE**  
[12 W. R., 180]

18. ———— *Decision on Act VI of 1840—Evidence of title*.—A decision in an Act IV of 1840 case was no evidence of title one way or the other. **GUDADHUR v. KOONDOR RAMKOOVAR BOSE**  
[6 W. R., 155]

19. ———— *Award under Act IV of 1840—Proof of title*.—An award under Act IV of 1840 was not sufficient proof of title when the person in whose favour it was given did not maintain his possession under the award before the survey authorities, and allowed his adversary to take actual possession. **BOOGUL KISHOR SHAHA v. RAJ KISHAN SURMAH**  
[3 W. R., 129]

20. ———— *Suit to set aside award under Act IV of 1840—Proof of title*.—In a suit to set aside an award under Act IV of 1840, *Held* that the plaintiff ought to furnish some decisive proof of his title, to justify the Court in disturbing the award of a competent authority, and that resumption proceedings instituted by Government, which declared only that the lands were unfit for resumption and the share left them in the plaintiff's possession, were not such convincing proof of title. **BAMA-SOONDEREK DABFA CHOWDHURANEE v. BHUGUTTEE DABFA CHOWDHURANEE GREENSH CHUNDER CHOWDHURY v. BHUGUTTEE DABFA CHOWDHURANEE**  
[1 Hy, 495]

**SURVEY AWARD—concluded.**

21. ———— *Award under Beng. Reg. VII of 1822, s. 33—Power of Court to set aside award*.—*Held* that an award of arbitrators under s. 33, Regulation VII of 1822, could not be set aside by the Courts of Judicature. **FUZUND ALI v. AHMED HOSSAIN**  
[1 Agra, 267]

22. ———— *Award for more than amount of land claimed*.—A survey award, if given for more than is claimed, is not binding as to the excess. It is not conclusive as to title. **LALCHIT NARAIN SINGH v. NARAIN SINGH**  
[1 W. R., 333]

**SURVEY OFFICER.**

See CASES UNDER KHOTI SETTLEMENT ACT

See UNDER SETTLEMENT OFFICER.

See SPECIAL OR SECOND APPEAL—ORDEES SUBJECT OR NOT TO APPEAL.

[I. L. R., 21 Calc., 935]

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R., 21 Calc., 935]

**SURVIVORSHIP.**

See ATTACHMENT—ATTACHMENT BEFORE JUDGMENT. I. L. R., 17 Mad., 144

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.

[I. L. R., 19 Bom., 338]

I. L. R., 17 All., 578

I. L. R., 23 Calc., 912

I. L. R., 22 Mad., 380

See CONVEYERS. I. L. R., 10 Mad., 69

See COURT FEES ACT, 1870, s. 19D

[I. L. R., 23 Calc., 980]

See GRANT—POWER OF ALIENATION BY GRANTEE. I. L. R., 11 Calc., 1

See HINDU LAW—INHERITANCE—IMPARTIBLE PROPERTY. 6 Mad., 93

[I. L. R., 4 Mad., 250]

I. L. R., 19 Mad., 451

L. R., 23 I. A., 128

See CASES UNDER HINDU LAW—INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—DAUGHTERS

[I. L. R., 6 Bom., 85]

15 B. L. R., 10

L. R., 2 I. A., 113

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—AFFILIATED SON.

[I. L. R., 17 Mad., 48]

See HINDU LAW—INHERITANCE—SPECIAL LAWS—NINANGS

[I. L. R., 16 All., 191]

L. R., 21 I. A., 17

**SURVIVORSHIP—concluded**

See HINDU LAW JOINT FAMILY—LOWERS  
OF ALIENATION BY MEMBERS—OTHER  
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I. L. R. 1 Calc. 223

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I. L. R. 21 Bom. 787

See HINDU LAW—PARTITION—PRINCIPLES FOR PARTITION

[I. L. R. 10 Mad. 345]

See HINDU LAW—PARTITION—SHARES IN  
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[I. L. R. 15 Bom. 443]

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Joint tenancy—Joint speculation

on improving land—Real and personal property.

—A joint speculation in improving land on a hazard

of profit and loss is treated in equity as in the nature

of merchandise and *res merces* and not allowed.

The survivorship in the case of joint tenancy is not

an incident to it in the case of less than full property

and personal estate. *Went v. Lester*

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See CASES UNDER MORTGAGE—TACKING

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[9 Bom., 217]

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See MADRAS DISTRICT MUNICIPALITIES  
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[I. L. R., 23 Mad., 523]

See MADRAS DISTRICT MUNICIPALITIES  
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[I. L. R., 1 Mad., 158  
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1. Certificates tax—Neglect to  
take out cert. ficate—Fine. The fine imposed under  
s. 17 Act IX of 1863 for neglect to take out a cert.  
ficate must not be less than twice the amount for  
which such cert. ficate should be taken out. *QUEEN*  
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[3 B. L. R., Ap., 40  
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2. Complaint for neglecting to  
take out cert. ficate—Collector of a Magistrate  
—Where a person fails to recover the penalty described  
in s. 1 Act IX of 1863 from any person who omits  
to take out a certificate the Collector who issued the  
notice should prefer a complaint before a Magistrate  
and the Collector cannot prefer the complaint before  
himself in his capacity of Magistrate. *ANONYMOUS*  
[4 Mad., Ap., 62]

3. — Magistrate, Powers of.—A  
Magistrate was held to have acted rightly in dismissing  
complaint under s. 17 of Act IX of 1863, because  
there was no evidence that the names of the accused  
were included in the list mentioned in s. 17. In a  
prosecution under this Act a Magistrate must pro-  
ceed in the manner laid down in Ch. XI of the  
Code of Criminal Procedure 1861 and must require  
proof of all the facts which constitute the  
offence. *QUEEN v. KHEITRO MOWUN GHOSH*  
[11 W. R., Cr., 58]

4. — Muhtarafa—Trade tax. *Zimn*  
*dar's right to collect—Mad. Reg. XXV of 1803*  
s. 4—*Mad. Reg. XXI of 1832*. The right of  
collect the muhtarafa of trade tax from artisans  
in his jurisdiction has not been delegated by Govern-  
ment to the zamindar of Karva nagar and cannot  
be legally exercised by his assignees. *Quere*—  
Whether it was competent for Government to dele-  
gate the collection of the muhtarafa to zamindars for  
their own use. *VEDANTA v. KANHTAPPA*  
[I. L. R., 9 Mad., 14]

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See LIMITATION ACT 1877 ART. 81 (157)  
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See RULES OF HIGH COURT 1864—  
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[7 B. L. R., Ap., 59]

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[I. L. R., 20 Cal., 899]

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[I. L. R., 19 All., 129]

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[I. L. R., 24 Cal., 821]

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See CONTRACT—WAGERING CONTRACTS

[4 Moore & L. A., 839]

5 Moore & L. A., 109

6 Moore & L. A., 251

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*Act (XXI of 1849)*—Where the plaintiff had ex-  
pended money at the request of the defendant in the  
purchase or settlement of taxi mandis tax—*He* is  
he was entitled to recover notwithstanding Act XXI  
of 1849. *KANAYALL v. CHAGMAL BATTIA*  
[8 B. L. R., 413]

*BHAKTANATH KHEITRI v. JUMAYRAM DRIN-*  
*DARIA*  
8 B. L. R., 415 note

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[I. L. R., 8 N., 20 10 W. R., 280]

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See HINDU LAW—ENDOWMENT

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See CASES UNDER LANDLORD AND TENANT.

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8 C. L. R., 50  
1 Mad., 109  
I. L. R., 19 Bom., 150  
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[I. L. R., 8 Mad., 424  
I. L. R., 22 Bom., 893  
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[I. L. R., 11 Bom., 69, 573

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————— Suit against, for share of rent.

See CASES UNDER CO-SHARERS—SUITS BY  
CO-SHARERS WITH RESPECT TO THE  
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**TENANT—concluded.**

See CASES UNDER CO-SHARERS—SUITS BY  
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See CASES UNDER CO-SHARERS—SUITS BY  
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See BENGAL RENT ACT, 1869, s. 46.  
[I. B. L. R., S. N., 7: 10 W. R., 101  
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[I. L. R., 17 Mad., 267

See TRANSFER OF PROPERTY ACT, s. 135.  
[I. L. R., 22 Calc., 792  
2 C. W. N., 147

**1. ——— Validity of tender—Contract Act, s. 38—Tender of interest on mortgage-debt.**—Under a mortgage-deed taken to secure the repayment within three years of a sum of Rs. 600 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that, if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal any sum not less than Rs. 1,000. The first year's interest was allowed to get into arrear, but in September 1875 the defendant went to the plaintiff with Rs. 19,000, a greater sum than was due for principal and interest, and told him to repay himself from that sum. The offer was refused, and the plaintiff thereupon brought a suit on the 9th July 1877 for Rs. 6,000, with interest from the date of the mortgage to the date of the suit and subsequent interest. *Held* that the tender made by the defendant, although not valid according to English law, was valid under s. 38 of the Contract Act. *Per WILSON, J.*—S. 38 of the Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. *KANYE LALL KHAN v. KHETTERMOONEY DOSSEE* 5 C. L. R., 105

**2. ——— Offer by letter to pay debt.**—A mere offer by a debtor by letter to pay an amount cannot be treated as a tender either in law or in equity. In order to stop interest, a strict tender should be proved. *KAMAYA NAIK v. DEVAPA RUDRA NAIK*. I. L. R., 22 Bom., 440

**3. ——— Unconditional tender—Costs.**—In a suit to recover Rs. 1,23-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of Rs. 1,013-5, stating in the letter of tender

**TENDER—concluded**

that the sum so tendered was the only sum due. At the trial the plaintiff obtained a decree for the full amount claimed by him. *Held* both in the Court below and on appeal, that the tender was bad, and therefore the plaintiffs were entitled to their costs. *Held per KENNEDY J* that the tender was bad being a tender of part of an entire debt. *Held per GARTH C J* (MARKEY J, concurring) that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of the claim. *CHUNDER CATTY MOOKERJEE v JODOOVATH KHAN* [I L R., 8 Calc., 488 1 C L R., 470]

4. **Tender of part of debt** *Rule as to—Plea of tender—Payment into Court*—The rule laid down in *Dixon v Clark* 5 C B., 365 that the tender of only a part of a debt must be treated as if it had never been made applies only where the party making the tender admits more to be due than is tendered. A plea of tender before act on must be accompanied by a payment into Court after act on otherwise the tender is ineffectual. *ABDUL RAHMAN v NOOR MAHOMED* [I L R., 18 Bom., 141]

5. **Agent—Cheque in payment of debt for rent—Suit for rent—Costs**—The landlord of a house through his agent sent in rent-bills to his lessee. The lessee gave the agent a cheque payable to her attorney for the amount demanded. The attorney realled the amount of the cheque and gave the money to the agent, who tendered it to the landlord's attorney who refused to accept and the money was returned to the lessee's attorney. *Held* in a suit for the rent that under the circumstances, the tender amounted to payment. *Held* further that although as a general rule the amount of a tender not accepted on bill to be paid into Court in order to entitle the defendant to costs, yet that, as the tender in this case amounted to payment the defendant was entitled to have the suit dismissed with costs. *BOLTE CHUND SING v MOULAB* [I L R., 4 Calc., 572]

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*See* BENGAL PVT ACT 1860 s. 2 (ACT V of 1859 s. 8)

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*See* CASES UNDER LANDLORD AND TENANT—ABANDONMENT RELINQUISHMENT OR SURRENDER OF TENURE

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*See* CASES UNDER LANDLORD AND TENANT—FORFEITURE.

Relief against—

*See* CASES UNDER LANDLORD AND TENANT—FORFEITURE.

Transfer of—

*See* BENGAL REGULATION VIII of 1919

[3 B L R., P C., 48

I L R., 17 Calc., 182

*See* BENGAL TENANCY ACT s. 12.

[I L R., 16 Calc., 643

I L R., 10 Calc., 17 774

*See* LANDLORD AND TENANT—EJECTMENT

—NOTICE TO QUIT

[I L R., 14 Mad., 98

*See* LANDLORD AND TENANT—FORFEITURE

—BREACH OF CONDITIONS.

[I L R., 17 Calc., 696

*See* LANDLORD AND TENANT—FORFEITURE

—TRANSFER OF TENANCY

[I L R., 20 C B., 520

*See* CASES UNDER LANDLORD AND TENANT

—TRANSFER BY LANDLORD

*See* CASES UNDER LANDLORD AND TENANT

—TRANSFER BY TENANT

*See* LEASE—CONSTRUCTION

[I L R., 17 Calc., 626

*See* OUST OF PROOF—LANDLORD AND

TENANT I L R., 13 Mad., 60

*See* CASES UNDER RIGHT OF OCCUPANCY—

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*See* STAMP ACT 186., s. 14.

[3 B L R., Ap., 50

1. **Grant for purpose of living on the land.**—*Per* PEACOCK C J—If one man grants a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary is assignable. *BENI MADHAB BANERJEE v JAI KRISHNA MOOKERJEE* [7 B L R., 152 12 W R., 485]

Upholding on appeal *KEMP J.*, in *BANER MA DHUB BANERJEE v JOY KRISHNA MOOKERJEE* [11 W R., 354]

2. **Homestead land—Transferability under the law before the Transfer of Property Act (IV of 1882)—Custom**—Where a non-agricultural holding was transferred before the passing of the Transfer of Property Act—*Held* that it could not be inferred that the holding was transferable from the mere fact that it was used for residential purposes, having regard to the law as it then stood. s. 104 cl. (j) of the Transfer of Property Act (IV of 1882) does not apply to transfers which took place before the Act. *BENI MADHAB BANERJEE v JAI KRISHNA MOOKERJEE* 7 B L R., 152, followed.

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NABU MONDUL *v.* CHOLIM MULLICK  
[I. L. R., 25 Calc., 898]

3. ——— Mokurari tenure.—It is necessary that a tenure should be mokurari in order to be transferable. HUBOMOHUN MOOKERJEE *v.* LALUN-MONEE DASSEE . . . . . 1 W. R., 5

4. ——— Surburakari tenure in Cuttack.—Consent of zamindar.—The alienation of surburakari tenure in Cuttack is not practicable without the consent of the zamindar. DOORJODHUN DOSS *v.* CHOXYA DATE . . . . . 1 W. R., 322

5. ——— Raiyatwari tenure.—Consent of zamindar or talukhdar.—Quære—Whether a transfer of a raiyatwari tenure can be effected without the consent of the zamindar or talukhdar, as the case might be, the immediate successor in estate. SHIBES-SUREE DEBIA *v.* MOTOORANATH ACHARJEE  
[13 W. R., P. C., 18; 13 Moore's I. A., 270]

**TERM OF YEARS.**

See ENGLISH LAW—PERSONALTY, LAW  
RELATING TO . I. L. R., 24 Calc., 218

**TERRITORIAL JURISDICTION.**

——— Effect of Cession on—

See CESSION OF BRITISH TERRITORY IN  
INDIA . . . . . I. L. R., 1 Bom., 367  
[L. R., 3 I. A., 102  
10 Bom., 37]

**TERRITORIAL LAW OF BRITISH INDIA.**

——— Nature of territorial law—*English law.*—The territorial law of British India is a modified form of English law. SECRETARY OF STATE *v.* ADMINISTRATOR-GENERAL OF BENGAL  
[1 B. L. R., O. C., 87]

**TERRITORY, TRANSFER OF—**

——— District of Kanara—16 & 17 Vict., c. 95, 21 & 22 Vict., c. 106—*Indian Councils Act*, 24 & 25 Vict., c. 67.—The power given by 16 & 17 Vict., c. 95, to alter the distribution of territories among the presidencies, was vested by 21 & 22 Vict., c. 106, in the Secretary of State for India, by whose order of 28th of February 1862 North Kanara was annexed, the new arrangement of territory to take effect from such date as the Governor-General of India in Council should by proclamation appoint for the purposes of the Councils Act, 1861, which Act has reference solely to the constitution and functions of the Legislative Councils, and does not purport to affect in any way the exercise of the general powers of Government, or the administration of justice, and the juris-

**TERRITORY, TRANSFER OF—concluded.**

diction and authority of the Courts of Justice, the annexation of those purposes being made by the Secretary of State, and not being qualified or controlled by the proviso in s. 47 of 24 & 25 Vict., c. 67, which cannot be construed as a substantive enactment, or as qualifying or restraining the power vested in the Secretary of State. REG. *v.* VYANKATESWAMI . 2 Bom., 112; 2nd Ed., 108

**TESTATOR.**

See HINDU LAW—WILL.

See MAHOMEDAN LAW—WILL.

See CASES UNDER WILL.

——— Acknowledgment of signature  
by—

See WILL—ATTESTATION.  
[I. L. R., 1 Bom., 547]

——— Creditor of—

See PROBATE—OPPOSITION TO, AND REVOCATION OF, GRANT.

[I. L. R., 2 Calc., 208  
I. L. R., 6 Calc., 429, 480  
I. L. R., 10 Calc., 18, 413  
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——— Debts of Hindu—

See VENDOR AND PURCHASER—NOTICE.  
[I. L. R., 4 Calc., 897]

——— Power of—

See CASES UNDER HINDU LAW—WILL—  
POWER OF DISPOSITION.

See MAHOMEDAN LAW—WILL.

——— Signature of—

See CASES UNDER WILL—EXECUTION.

**THAKBUST AWARD.**

See ACT XIII OF 1848.  
[2 B. L. R., P. C., 111; 12 W. R., P. C., 6]

**THEFT.**

See CATTLE TRESPASS ACT, s. 22.  
[I. L. R., 22 Calc., 139]

See CHARGE—ALTERATION OR AMENDMENT OF CHARGE

[I. L. R., 17 Bom., 369  
I. L. R., 27 Calc., 680, 990]

See PARTNERSHIP PROPERTY.

[13 B. L. R., 307, 303 note, 310 note]

See POST OFFICE ACT, s. 48.

[I. L. R., 14 Mad., 229]

See CASES UNDER STOLEN PROPERTY.

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committed outside jurisdiction

See CASES UNDER JURISDICTION OF CRIMINAL COURT OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—RECEIVING STOLEN PROPERTY

See CASES UNDER JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—THEFT

Damages for—

See HINDU LAW—JOINT FAMILY—SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, ETC

[1 L. R., 24 Calc., 672]

Suspicion of—

See FOREST ACT s. 57 73

[1 L. R., 15 Bom., 229]

1. ——— Penal Code s. 378—Definition of theft—As to what constitutes theft as defined in the Penal Code. *QUEEN v. MADABEE*

[3 W. R., Cr., 2]

2. ——— Moving property and severing it—The moving by the same act which effects the severance may constitute a theft. *ANONYMOUS*

5 Mad., Ap., 38

3. ——— Removal of property against wish of ostensible purchaser thereof—Apparent title or colour of right to property—To constitute theft it is sufficient if property is removed against his wish from the custody of a person who has an apparent title or even a colour of right to such property. *Cope v. Scott*, L. R., 2 Q. B. 269 followed. *QUEEN EMRESS v. FOR NERAGAM*

1 L. R., 8 Bom., 135

4. ——— Giving up right of possession in property by owner—A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft. *ANONYMOUS*

[4 Mad., Ap., 30]

5. ——— Making away with property lawfully possessed—The making away with property of which a person has been put in lawful possession by superior authority is not theft, but criminal breach of trust. *QUEEN v. BHARAT CHUDDE*

1 W. R., Cr., 2

6. ——— Unexplained possession of rice—Meaning of corpus delicti—Where a prisoner was found in possession of rice not thrashed in the usual way, and having no paddy land of his own he failed to account satisfactorily for his possession of the rice—Held he could not be convicted of theft without more evidence. The meaning of the term 'corpus delicti' explained. *ANONYMOUS*

7 Mad., Ap., 19

7. ——— Dishonestly taking Omission of allegation of—The prisoner was convicted of theft on his own confession. The charge to which the prisoner pleaded did not allege the taking out of the possession of some person dishonestly, and

**THEFT—continued**

there was no evidence of such taking. Held that the conviction was bad. *ANONYMOUS* 5 Mad., Ap., 37

8. ——— Theft of joint property by co-partner—Theft of joint property may be committed by a co-partner if he takes it from joint possession and converts such possession into separate possession. *QUEEN EMRESS v. FOR NERAGAM*

1 L. R., 10 Mad., 188

9. ——— Abetment of theft—Receiving stolen property—Joint undivided Hindu family—A Hindu, intending to separate himself from his family emigrated to Demerara as a coolie. After an absence of thirty years, he returned to his family, bringing with him money and other movable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family, he lived in communal life with it but he did not treat such property as joint family property, but as his own property. Held that such property was his sole property, and his brother was not a joint owner of it, and could properly be convicted of theft in respect of it. It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property. *EMRESS v. SITA RAM HAI*

1 L. R., 3 All., 181

10. ——— Dispute as to possession of land—Bond fide belief as to title—Cutting and carrying away crops sown by another—Facts constituting theft—Dishonest intention—Code of Criminal Procedure (Act V of 1893), ss. 423 and 430—An accused person alleged as he claimed that certain paddy was grown upon his job, and that he cut and removed it as a matter of right, and in an assertion of a bond fide claim to the land. It was admitted by the complainant, who also claimed the paddy and the land, that there had been a boundary dispute between his landlord and the landlord of the accused. The accused was convicted in a summary trial of the theft of the paddy. In an application for revision and to set aside the conviction, *Held per PRINCE J.* declining to interfere that if the complainant's bargadars had grown the crops as found and nevertheless the accused cut and carried them off there could be no bond fide belief that he was entitled to do so, to justify his action in regard to the complainant. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without justification in thus taking the law into his hands even if he was entitled to hold the lands, because he was not in actual possession of them. *Per STEVENS J.*—The findings of the lower Court taken as a whole amounted to a finding that the accused acted mala fide, and the mere fact that he brought some witnesses to speak to his long possession of the land and the cultivation of the crops by him, could not be taken as showing that a bond fide dispute as to title existed between the complainant and himself. To constitute theft, it is sufficient if property is removed against his wish from the custody of a person who has an apparent title or even a colour of right to such property. In the present case the

**THEFT—continued.**

complainant had an apparent title as tenant of the land, together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the accused removed. The application should be dismissed. *Queen-Empress v. Gangaram Santram, I. L. R., 9 Bom., 135*, referred to. *Per STANLEY, J., contra.*—That the evidence as well for the prosecution as for the defence conclusively established that there was a *bonâ fide* dispute as to the title to the land upon which the paddy was sown. Once this was shown, the criminal charge failed. The fact, if it be the fact, that the paddy was sown by the complainant, would not give him the property in the crop, if it were sown on the land of the accused. If the land was the land of the accused, it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant had no right to complain if the accused resented his act of aggression by cutting and removing the crop. A dishonest intent is a necessary ingredient in the offence of theft. No such intention has been found on the part of the accused. The conviction and sentence should be set aside. *PANDITA alias RAHMATULLA PRAMANIK v. RAHMATULLA AKUNDU*  
[I. L. R., 27 Cal., 501  
4 C. W. N., 480]

11. *Cutting and removing crops under claim not to the crop, but to the land on which it was grown—Charge, Framing of—Penal Code, ss. 143, 379.*—The accused in a body cut and took away certain paddy found by the Court to have been sown by the complainant. At the trial they alleged that the land on which the paddy was grown was theirs, and that the crop was sown by one of their tenants, and not by the complainant. A suit by the complainant's landlord against some of the accused was then pending in a Civil Court. *Held* that whatever might be the legal claim of the accused in respect of the land on which the paddy was sown, as they had never claimed the crop as belonging to them, they did not act in good faith believing the crop to be their own property, and were therefore guilty of the offences under ss. 143 and 379. *Abdool Bivas v. Khator Mondal, 3 C. W. N., 332*, distinguished. *JAGAT CHANDRA ROY v. RAKHAL CHANDRA ROY*  
4 C. W. N., 190

12. *Mahomedan married woman—Husband and wife—Taking property of husband.*—A Mahomedan married woman may be convicted of theft, or abetment of theft, in respect of the property of her husband. *REG. v. KHATABAI*  
[8 Bom., Cr., 9]

13. *Hindu woman removing stridhan from possession of her husband.*—A Hindu woman who removes from the possession of her husband, and without his consent, her patta or stridhan, cannot be convicted of theft, nor can any person who joins her in removing it be convicted of that offence. *REG. v. NATHA KALYAN*  
[8 Bom., Cr., 11]

14. *Removal by a wife of her husband's property left in her custody.*—There is no presumption of law that a wife and

**THEFT—continued.**

husband constitute one person in India for the purposes of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft. *QUEEN-EMPRESS v. BUTCH*  
I. L. R., 17 Mad., 401

15. *Removal of family jewels by wife and persons coming to commit adultery with her.*—Two persons were committed for trial, the first prisoner for adultery, enticing away a married woman, and theft, and the second prisoner for abetment of the enticing away and theft. The first prisoner was acquitted of the charges of adultery and enticing away. The case for the prosecution was that the prosecutor's wife left her husband's house in company with the first prisoner, and that previous to her departure she, by means of false keys supplied to her by the second prisoner, opened the room where the family jewels and money were kept and removed them. The jewels were deposited with the second prisoner for safe custody. Part of the money was handed to the first prisoner. *Held* that, notwithstanding the acquittal, the prisoners were not entitled to be discharged without trial on the charge of theft. *ANONYMOUS*  
5 Mad., Ap, 23

16. *And s. 114—Forcefully carrying off crop—Want of consent of owner.*—Where a Court finds that parties came with a number of armed men, and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner. Even if they took no part in the actual taking, they must, with reference to s. 114, Penal Code, be considered guilty of the substantive offence under s. 378. *QUEEN v. SHIB CHUNDER MUNDLE*  
8 W. R., Cr., 59

17. *Removal of crop under attachment—Dishonest intention—Madras Rent Recovery Act, s. 8—Notice of distraint.*—Certain crops which had been distrained for arrears of revenue were harvested and removed by the owners and occupiers of the land, who were thereupon charged with theft. The accused were not the defaulters, the demand having been made upon certain other persons in whose names the pottas stood as the registered proprietors. The accused were acquitted. *Held* that the acquittal was wrong in the absence of a finding whether or not the accused were aware of the distraint, and dishonestly removed the crops with such knowledge, on the ground that, under s. 8 of the Madras Rent Recovery Act, they were entitled to notice of the distraint which had not been served on them. *QUEEN-EMPRESS v. RAMASAMI*  
[I. L. R., 16 Mad., 364]

18. *Person acting under ill-founded claim of right.*—A person acting under a claim of right (however ill-founded such claim may be) is not guilty of theft by asserting it. *QUEEN v. RAM CHURN SINGH*  
7 W. R., Cr., 57

19. *Removing a thing with the object of causing trouble to the owner—Wrongful loss.*—The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the cowshed to give a lesson to his master.

**THEFT—continued**

The Sessions Judge in his charge to the jury said "If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner and the act is theft;" and the jury returned a verdict of guilty, finding "that the taking was with the intention of putting the owner to trouble." *Held* the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing "wrongful loss." **HARI BAKSH v. QUEEN EMRESS**

[L. L. R., 25 Cal., 418  
2 C. W. N., 347]

20. *Wrongful gain—Wrongful loss—A charge of theft will lie under s. 378 of the Penal Code (Act XLV of 1860) even where there is no intention to assume entire dominion over the property taken, or to retain it permanently. When a person takes another man's property believing under a mistake of fact and in ignorance of law that he has a right to take it, he is not guilty of theft, because there is no dishonest intent, even though he may cause wrongful loss within the meaning of the Penal Code. The accused was the brother of a farmer or contractor of a public ferry on the Tadrin river. He seized a boat belonging to the complainant while conveying passengers across the creek which flows into the river at a point within three miles from the public ferry. His intention was apparently to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from fees to be paid by passengers crossing the creek. The accused had no reason to believe that he was justified in seizing the boat. *Held* that the accused was guilty of theft, though it was not his intention to convert the boat to his own use, or deprive the complainant permanently of its possession. **QUEEN EMRESS v. NAGAPPA***

[L. L. R., 16 Bom., 344]

21. *Absence of dishonest intent—Cutting paddy under claim of right.—The accused cut and removed paddy from certain land alleging that the land and paddy belonged to his uncle. He cited witnesses in support of his story and also produced a deed of compromise in support of title. The Magistrate disbelieved the defence witnesses, and found that the land and paddy belonged to the complainant, and that the deed related to other land but there was nothing in his judgment to show that the petitioner did not bona fide believe that the paddy belonged to his uncle. *Held* that the findings did not support the conviction for theft. To constitute the offence, it was necessary that the taking away of the paddy should have been done dishonestly, i.e., with the knowledge that it belonged to the complainant and not to his uncle. **ABDOOL BAWAS v. HAKIM MOHDAL***

[3 C. W. N., 332]

22. *Unlawful assembly and theft—Property is crop grown on another's land on contract to pay latter a certain sum for the crop when grown—Removal of such crop by owner of land—An indigo planter agreed with some cultivators that the former would*

**THEFT—continued.**

grow rice on their land at his own expense and take the whole crop paying them Rs 16 for each bigha. The owners of the land cut and carried away the crop so grown. *Held* that on the agreement the crop remained the property of the owners of the land which the factory merely agreed to purchase, and that a removal of the crop did not constitute theft, but merely a breach of contract remediable in damages. As the acts did not amount to theft, which was said to be the common object of the accused, conviction for being members of an unlawful assembly could not stand. **PARMESH WAR SINGH v. EMRESS**

[4 C. W. N., 345]

23. *Removal of debtor's property by the creditor—Penal Code as drafted in 1837, s. 363—With a view to coerce the complainant to pay a sum of Rs 14, which he owed to the accused, three head of cattle worth Rs 100 were removed from the complainant's homestead under the order of the accused. *Held* the offence of theft was not committed by the accused. The illustrations to s. 378 of the Penal Code indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with intention of keeping it himself, or disposing of it for his own benefit or in some way which would compel the owner to pay him money which he did not owe him in order to regain his property. The words "intending to take dishonestly any movable property" in the above section, read with s. 23 and s. 24 of the Penal Code, mean "with the intention of gaining by unlawful means property to which he is not legally entitled." "To gain property by unlawful means" means "to gain the thing moved for the use of the gainer," and not "the gaining possession of it for a time for a temporary purpose." S. 363 of the Penal Code as drafted in 1837 discussed. **PROSOD KUMAR PATRA v. UDOY SANT***

[L. L. R., 23 Cal., 639]

24. *Removal of debtor's property by creditor to enforce payment of debt—Wrongful gain—Wrongful loss—A creditor by taking any movable property of his debtor from the debtor's possession or without his consent, with the intention of coercing him to pay his debt, commits the offence of theft as defined in s. 378 of the Penal Code. Ss. 23 and 24 of the Penal Code discussed and explained. **PROSOD KUMAR PATRA v. UDOY SANT**, L. L. R., 23 Cal., 669, overruled. **QUEEN EMRESS v. SAI CHURN CHUNGO***

[L. L. R., 23 Cal., 1017]

25. *Removal of debtor's property with a view to obtaining payment of his debt.—Held* that the removal by a creditor against the will of his debtor of property belonging to such debtor, with the view of compelling such debtor to discharge his debt, amounts to theft within the meaning of s. 378 of the Penal Code. **QUEEN EMRESS v. SARMOJEE BAN, Weekly Notes, All (1858), p. 97, referred to. PROSOD KUMAR PATRA v. UDOY SANT**, L. L. R., 23 Cal., 669, dissented from. **QUEEN EMRESS v. AGHA MOHAMMAD YUSUF**

[L. L. R., 18 All., 88]



**THEFT—continued.**

26. ———— *Assertion of right by accused—Defence to charge of theft.*—A bare assertion by an accused charged with committing theft of a proprietary right in the alleged stolen property is no reason for a Magistrate to refuse to entertain a charge of theft. *QUEEN v. KALICHARAN MISSEER* . . . 7 B. L. R., Ap., 55

*S. C. RUNNOO SINGH v. KALI CHURN MISSEER*  
[16 W. R., Cr., 18]

*See KHETTES NATH DUTT v. INDRO JALIA*  
[16 W. R., Cr., 78]

*HURIS CHUNDBA DAS v. BOLAI AUDHICAREE*  
[16 W. R., Cr., 75]

27. ———— *Plunder of crops—Assertion of right to crops.*—The mere assertion of a fair claim of property or right, or the mere existence of a doubt as to right, is not sufficient to justify an acquittal in a case of plunder of crops. The claim to the property must be proved by evidence to be fair and good. *NASSIB CHOWDREY v. NANNOO CHOWDREY* . . . 15 W. R., Cr., 47

28. ———— and s. 442.—*Boat—Moveable property.*—A boat may be the subject of theft. Although, under s. 442 of the Penal Code, it is for certain purposes classed with houses, it does not cease to be moveable property under s. 378. *QUEEN v. MEHAR DOWALLA* . . . 16 W. R., Cr., 63

29. ———— *Intention to convert to his own use, Want of—Temporary use.*—When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat, —Held that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping. *ADU SHEDAR v. QUEEN-EMPRESS*  
[I. L. R., 11 Calc., 635]

30. ———— *Property removed with criminal intent, but with consent of owner.*—A sought the aid of B with the intention of committing a theft of the property of B's master. B with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. On the prosecution of A for theft, —Held that, as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed. *EMPRESS v. TROY-LUKHONATH CHOWDHRY*  
[I. L. R., 4 Calc., 366; 3 C. L. R., 525]

31. ———— *Possession of wood by forest inspector—Removal of wood without payment of fees.*—Possession of wood by a forest inspector, who is a servant of Government, is possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft within the meaning of s. 378 of the Penal Code, if that consent was unauthorized or fraudulent. *REG. v. HANMANTA* . . . I. L. R., 1 Bom., 610

**THEFT—continued.**

32. ———— *Moveable property.*—A dug up and immediately carried away without any authority or right several cart-loads of earth, part of unassessed lands of a village. Held that A was not guilty of theft. *QUEEN-EMPRESS v. KOTAYYA*  
[I. L. R., 10 Mad., 255]

33. ———— *Earth—Moveable property.*—Earth, that is, soil, and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft. Whoever dishonestly severs such earth from the earth commits theft. Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land, —Held that he was guilty of theft. *Queen-Empress v. Kotayya, I. L. R., 10 Mad., 255*, dissented from. *QUEEN-EMPRESS v. SHIVRAM*  
[I. L. R., 15 Bom., 702]

34. ———— and s. 95.—*Valueless produce—Property almost valueless.*—Conviction and sentence by a Magistrate reversed, as the act of which the accused was convicted—taking pods (almost valueless) from a tree standing upon Government waste ground—came within the meaning of s. 95 of the Penal Code, and did not therefore amount to theft. *REG. v. KASTA BIV RAVJI*  
[5 Bom., Cr., 35]

35. ———— *Retaining possession of nets of poachers.*—The prisoner, acting *bona fide* in the interests of his employers and finding a party of fishermen poaching on his master's fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers. Held that the prisoner was not guilty of theft. *QUEEN v. NOBIN CHUNDER HODDAR* . . . 6 W. R., Cr., 79

36. ———— *Taking fish in navigable river.*—The taking fish in that portion of a navigable river over which a right of *julkur* exists in another person does not fall within s. 378 of the Penal Code. *HURI MOTI MODDOCK v. DENONATH MALO* . . . 19 W. R., Cr., 47

*BRHUN PARUI v. DENONATH BANERJEE*  
[20 W. R., Cr., 15]

37. ———— *Taking fish from creek.*—The wrongful taking of fish from a creek is not theft. *QUEEN v. REVU POTHADU*  
[I. L. R., 5 Mad., 390]

38. ———— and s. 447.—*Fishery—Fishing in tank connected with a running stream—Criminal trespass.*—Accused were charged with having taken fish from a tank belonging to the complainant, and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish; that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high and the tank was connected with the streams, so that the fish could leave it at pleasure. Held that the fish were *feræ naturæ* and

**THEFT—continued.**

order to constitute the offence of theft in a building is that the property should be under the protection of the building. It is not necessary to show unlawful entry into the building. *QUEEN v. LAMER PRASHAD* . . . . . 21 W. R., Cr., 49

48. . . . . and s. 409—  
Installation of property from house under their charge.—Thief by removal of property from the house they were employed to guard is punishable under s. 380 and not s. 409. *PENAL CODE QUEEN v. BOONATH SINGH* . . . . . 3 W. R., Cr., 29

49. . . . . s. 381.—*Theft by servant*  
—Hired to do so.—A hired labourer does not come within the definition of a clerk or servant under s. 381 of the Penal Code. Theft by such a person in a house is not covered under s. 380. *QUEEN v. BAWOOL MANGH* . . . . . 5 W. R., Cr., 32

50. . . . . s. 381, 409.—*Stealing money in accused's charge*—Criminal breach of trust.—Thief by persons were charged with having stolen a sum of money that up in a box and placed in the police treasury buildings over which they, as labourers, were placed on guard. Held that the charge should have been made under s. 381 of the Penal Code (theft by servant in possession of property), and not under s. 380 (criminal breach of trust by public servant). *QUEEN v. JUNGKEATH SINGH* [2 W. R., Cr., 55]

51. . . . . s. 401.—*Belonging to a gang of persons associated for the purpose of habitually committing theft*—Evidence of bad character.—Evidence Act (I of 1872), s. 14 and s. 51 as amended by Act III of 1891.—The character of the accused as being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under s. 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting one another, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses.—Held they could not be convicted under s. 401 of the Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft. *MANKERA PARI v. QUEEN-EMRESS* [I. L. R., 27 Cal., 139]

DWARKA BENIA v. EMRESS . . . 4 C. W. N., 87

**THEKADAR.**

1. — **Meaning of term.**—The term "thekadar" is properly applicable to hereditary cultivators only when they have also a theka or lease of a share in, or the whole of, the profits of an estate. *BAIS NATH v. MUNDAH* . . . . . 2 N. W., 411

**THEKADAR—continued.**

2. **Made of creation of thekadar's interest.**—Effect of accepting theka.—A thekadar is ordinarily a person who holds a theka or lease of the whole of a zamindar's interest in a village. There is nothing in the law which renders a writing necessary to the creation of such an interest. It is not to be inferred from the mere circumstance that persons accepted a theka that they forewent their existing right. *LEELA DHUR v. BHUGWENT* . . . . . 3 N. W., 39

**THUMB IMPRESSIONS**

See EVIDENCE—CRIMINAL CASES—THUMB IMPRESSIONS . . . . . 1 C. W. N., 33

**TICKET.**

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See RAILWAYS ACT, 1871, s. 2  
[I. L. R., 1 Bom., 25]

See RAILWAYS ACT, 1879, ss. 17, 31.  
[I. L. R., 1 Cal., 192]

**TIMBER.**

—Right to—

See CUSTOM—EVIDENCE OF CUSTOM.  
[9 W. R., 87]

See TYPES . . . . . I. L. R., 24 Bom., 31

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See CASES UNDER POSSESSION—EVIDENCE OF TITLE.

See CASES UNDER POSSESSION—SUITS FOR POSSESSION—PROOF OF PARTICULAR TITLE.

See CASES UNDER RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE.

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See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.

[I. L. R., 17 Calc., 918]

## Decision of Revenue Court as to—

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[I. L. R., 12 Bom., 678]

I. L. R., 15 Bom., 407, 414 note, 415 note

I. L. R., 17 Bom., 631

I. L. R., 18 Bom., 110

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[I. L. R., 1 Bom., 81, 208]

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I. L. R., 13 All., 364

I. L. R., 14 All., 200

I. L. R., 18 All., 210

See BENGAL RENT ACT, 1829, s. 27

[I. L. R., 8 Calc., 365]

I. L. R., 8 Calc., 280, 423

9 C. L. R., 253

I. L. R., 12 Calc., 608

I. L. R., 14 Calc., 634

See CASES UNDER BENGAL RENT ACT, 1829, s. 102.

See BENGAL TENANCY ACT, s. 149

[I. L. R., 17 Calc., 639]

I. L. R., 14 Calc., 637

See BENGAL TENANCY ACT, SEC. III, ART. 3

I. L. R., 18 Calc., 741

See CERTIFICATE OF ADMINISTRATION—PROCEDURE

I. L. R., 3 Calc., 616

[I. L. R., 6 Calc., 303]

I. L. R., 15 Calc., 674

I. L. R., 17 Mad., 477

I. L. R., 23 Calc., 431

See DEKKAN AGRICULTURISTS' ACT, s. 2

[I. L. R., 16 Bom., 128]

See INSOLVENT ACT, s. 26.

[I. L. R., 3 Calc., 431]

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.W. P.

[I. L. R., 13 All., 309]

See JURISDICTION OF REVENUE COURT—BOMBAY REGULATIONS AND ACTS

[I. L. R., 1 Bom., 624]

See JURISDICTION OF REVENUE COURT—MADRAS REGULATIONS AND ACTS

[I. L. R., 15 Mad., 323]

I. L. R., 17 Mad., 140

See JURISDICTION OF REVENUE COURT—N.W. P. RENT AND REVENUE CASES.

[W. R., 1894, Act X, 118]

1 W. R., 38

2 Agra, Rev., 9

3 N. W., 141

I. L. R., 9 Calc., 625

See LETTERS OF ADMINISTRATION [I. L. R., 21 Calc., 344]

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION

[I. L. R., 14 Calc., 169]

See RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE.

[I. L. R., 14 Bom., 627]

**TITLE—continued.**

See CASES UNDER RES JUDICATA—COMPETENT COURT—REVENUE COURTS.

See CASES UNDER RES JUDICATA—COMPETENT COURT—SMALL CAUSE COURT CASES.

See CASES UNDER SMALL CAUSE COURT, MOPUSSIL—JURISDICTION—TITLE, QUESTIONS OF.

See CASES UNDER SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—IMMOVABLE PROPERTY.

See CASES UNDER SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS—TITLE, QUESTION OF.

**Slander of—**

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.

[L. L. R., 1 Mad., 65]

**Warranty of—**

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—GENERALLY.

[4 Bom., A. C., 111]

8 Bom., A. C., 258

12 W. R., 41

I. L. R., 2 All., 108, 828

See CASES UNDER VENDOR AND PURCHASER.

**1 EVIDENCE AND PROOF OF TITLE.****(a) GENERALLY.**

1. ——— Evidence of title—*Oral evidence*.—Where the Principal Sudder Ameen, reversing the decision of the Munsif, dismissed a claim to the possession of certain land, on the ground that "mere oral evidence unsupported by any documentary evidence was not admissible to establish a man's title to landed property," the High Court on appeal reversed his decision, and held that oral evidence, if believed, may be as good for proving a man's title as documentary evidence. *DURBAN FAKHER v. NODIN-CHANDRA MAZUMDAR*

[I B. L. R., S. N., 16: 10 W. R., 217]

2. ——— *Documentary evidence in India*.—The presumption in favour of the genuineness of documents offered in evidence in India is very weak, but it must not be held that the presumption is in favour of forgery, and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title and a possession consistent with it, confirmed by the fact of such possession existing at the time of the commencement of the respondents' title by purchase in 1833, the evidence of extrinsic improbability should be very strong indeed to counterbalance the weight of such testimony. *WISE v. BHOODUN MOYEE DEBIA*

[3 W. R., P. C., 5: 10 Moore's I. A., 165]

3. ——— *Pottah granted by Collector*.—A pottah of land in Calcutta granted by

**TITLE—continued.****1. EVIDENCE AND PROOF OF TITLE**

—continued.

the Collector is not a munim of title, but only evidence of a holding according to a local and fiscal regulation. *FREEMAN v. FAIRLIE*

[I Moore's I. A., 305]

**4. ——— Forged documents.**

—If a party put in evidence in support of his title documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and, if satisfied, adjudicate thereon. *SEVYAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAK v. CHINNA NATANA CHETTI*

15 Moore's I. A., 151

**5. ——— Suit for possession.**

—In a suit to recover possession of land which both the plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which each claimed to have obtained a pottah from Government, the mere fact that the land was included in plaintiff's pottah was held to be insufficient, without going into the facts to ascertain possession, to entitle him to a decree. *GOLAM REZA CHOWDHRY v. CHANDOO MRAH LUSHKUR*

[5 W. R., 45]

**6. ——— Possession—Presumption.**

—The ordinary presumption that possession goes with the title would be of no avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on one side opposed by evidence apparently strong also on the other side, the Privy Council held that in estimating the weight due to the evidence on both sides, the presumption might, under the circumstances of the case, be regarded, and that with the aid of it there is stronger probability that the case of the side that had possession was true than that of the party out of possession. *RUNJEET RAM PANDAY v. GOBERDHUN RAM PANDAY*

20 W. R., P. C., 25

**7. ——— Possession—Limitation Act (XI of 1877), arts. 143, 144—Conflicting evidence of possession—Presumption of title.**

—Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either side, —Held that the presumption that possession goes with the title must prevail. *DHARM SINGH v. HUR PRESHAD SINGH*

I. L. R., 12 Calc., 38

**8. ——— It is only when**

the evidence of possession is strong on both sides and apparently equally balanced that the presumption that possession goes with title should prevail. The principle does not apply when the evidence of possession is equally unworthy of reliance on both sides. *Dharm Singh v. Harpershad Singh*, I. L. R., 12 Calc., 38, explained. *THAKUR SINGH v. BHOGERAJ SINGH*

I. L. R., 27 Calc., 25

**9. ——— Possession, Presumption of—Waste lands**

—In disputes as to the right to the possession of jungle lands, it is only in cases where neither party has exercised any

## TITLE—continued

## 1 EVIDENCE AND PROOF OF TITLE

—continued

acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession. *PAM BANDHU v. KESHU BHATTAR*

[5 C L R., 481]

## 10

*Suit for possession—Possession of title-deeds and receipts for rent*—In a case involving the alternative question of fact whether certain land belonged to R or C, neither the one nor the other of the opposite party venturing to state who his opponent was and the testimony of the witnesses on this point being doubtful, *Held* that R, who was in possession of the title-deeds and of the receipts of rent, ought to succeed unless there was something on the record to counteract such strong evidence. *KODA BIKSHU KHAN v. CHOA*

[19 W R., 162]

## 11

*Suit for declaration of title—Onus probandi*—Production of title-deeds. The plaintiff sued for declaration of her title to property of which the defendant was in possession, but of which she produced the title-deeds in favour of herself. *Held* the onus was on the defendant to disprove the plaintiff's title and the defendant was not allowed to raise certain fresh issues, but the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds; in her favour. *SWARNAMAYI PAIR v. SHRINIBASH ROYAL*

[6 B L R., 144]

## 12

*Possession—Uninterrupted and undisputed possession*—Uninterrupted and undisputed possession for a long time constitutes sufficient *prima facie* evidence of title, but if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails. *HAINESCHULL SINGH v. GUNDEEM SINGH*

[5 W R., P C., 89]

## 13

*Suit for possession*—Where, in a suit to recover possession of land the plaintiff succeeded in proving that he had been in possession up to a recent date and that he had been forcibly dispossessed by the defendant the lower Appellate Court threw upon the defendant the burden of proving his title and on his failing to do so, decreed the case. *Held* that this was a fair inference of title and of a right to be replaced in possession without going further into the title, that is to the mode of its acquisition. *TELOCHET GROSS v. KAILAS NATH SINGH v. BHOMIK BHUTTA-CHANDI*

[3 B L R., A. C., 298 12 W R., 175]

## 14

*Proof of title—Suit for possession*—In a suit to recover possession on the allegation that plaintiff had been illegally ousted though holding under a lease from defendant the latter urged that though plaintiff had been allowed to hold the tenure as a tenant or collector of rents, he had never been the landlord or farmer in possession. The Judge found that the estate was really let out in lease to the plaintiffs by the defendant who had recovered rents and granted him receipts on account of the *Nara mehal*. *Held* that this

## TITLE—continued

## 1 EVIDENCE AND PROOF OF TITLE

—continued.

was a complete finding in favour of the plaintiff's title, and that it was not necessary for him to sue for the pottah which had been wrongfully denied him by defendant. *JOHNEEROODEEY MAHOMED v. DILIP PERSHAD SINGH*

[13 W R., 21]

## 15

*Proof of title—Evidence of possession*—In a suit to establish title, evidence of plaintiff's possession prior to the summary award under a 15 Act VII of 1859 under which he was dispossessed, may be good evidence of his title, and must be considered. *BELLURRY EAST BHUTTACHARJEE v. DOORJO DUTY SHIKDAR*

[7 W R., 89]

## 16

*Possession—Evidence Act, s. 110—Specific Relief Act, 1877, s. 2*—In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute, and that he had been ousted by the defendants who were unable to give any proof of their right so to oust him or of a superior title, —*Held* (PRINSEP, J., dissentiente) that the prior possession of the plaintiff was *prima facie* evidence of title, and that he was entitled to a decree. *Per PRINSEP, J.*—Proof of prior possession and of illegal dispossession are in themselves no evidence of title, except in a possessory suit under the Specific Relief Act (1 of 1877). S. 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *prima facie* evidence of title. *KAWA MANJI v. KHAWAZ DASSIO*

[5 C L R., 278]

## 17

*Possession—Lands attached by Government as being dispossessed*—Disputes respecting the boundaries of the zamindaris of Yettisapooram and Pannad in the district of Madras having led to acts of violence by the raiyats the Government, in the year 1836 to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the zamindar of Yettisapooram was in possession of certain lands adjacent to, and taken as a part of the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years no steps having been taken regarding them till the year 1855, when the zamindar of Yettisapooram brought a suit against the Collector of Madras and the zamindar of Rannad to recover possession of the land so formerly occupied by him and for the same profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either zamindar it was held by the Courts in India, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the zamindar of Yettisapooram before and at the time of the attachment by Government was under the circumstances, evidence of title, and the Government was ordered to restore the lands to him. *ZAMINDAR OF RANVAD v. ZAMINDAR OF YETTISAPORAM*

[10 Moore's L A., 47]

**TITLE—continued****1. EVIDENCE AND PROOF OF TITLE**  
—continued.

18. ———— *Proof of possession—Suit for possession.*—In a suit to recover possession of two plots as parcels of the plaintiff's ancestral jammal lands, the Court of first instance found that one plot was parcel, but was not satisfied that the other was so also. The lower Appellate Court agreed with the first finding, but further found that there was sufficient evidence of possession to show that both plots were parcels of the jammal. *Held*, reversing the decision of FIELD, J., that on second appeal the High Court was not entitled to question the sufficiency of that evidence; and, further, that one plot having been found to be parcel of the jammal, it was sufficient to give evidence of possession and ownership to prove that the other plot was also parcel. *Dadabhai Narsidas v. Sub-Collector of parcel Broach, 7 Bom., A. C., 82, distinguished BARODA KANTO BEEPARI v. JODHISTER NATH* [10 C. L. R., 99]

19. ———— *Registration after proclamation—Evidence of assertion of title*—The act of registration after a proclamation under s. 20, Regulation XXXVII of 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other. *USUDOOLLAH v. IMAMAN* [5 W. R., P. C., 26; 1 Moore's I. A., 19]

20. ———— *Proof of title—Registration in Collector's books.*—Registration in the Collector's books is not of itself a proof of title. *GOBIND NATH SEIN v. GOBIND CHUNDER SEIN* [10 W. R., 393]

AMEERONISSA BIBE v. WOOVAROODDEEN MAHOMED CHOWDHRY 14 W. R., 49

21. ———— *Entry in Collector's books—Proof of title.*—The Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. *FATMA KUM NUBI SAHEB v. DARIA SAHEB* 10 Bom., 187

COLLECTOR OF POONA v. BHAYANRAT BALKRISHNA [10 Bom., 192]

SANGAPA MALAPA v. BHIMANGOWDA MARIAPA [10 Bom., 194]

22. ———— *Entry of name in Collector's book.*—The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person. The title or defeat the title of any other person. The Collector's book is kept for purposes of revenue, not for purposes of title. *Fatma v. Daria Sahab*, 10 Bom., 187, followed. *BHAGONJI v. BARUJI* [I. L. R., 13 Bom., 75]

**TITLE—continued.****1. EVIDENCE AND PROOF OF TITLE**  
—continued.

23. ———— *Co-proprietors—Registration of shares in land.*—Registration of land under Bengal Act VII of 1876 is not only no conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered. Such registration does not relieve a plaintiff from the onus of proving his title to land claimed by him. *RAM BHUSAN MAHTO v. JEBBI MAHTO* [I. L. R., 8 Calc., 853]

See also *SARASWATI DAS v. DHANPUT SINGH* [I. L. R., 9 Calc., 431; 12 C. L. R., 12]

24. ———— *Resumption chittas.*—Government resumption chittas, in the absence of the resumption-proceedings, are not conclusive evidence of title as against third persons. *Ram Chunder Rao v. Bunshee Dhur Nark, I L R., 9 Calc., 741, followed DWARKA NATH MISSE v. TARITI MOYI DABIA* I. L. R., 14 Calc., 120

25. ———— *Dispute as to ownership of property—Trespasser—Onus of proof.*—A person sued as a trespasser cannot, without proof of his own right, oust an apparent owner by pointing out some defect in the title of the latter. *TULJARAM v. BAMANJI KHARSEDJI* I. L. R., 19 Bom., 828

26. ———— *Possession—Alleged title by adverse possession for more than the period of limitation.*—Land bordered by the estates of each of the parties contesting its ownership was registered in the Collectorate as a separate mouzah, as it also was represented to be in revenue survey map of 1856. In a subsequent survey map of 1865 it appeared as being within the limits of the defendants' adjoining talukh. Neither from these maps nor any other documents was there evidence of title in either party, so that possession was all that could be resorted to as the ultimate test of right. The plaintiff relied on limitation. She asserted more than twelve years' adverse possession by having settled tenants on the disputed ground. To entitle her, it was necessary for her, the burden of proof being upon her, to prove that she had held a possession adequate in continuity, in publicity, and in extent of area. Upon all these points her case was deficient, and therefore her claim failed. It was also in evidence, which was the more substantial, that the defendant had occupied during that period a part of the land by tenants; and this, as proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiffs' claim. *RADHAMONI DEBI v. COLLECTOR OF KHULNA* [I. L. R., 27 Calc., 943]

27. ———— *Ownership, Evidence of titles contested between rival purchasers—Benami transaction—Declaratory decree, Suit for.*—Under the Land Registration Act (Bengal Act VII of 1876), registration of ownership was refused on the application of two rival purchasers of the same property, and a reference concerning

I. L. R., 27 I. A., 138  
4 C. W. N., 597

## TITLE—continued

1 EVIDENCE AND PROOF OF TITLE  
—continued.

them was made to the High Court under s. 55. The one purchaser then sued the other, claiming a decree declaratory of this title under conveyances made to him in 1890 by a Mahomedan widow, since deceased, and by assignees and issues from her of parts of her interest in the property. He alleged that a hiba-bill was, executed by her in 1808 to her son in law for no substantial consideration, was nothing more than a benami transfer, after which she had remained the owner with her former title. On that hiba, however the defence was founded, the defendant averring that it was a real conveyance by the widow, and that through the son in law, from whose sons the defendant had purchased the property, the latter had obtained a good title. No actual possession was established by either of the parties. The property had been let in parcels to different tenants. Among other things disputed, it was the subject of conflicting evidence whether leases had been made in the past by the then real owner or upon assumption of title by the adverse party. The Courts below differed in their conclusion as to which of the parties was entitled to a decree. The Judicial Committee maintained the decision of the Original Court in favour of the plaintiff. *NIRMAL CHUNDER BANERJEE v. MAHOMED SIDDIK* I. L. R., 26 Cal., 11 [I. L. R., 25 I. A., 225]

28 — *Survey map—Suit for possession—Ejectment—Evidence of possession and title*—In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a revenue-sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47. *Held* that a survey map is evidence of possession at a particular time viz., the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case. *Held* further that, as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly twenty years between them—they might be sufficient evidence of title and the decree of the lower Court was correct. *Mahesh Chandra Sen v. Jagat Chandra Sen*, I. L. R., 5 Cal., 212 discussed. *SHAM LAL SARKU v. LUCKMAN CROWDERY* I. L. R., 15 Cal., 353

29 — *Transfer of property—Surrender of dar-mokurari lease—Formal deed unnecessary*—Where a mokurandar granted a dar-mokurari lease of part of his holding which was afterwards surrendered for good consideration, *likar namas* to this effect were executed, but, not being registered, were not receivable in evidence. *Held* that to prove a formal deed of reconveyance was not necessary the receipt of the money and the relinquishment of possession sufficiently showing what had be-

## TITLE—continued.

1. EVIDENCE AND PROOF OF TITLE  
—continued.

come of the dar mokurari interest. *INAMTUNJI BEGUM v. KAMLESWARI PERSHAD* [I. L. R., 14 Cal., 103 [I. L. R., 13 I. A., 160]

30 — *Hypothecation—Decree for enforcement of lien—Objection to attachment and sale raised by person not a party to decree—Release of property from attachment—Suit by decree-holder for declaration of right based on decree—Defence based on sale-deed found to be fraudulent—Plaintiff entitled to succeed on basis of his decree without further proof of title*—An objection to the attachment and sale of a house which was advertised for sale in execution of a decree for enforcement of lien was allowed, upon the ground that the objector had purchased the house from the mortgagor, and his purchase was not subject to the decree to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside. The Courts below, holding that the deed of sale set up by the defendant was fraudulent and collusive, decreed the claim. *Held* that, although the defendant was not a party to the decree obtained against the mortgagor, yet, as the basis of his title to claim the property had been found to be a mere nullity, the plaintiff was entitled to succeed on the basis of the decree, which stood unimpeached, without being put to proof of the mortgage deed as against the defendant. *KADIR BAKSH v. SALIG RAM* I. L. R., 9 All., 474

31 — *Commission of partition*—Under a commission of partition issued by the Supreme Court, land in Calcutta was apportioned among the members of a family, and the allotments were confirmed by final decree in 1825. In this suit brought in 1884, the plaintiff claimed, through one of the family, a parcel of land, by reference to one of the allotments so made. The defence which was made by setting up a title through the widow of him who received the allotment, was not proved; but the correctness of the area allotted was also in dispute, and the Appellate Court excluded part from the decree, made by the first Court for the whole. It appeared to the Judicial Committee that there was no ground for assuming that the members of the family, who were parties to the partition suit, were under any mistake as to the family property or that there was any error or want of due care, on the part of the commissioners of partition, whose proceedings had been regular; nor had there been any adverse claim to any part of the allotted land. The first Court's decree was restored. *SARODA PROSVEN PAL v. SHAM LAL PAL* I. L. R., 19 Cal., 618 [I. L. R., 19 I. A., 75]

32 — *Mortgage—Hypothecation—Payment of rent—Presumption*—Continuous payment of rent for about a hundred years held to give

## TITLE—continued.

1. EVIDENCE AND PROOF OF TITLE  
—continued.

rise to a presumption that the tenant held under a mirasi title. *BRAJANATH KUNDU CHOWDHRY v. LAKSHI NARAYAN ADDI* . . . 7 B. L. R., 211

33. ————— *Title confirmed by decree*—Where a proprietary title is affirmed by a decree, the property is not subsequently held under the decree alone, but under the original title. *AMBIT KOOR v. ROOF KOOR*  
[2 N. W., 459: Agra, F. B., Ed. 1874, 240]

## (b) LONG POSSESSION.

34. ————— *Title by long possession—Adverse possession—Limitation*.—Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer. *Semble*—Such title may be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by possession. *GOSSAIN DASS CHUNDER v. ISSUR CHUNDER NATH* . . . I. L. R., 3 Cal., 224

See *GOLUCK CHUNDER MASANTA v. NUNDO COOMAR ROY*  
[I. L. R., 4 Cal., 699: 3 C. L. R., 450]

35. ————— *Title by long possession—Adverse possession—Limitation—Grant made by wife during absence of husband*.—A wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a mirasi grant of a portion of her husband's estate. The grantee entered into and remained in possession for upwards of twelve years. *Held* that the position of the grantee was not that of a lessee, and that his possession (although in its inception an act of trespass against the husband), having continued for upwards of twelve years, had perfected his title to the lands. One who holds possession on behalf of another does not, by mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the statute of limitation. *BEJOY CHUNDER BANERJEE v. KALLY PROSONO MOOKERJEE* . . . I. L. R., 4 Cal., 327

36. ————— *Declaration of title—Adverse possession—Variation between pleading and proof*.—A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues. *SHIRO KUMARI DEBI v. GOVIND SHAW TANTI* . . . I. L. R., 2 Cal., 418

37. ————— *Suit for declaration of title—Failure to prove stated title—Title by long possession*.—In a suit for a declaration of title to a share of landed estate, although the plaintiffs fail to satisfy the Court that their title to the land has been acquired in the way they state, yet if it is admitted that they have been in possession for more than twelve years, the effect of such possession

## TITLE—continued.

1. EVIDENCE AND PROOF OF TITLE  
—continued.

is to extinguish other titles, if these existed, and the plaintiffs ought to have the declaration sought. *RAM LOCHUN CHUCKERBUTTY v. RAM SOONDER CHUCKERBUTTY* . . . 20 W. R., 104

*JUGGUT CHUNDER v. BANEE MADHUR BANERJEE*  
[23 W. R., 205]

38. ————— *Proof of title—Possession for period of limitation*.—Plaintiff, stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed, but the Civil Judge made a declaration of title in the plaintiff's favour, basing that entitlement on the statute of limitations. *Held* that where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved." *TRIMULASANI REDDI v. RAMA SANI REDDI*  
[6 Mad., 420]

39. ————— *Presumption arising from possession—Issue as to identity of land re-formed on a site formerly submerged*.—In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favour of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the chur, a title denied by the defendants, and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favour of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs. Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held* that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumptio rei iure*. *ANANGAMANJARI CHOWDHURANI v. TRIPURA SUNDARI CHOWDHURANI*  
[I. L. R., 14 Cal., 740  
L. R., 14 I. A., 101]

40. ————— *Mokurari mairasi title, Evidence of—Presumption of permanent tenure*.—A person claimed to hold a mokurari



## TITLE—continued

## 1 EVIDENCE AND PROOF OF TITLE

—continued

insurance title to certain land which was acquired under the Land Acquisition Act, but could produce no receipts or evidence of title other than certain rent receipts, which showed that he or his predecessors in title had held the land in question for nearly one hundred years at presumably a fixed rent, the nature of the tenure not being mentioned in such receipt. *Held* that the presumption was, in the absence of any evidence to the contrary, that the claimant had a permanent and transferable interest in the tenure and not merely an interest in the nature of a tenancy at will, and that this presumption was strengthened by the fact that his superior landlord the Mallarajdar had made no attempt to eject him or his predecessors in title during this long period. *Dewan v. Nono Krishna Mookerjee* I. L. R., 17 Cal., 144

41

Sui to cust

*shebait from office—Tenure of office for a period greater than that provided by law of limitation—* The plaintiff as shebait of a certain Hindu endowment, instituted a suit to set aside certain leases and alienations created by one who had formerly been shebait but who, it was alleged had relinquished and abandoned the office on the ground that such leases and alienations were void and not binding on the endowment and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admitted that the plaintiff had held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title as shebait. The lower Courts found that the plaintiff had failed to prove his title and, holding that on this ground he had no locus standi dismissed the suit. *Held* that, as a suit to oust the plaintiff from his office would have been barred by limitation, by reason of his having held the office for a period exceeding that provided by the law of limitation he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title. *Jagan Nath Das v. Bishradha Das*

[I. L. R., 19 Cal., 778]

42

Presumption of

*title—Onus of proof—Madras Forest Act (Mad Act F of 1902), s. 6—* Certain land was notified under the Madras Forest Act, 1902, to be constituted a reserved forest. A person, alleging that the jemm title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been expropriated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged expropriation was not proved. *Held* that the claim should be allowed.

## TITLE—continued.

## 1 EVIDENCE AND PROOF OF TITLE

—concluded.

Observations on the burden of proof and on the presumption of title arising out of possession. *SECRETARY OF STATE FOR INDIA v. BAYOTI HAJI* [I. L. R., 15 Mad., 315]

43

Proof of title—Suit for declaration of title—Adverse possession—Case made in plaintiff—Where a specific title has been alleged, but not proved and the plaintiff endeavours to succeed in the first Court or second Court of appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. *Krishna Chetty Baijath v. Pratab Chunder Surma* I. L. R., 7 Cal., 560

44

*Adverse possession—Unregistered deed of sale—* On the 18th January 1876 plaintiff became purchaser at a Court's sale of the right, title, and interest of G and N in a shop, and, having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed on the 27th January 1877. Defendant answered that he purchased it from G under a deed of sale dated 25th January 1865, and that he had been in possession since that day. The deed of sale was not admitted in evidence for want of registration, but it was found that defendant had been in possession as owner since 5th January 1865. *Held* that, although the defendant could not prove a title by purchase, it was open to him to establish his title without the aid of the deed of sale, that his possession of the premises for more than twelve years prior to the institution of the suit was adverse both to G and N, and that the claim of the plaintiff, who was assignee of their interest, was consequently barred. *Balaram Arumchal v. Appa*, 9 Bom. 121 explained. *Somv Gurrul v. Rangammal*, 7 Mad. 13, referred to and followed. *Samburam Kay Sandass v. Shivalaldass Sadashivadas* [I. L. R., 4 Bom., 69]

45

Long possession

*Liability to assessment of revenues—A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue-free. SECRETARY OF STATE FOR INDIA v. CORSEY* I. L. R., 7 All., 140

RAM LOHAN SINGH

## 2 MISCELLANEOUS CASES.

46

*Right to raise question of title—Boundary dispute—Suit for possession—* In a boundary dispute the title of the plaintiff is not, except under very peculiar circumstances, open to attack; but when the plaintiff sues for possession of property in the defendant's hands, not as forming part of another estate, but claiming a right thereto under a superior title, then the defendant has a right to call the plaintiff to the question. *Ramchandra Bawerjee v. Muddummon Thakare*

[W. R., 1804, 335]

**TITLE—continued.****2. MISCELLANEOUS CASES—continued.**

47. ———— *Suit for possession of land held under superior holders.*—The plaintiff sued to recover possession of certain lands said to have been included in a talukh pottah given him by the zamindars, alleging that the defendants were obstructing his possession. For the defence it was averred that these lands fell within a 9 annas share which belonged to one D, and that by process of sale they became the right of other parties under whom defendants held as lessees. *Held* that, notwithstanding the parties to this suit held under a superior landholder, plaintiff was entitled to have his title put in issue and determined. **NAGUR CHAND v. DOORGA DOSS CHOWDRY**

[11 W. R., 137]

See **DINOMONEE BANERJEE v. GYRUTOOLLAH KHAN** . . . . . 2 W. R., 138

48. ———— *Onus probandi—Proof of title—Suit for confirmation of title and declaratory decree.*—When a plaintiff sues for confirmation of possession and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court. **TORAB ALLY v. MAHOMED TUKKEE**

[19 W. R., P. C., 1]

49. ———— *Claim under particular title—Presumption.*—Where a plaintiff claims, not under any general right of inheritance, but expressly under a deed, he must prove that deed; no legal presumption as to the contents of the deed can arise from a consideration of what the party, through whom he claims, would have been entitled to by the law of inheritance, had there been such a deed. **MOOAD MULLICK v. BELAT MULLICK**

[9 W. R., 385]

50. ———— *Possession—Proof of title and possession—Suit for injunction—Hindu law—K C, a Hindu, died in March 1864, possessed, among certain other property, of a house, and leaving three sons, R, B, and T. He also left a will, of which he appointed R executor, and declared that "the whole of my estate, both real and personal, and the existing shop, you, R, are the proprietor of the whole." R was directed to furnish the expenses of the household and carry on the shop, and pay for religious observances, etc. The testator then left legacies to his daughters and others, but made no mention of his sons B and T. R applied for probate of the will, and a caveat was entered by B, but the opposition was withdrawn on a compromise, and the will was proved; the compromise, however, was never carried out. In August 1866 R died, leaving a son, M, and his two brothers, B and T, surviving him and having made a will appointing T executor, and giving him the power of dealing with all the property. T applied for probate, but was opposed by M; but on 23rd May 1867 probate was granted. On 26th March 1867 B and T mortgaged a two-thirds share in the house to the defendant, and, on*

**TITLE—concluded.****2. MISCELLANEOUS CASES—concluded.**

default in payment of the mortgage-debt, the defendant obtained a decree for payment or sale on 6th January 1868. On 17th August 1867 T mortgaged the whole house to the plaintiffs to secure payment of money borrowed to carry out A's will. The plaintiffs obtained a decree for foreclosure on 15th July 1869, and subsequently a decree for possession. In a suit brought by the plaintiffs in possession, alleging that the defendant's mortgage and decree threw a cloud on their title, and that they would be injured by the sale, the plaintiff prayed that the defendant might be restrained by injunction from proceeding to sale, and his mortgage be brought into Court and cancelled. *Held* that, to entitle them to relief, they must prove their title as well as their possession, and, on failure to do so, the suit must be dismissed. **ROOPALL KHETTRY v. MOHENDRA NATH ROY**

[10 B. L. R., 271 note]

51. ———— *False deed set up in support of rightful claim.*—A party is not precluded from succeeding upon a title established by a genuine deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title. **PATTABHIRAMER v. VENCATAROW NAICKEN**

[7 B. L. R., P. C., 136: 15 W. R., 35  
13 Moore's I. A., 560]

52. ———— *Transfer of property—Relinquishment of dar-mokurari lease—Necessity for conveyance.*—Where a dar-mokurari has been granted and then relinquished for valuable consideration to the grantors, no formal reconveyance is necessary to re-vest the title in the latter. **IMAMBANDI BEGUM v. KUMESWAR PERSHAD**

[L. R., 13 I. A., 180: I. L. R., 14 Cal., 109]

**TITLE-DEEDS.**

See **EXECUTION OF DECREE—MODE OF EXECUTION—POSSESSION.**

[I. L. R., 11 Bom., 485]

See **VENDOR AND PURCHASER—TITLE.**

[I. L. R., 15 Bom., 657]

——— **Delivery of, for specific purpose.**

See **ATTORNEY AND CLIENT.**

[15 B. L. R., Ap., 15]

——— **Deposit of—**

See **CASES UNDER DEPOSIT OF TITLE-DEEDS.**

See **INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.**

[6 B. L. R., 701  
[I. L. R., 19 All., 78  
I. R., 23 I. A., 108]

See **NEGOTIABLE INSTRUMENTS ACT, s. 13.**

[I. L. R., 17 Mad., 85]

**TITLE-DEEDS—concluded**

Possession of—

See EVIDENCE—CIVIL CASES—MODE OF  
DEALING WITH EVIDENCE[2 W. R., P. C., 1  
8 Moore's L. A., 467]

See REGISTRATION ACT 1877 s 50

[I. L. R., 18 Bom., 444]

Production of—

See INSPECTION OF DOCUMENTS.

[5 Bom., O. C., 153  
I. L. R., 10 Calc., 608]See OATHS OF PROOF—DECLARATION OF  
TITLE

6 B. L. R., 144

See TITLE—EVIDENCE AND PROOF OF  
TITLE—GENERALLY6 B. L. R., 144  
[19 W. R., 162]

Refusal to produce—

See RIGHT OF WAY

[I. L. R., 15 All., 270]

Suit to recover—

See VINDICATION—SUITS FOR LAND—  
GENERAL CASES

I. L. R., 4 Calc., 322

See LIMITATION ACT 1877, ART 49

[I. L. R., 15 Mad., 157]

**TITLES OF HONOUR.**See PLAINT—FORM AND CONTENTS OF  
PLAINT—DEFENDANTS.

[12 B. L. R., 443, 445 note]

**TODA GARAS HAQ.**

See DUTIES.

[2 Bom., 253, 23d Ed., 239  
7 Bom., A. C., 50]See LIMITATION ACT 1877, ART 144—  
IMMOVABLE PROPERTY[13 B. L. R., 254  
I. L. R., 11 A., 34]

See PENSIONS ACT, 1871, ss 3 AND 4

[I. L. R., 1 Bom., 203  
I. L. R., 4 Bom., 443  
I. L. R., 5 Bom., 408  
L. R., 81 A., 77]

See PENSIONS ACT 1871 s 11.

[I. L. R., 4 Bom., 432]

**TODDY.**See BOMBAY ANKARI ACT, 1878, ss 3, 14  
AND 21I. L. R., 6 Bom., 398  
[I. L. R., 6 Bom., 462  
I. L. R., 18 Bom., 492]See BOMBAY REVENUE JURISDICTION  
1870

I. L. R., 9 Bo

**TOLLS.**

See SETTLEMENT—CONSTRUCTION

[I. L. R., 17 Calc., 458]

Lease of—

See BOMBAY TOLLS ACT, s 7

[I. L. R., 20 Bom., 668]

Non liability to—

See MADRAS LOCAL BOARDS ACTS s 57

[I. L. R., 20 Mad., 16]

Suit for, paid in excess.

See BENGAL ACT IX OF 1871, s 27

[I. L. R., 15 Calc., 259]

1. Lessee of tolls—Act VIII of 1851—A lessee of tolls was held not to be a person employed in the management and collection of tolls within the meaning of Act VIII of 1851 IN THE MATTER OF BANKA BHARI GHOSH

[3 B. L. R., A. Cr., 17; 11 W. R., 23]

2. Illegal collection of tolls—Act VIII of 1851 s 6—Public road.—To justify a conviction under s. 6, Act VIII of 1851, for illegal collection of a toll on a public road, it was necessary that the road should be a public road within the meaning of s. 2 of the Act. IN RE NARENDRA PRASAD SINGH

6 W. R., Cr., 48

3. Illegal demand of toll—Act VIII of 1851, s 6—Summary offence.—A charge of an illegal demand of toll under Act VIII of 1851, s. 6, ought not to be dealt with summarily under Ch. XVIII of the Criminal Procedure Code, 1872. The power of levying tolls under Act VIII of 1851 is vested in the Lieutenant Governor of Bengal, and is restricted to levying tolls only at the toll-bar, the establishment of a toll must be, by some distinct resolution of the Government, notified in some way or other by the Government. The word "extortionately" in s. 6 of Act VIII of 1851 is not used in the same sense as it is used in the Penal Code but as meaning an unlawful demand of toll accompanied by pressure, the pressure in this case being the exercise of the powers indicated in s. 3 of the Act by seizing the complainant's horses and carts and detaining them until the toll was paid. UTTOM CHUNDER GANGOOLY v. ISSUR CHUNDER MOOKERJEE

[23 W. R., Cr., 78]

**TORT**See CASES UNDER DAMAGES—MEASURES  
AND ASSESSMENT OF DAMAGES—TORTS.See CASES UNDER DAMAGES—SUITS FOR  
DAMAGES—TORTS.

See ENCROACHMENT

[I. L. R., 17 Mad., 388]

See MINOR—LIABILITY FOR TORTS

[3 N. W., 181]

Action framed in—

See MINOR—LIABILITY OF MINOR ON, AND  
RIGHT TO ENFORCE, CONTRACTS.

[I. L. R., 24 Calc., 285]

**TORT—concluded.**

See RIGHT OF SUIT—SURVIVAL OF RIGHT.  
[I. L. R., 13 Bom., 677]

See WRONGFUL DISTRRAINT.  
[I. L. R., 25 Calc., 285]

**TORT FEASORS**

See CASES UNDER CONTRIBUTION, SUIT FOR—JOINT WRONG-DOERS.

See RES JUDICATA — PARTIES — SAME PARTIES OR THEIR REPRESENTATIVES  
[I. L. R., 14 Bom., 408]

**TORTURE.**

See ABETMENT—TORTURE.  
[7 W. R., Cr., 3  
21 W. R., Cr., 11]

See POLICE OFFICER . 7 W. R., Cr., 3

**TOTAL LOSS.**

See INSURANCE—MARINE INSURANCE.  
[6 B. L. R., 218; 7 B. L. R., 347  
3 Bom., A. C., 1  
Bourke, O. C., 17, 228]

**TOWAGE, LIEN FOR—**

See BOTTOMRY BOND . 6 B. L. R., 323

**TOWAGE CONTRACT.**

See ACTION IN REM.  
[I. L. R., 10 Calc., 885]

**TOWING, RULES FOR .**

See STEAM TUGS . 1 Hyde, 293  
[2 W. R., P. C., 51; 8 Moore's L. A., 103]

**TOWN DUTIES, BOMBAY.**

————— Act XIX of 1844—*Suit to levy a tax on cotton and cotton seeds purchased in, and exported from, Broach—Cess illegal—Agency—Trust.*—The plaintiff, manager and part proprietor of a Vallabhacharya temple at Broach, sued the defendant to establish the right of the temple to levy a cess on cotton and cotton seed purchased in Broach and exported from it. The defendant denied the plaintiff's right and contended (*inter alia*) that, even if the right existed until 1844, it was then abolished by Act XIX of that year, which "enacted that from the first day of October 1844 all town duties, kusubviras, moltarphas, baluti taxes, and cesses of every kind on trades and professions, under whatsoever name, levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished." Held that Act XIX of 1844 applied to the cess claimed by the plaintiff. The expression "cesses of every kind"

**TOWN DUTIES, BOMBAY—concluded.**

included the cess on cotton and cotton seeds, and absolutely put an end to the right, if any existed, of the Government or of any private individual of levying the same. Held also the suit could not be regarded as a suit for money had and received by the defendant to the plaintiff's use, or as one to recover money received by the defendant as trustee or agent. GOSTAMI SHRI PURUSHOTAMJI MAHARAJ v. ROBB  
[I. L. R., 8 Bom., 398]

**TRADE.**

————— Contract in restraint of —

See CASES UNDER CONTRACT ACT, s. 27.

**TRADE MARK.**

See DAMAGES MEASURE AND ASSESSMENT OF DAMAGES—TORTS  
[I. L. R., 10 Bom., 617]

See INJUNCTION—SPECIAL CASES—TRADE MARK . 3 B. L. R., Ap., 4  
[Cor., 150  
I. L. R., 17 Bom., 584]

1 — Injunction to restrain use of trade marks—*Combination of figures.*—The plaintiffs, from 1872, imported and sold an article described as 7½ lb grey shirtings, and marked as follows: "In the centre of each piece of cloth a stamp in blue colour of a turtle in a star, with the words 'trade mark'; underneath, in a semi-circular form, is the name 'Fleming, Galbraith & Co., Manchester,' and under this the number 39 within a star, and at the bottom of each piece the number 2008." In 1877 the plaintiffs discovered that the defendants were importing from the same manufacturers, and selling cloth of a similar quality marked as follows: "A stamp in blue colour of a rose in a square; underneath are the words 'Rali and Mavrojani' arranged in a semi-circular form, and under this the number 39 in a star, and at the bottom the number 2008." On the facts of the case the lower Court (MACPHERSON, J.) granted an *interim* injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiff's mark and calculated to mislead the public; and on appeal the Court (GARTH, C.J. and MARRAS, J.) upheld that decision so far as to continue the injunction. Held *per* GARTH, C.J., —If the imitation of the plaintiffs' marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances, the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs. *Per* MARRAS, J.—The number 2008 was not part of the plaintiffs' trade mark proper, nor on the evidence was it so associated with the plaintiffs' name as to indicate to the public that the goods bearing that number came only from the plaintiff's firm as importers; on the evidence it was merely a quality mark, and therefore

**TRADE MARK—continued**

not calculated to mislead the public into the belief that they were purchasing the plaintiff's goods, while in fact they were purchasing those imported by the defendants. *Sembis*—There may be a right to exclusive use of a trade mark by traders who are importers only. *RALLI v. FLEMING*

[I. L. R., 3 Cal., 417; 2 C. L. R., 63]

2. ——— Right to use of trade mark—

*Rival traders—Similarity of name*—No trader importing goods can lawfully adopt a trade mark which is calculated to cause his goods to bear in the market the same name as those of a rival trader. *TAYLOR v. VIRASANI*. I. L. R., 6 Mad., 108

3. ——— Restraining use of trade

mark—*Evidence of fraud*—The ground upon which a person is restrained from using another's trade mark is that he is gaining an advantage by the use of a particular trade mark which is the property of another. It is not necessary to prove intentional fraud, or to show that persons have been actually deceived. It is sufficient if the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *EWING v. GRANT, SMITH & Co.* 2 Hyde, 185

*BALFOUR & Co v. KILBURN & Co*

[1 Hyde, 270]

4. ——— Possession and use of trade

mark—*User in foreign market—Abandonment—Estoppel by conduct*—Such possession and use of a trade mark in one market as to constitute a right in it establishes in the owner thereof an exclusive right to that trade mark in other markets, although the owner may not have used it in such markets. To constitute a mark a trade mark, it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. Where the plaintiffs by their conduct let the defendant to believe that they claimed no right to a certain trade mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market,—*Held* that the plaintiffs were estopped from denying the defendant's right to use the trade mark in the Indian market. *LAVEBOYE v. HOOPER*

[I. L. R., 8 Mad., 149]

5. ——— Right of exclusive user—

*Infringement—Combination of number*—Is as a trade mark—*Injunction*—The question of a right to the exclusive user of a trade mark of a particular number is largely, if not entirely a question of fact, and the question whether it exists in a particular case must depend upon whether the evidence in that case is sufficient to show such an association connect between the mark or the number and the firm which uses it as to indicate to the ordinary trader in the market that the goods are the property of that particular firm. To show that a particular number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the goods, is not sufficient to establish the

**TRADE MARK—continued**

right of exclusive user of that number. There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm. The right of exclusive user of a name or a number as a trade mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived; it is not enough to show a mere possibility of deception. *BARLOW v. GONDEBAUX*

[I. L. R., 24 Cal., 364  
1 C. W. N., 281]

6. ——— Offence of using false or counterfeit trade mark—*Penal Code (Act XLF of 1860), ss 452, 456*—*Prosecution after one year from first discovery of offence—Imitation—Merchandise Marks Act (I of 1859), s 15*—A complainant having in 1893 discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade-mark and to render an account of sales. The right to proceed further was reserved but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced. *Held* that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time barred under s. 15 of the Indian Merchandise Marks Act, 1859; and that the complainant must enforce his remedy by civil process. *RUFFELL v. PONTIAMI TEYAN*

[I. L. R., 23 Mad., 468]

7. ——— Selling books with counterfeit property mark—*Penal Code (Act XLF of 1860), s 456—Goods—Indian Merchandise Marks Act (IV of 1859)*—Books are the subject of trade and are goods within the meaning of s. 2, cl (4), of the Indian Merchandise Marks Act (IV of 1859); therefore when a person sells books with a counterfeit property mark he commits an offence under s. 456 of the Indian Penal Code. *KANAI DAS BHARGAVA v. RADHA SHYAM BASAK*. I. L. R., 28 Cal., 232  
[3 C. W. N., 97]

8. ——— User of and property in trade mark—*Proof of trade mark—Importation and sale of articles with particular marks impressed upon them—Succession by one Bank to business of another—Merchandise Marks Act (I of 1859), s 3—Penal Code (Act XLF of 1860), ss 455 and 456*—A mark to be a trade mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person. The mere fact that a Bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a Bank that had ceased to exist and where there was no proof of any transfer or assignment of the mark, or that the new Bank succeeded the other in the sense either that

**TRADE MARK—concluded.**

it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good-will of that Bank, was held not to be sufficient to establish that the mark was the trade mark of the new Bank. **ANOOKOOL CHUNDER NUNDY v. QUEEN-EMPRESS** . I. L. R., 27 Calc., 776

**ANOOKOOL CHUNDER NUNDY v. EMPRESS**

[4 C. W. N., 423]

**TRADER.**

See **INSOLVENT ACT**, s. 7.

[I. L. R., 7 Bom., 411]

I. L. R., 13 Calc., 63

See **INSOLVENT ACT**, s. 9.

[I. L. R., 5 Calc., 605]

I. L. R., 20 Calc., 771

I. L. R., 23 Calc., 26

L. R., 22 L. A., 162

See **INSOLVENT ACT**, s. 69.

[I. L. R., 5 Bom., 1

2 Hyde, 1, 177

7 Bom., O. C., 22

I. L. R., 21 Calc., 1018

See **MADRAS DISTRICT MUNICIPALITIES ACT**, 1884, s. 53.

[I. L. R., 17 Mad., 100]

**TRADESMAN'S ACCOUNT.**

See **SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—GENERALLY.**

[I. L. R., 2 Bom., 570]

**SUPERINTENDENT OF**

See **INSOLVENT ACT**, 1880, s. 77.

[I. L. R., 24 Calc., 306]

I. L. R., 22 Mad., 137

**TRAMWAYS.**

See **BOMBAY TRAMWAYS ACT.**

[I. L. R., 22 Bom., 739]

**TRANSFER.**

Instrument of—

See **STAMP ACT**, 1863, SCH. II, ART. 33.

[I. L. R., 2 Calc., 399]

Registration of—

See **CASES UNDER BENGAL RENT ACT**, 1869, s. 26.

See **CASES UNDER BENGAL RENT ACT**, 1869, s. 46.

See **CASES UNDER LANDLORD AND TENANT—ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT.**

See **CASES UNDER LANDLORD AND TENANT—TRANSFER BY TENANT.**

See **SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE** . 13 B. L. R., 146

**TRANSFER—concluded.**

See **SALE FOR ARREARS OF RENT—EFFECT OF SALE** . . . . . 9 W. R., 161  
[7 W. R., 409  
Marsh., 212  
1 W. R., 225]

**TRANSFER OF CIVIL CASE.**

Col.

1. **GENERAL CASES** . . . . . 9150

2. **LETTERS PATENT, HIGH COURT, CL. 13** 9158

3. **GROUND FOR TRANSFER** . . . . . 9162

**1 GENERAL CASES.**

1. ———— **Power to transfer—Mad. Reg. IV of 1816, s. 25—Village Munsif—Jurisdiction.**—In a suit under Regulation IV of 1816, the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif. *Held* that this transfer was illegal. *Per HUTCHINS, J.—Semble*—In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif. **LAKSHMAKKA v. BALI**

[I. L. R., 8 Mad., 500]

2. ———— **Transfer to Munsif of Small Cause Court suit.**—A suit within the cognizance of the Small Cause Court cannot be lawfully transferred for trial to a Munsif's Court. **JOBBRAJ CHOWKEEDAR v. WHELAN** . . . . . 13 W. R., 399

3. ———— **Case remanded for local inquiry.**—A case remanded to a District Judge for the purpose of a local inquiry cannot be transferred to a Subordinate Judge for disposal. **CHOWDREY HAMEDOOLLAH v. MUTREOONISSA BIBEE**

[15 W. R., 574]

4. ———— **Power of Judge to transfer case under Act XVI of 1863.**—A Judge had no authority under Act XVI of 1863 to order a Subordinate Judge to try proceedings in execution of a decree which were a portion of the original civil suit tried by himself. **AFTABOODEEN AHMED v. MOHIN-NEE MOHUN DOSS** . . . . . 15 W. R., 48

5. ———— **Bengal Civil Courts Act, VI of 1871, s. 19.**—Though a Subordinate Judge may very properly, if he find the subject-matter of a suit to be of the value of less than Rs. 1,000, transfer it for trial to a Munsif, yet a Subordinate Judge is empowered under s. 19, Act VI of 1871, to try cases of any value. **SUPREOOLLAH SINGAR v. BEGUM BIBEE** . . . . . 25 W. R., 219

6. ———— **Civil Procedure Code, 1859, s. 6—Withdrawal of suits from subordinate Courts—Remand by higher Court—Fresh suit.**—The power given by s. 6 of Act VIII of 1859 to a Zillah Judge for the withdrawal of suits from subordinate Courts should only be exercised upon a cause shown, and ordinarily not without opportunity given to the parties to the suit to be heard upon the question. The terms of s. 6 were inapplicable to suits which the subordinate Court had received by order of remand

**TRANSFER OF CIVIL CASE—continued.****1 GENERAL CASES—continued**

from a Court to which the District Court was itself subordinate. A suit sent by the High Court to a subordinate Court under a remand to the High Court by Her Majesty's Order in Council, and in which, under the Council's remand order, the plaintiff has been amended a new statement filed and new issues framed, is substantially a new suit. **MAHOMED ZAHOR ALI KHAN v. RITTA KUNWOOR** 2 N. W. 481

**7** ——— **Civil Procedure Code (1-52) s. 20**—*Suit transferred to his own file by District Judge. Appeal to High Court—Remand to District Judge under s. 552 of the Civil Procedure Code—Power of Judge to transfer*—By order of the District Judge under s. 25 of the Code of Civil Procedure a suit was transferred from the Court of the subordinate Judge to his own Court. The District Judge decided the suit and from his decree there was an appeal to the High Court. The High Court remanded the suit under s. 552 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held* that the District Judge had then no power to transfer the suit but was bound to try it himself. *semble*—That s. 25 of the Code of Civil Procedure has no application to a case remanded under s. 552 of the Code. **SITA RAM v. NAUNI DELIYA** (I. L. R., 21 All., 230)

**8** ——— **Civil Procedure Code 1859 s. 6**—*Transfer of suit heard case to be completed in another Court*—s. 6 of Act VIII of 1859 did not authorize the taking a case in progress of trial off the file of a Subordinate Judge in order that it might be completed by the Judge himself of some other Court. It is clear that such transfer must take place on the institution of the suit. **RAM NATH v. GOWDER** 2 N. W., 230

**DUMRES SAHOO v. JAGDHAN** 13 W. R., 398  
**ABDOOL HIE v. MACRAE** 23 W. R., 1

**9** ——— **Civil Procedure Code 1859 s. 6**—*Transfer after evidence has been taken*—*Quare*—Whether a case could be transferred from one Court to another under s. 6, after the evidence had been taken in the former Court. **AS MEER KOCKWAR v. TAYLER, KHORSHID ALI v. TAYLER** W. R., 1864, 15

**10** ——— **Civil Procedure Code, 1859, s. 6**—*Suit brought whilst Court is closed for vacation*—The Court of the Principal Sudder Ameer of Thanna being closed during vacation a plaintiff which under s. 6 of the Civil Procedure Code ought to have been instituted in that Court was, by the order of the District Judge, referred for trial to the Assistant Judge, entered in the register of suits in the Judge's Court, and tried by the Assistant Judge. *Held*, reversing the decree of the District Court in appeal that it was not lawful for the Judge to refer the suit, without its having first been instituted in the Principal Sudder Ameer's Court. **MOTILAL RAMDAS v. JANNADAS JAYEDAS** 2 Bom., 42; 2nd Ed., 40

**TRANSFER OF CIVIL CASE—continued****1. GENERAL CASES—continued**

**11** ——— **Civil Procedure Code, 1859, s. 6**—*District Court—Power to receive plaint when lowest Court closed*—Where a plaintiff presented a plaint to the District Court the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was held that the District Court could not be considered a Court of first instance, competent to receive the plaint. The decision in *In re Ganesh Sadash, 5 Bom., A. C. 117*, overruled; and *Motilal Ramdas v. Jannadas Javedas* 2 Bom., A. C. 42 is followed. **RAMAYA PLATA v. NITHAMADSHAI**, 10 Bom., 495

**12** ——— **Civil Procedure Code, 1859 s. 5 and 6—Jurisdiction**—*Held* that, though both suits were properly cognizable by the Court at Calcutta, yet the Sudder Court's order which it was competent to pass under s. 6 Act VIII of 1859 gave jurisdiction to the Principal Sudder Ameer of another district, whose decision was not liable to be set aside for want of jurisdiction, in reference to the provisions of s. 5 of that enactment. **RAM DIX v. GIRDHAR LALL** 1 Agre, 178

**13** ——— **Evidence recorded by one officer and decision given by another**—A suit for enhancement was filed under Act X of 1859 in the Court of a Deputy Collector. The issues were framed and the evidence recorded by an Assistant Collector, apparently not invested with the powers of a Deputy Collector who wrote a report recommending the mode in which the suit should be disposed of. It was then disposed of by another Deputy Collector, who was probably acting at the time as Collector. *Held* that there was no power to transfer the case, and that the procedure by which the suit was heard by one officer and decided by another was illegal. **MURDAL OOPADHTA v. MAROHAR NATH** 1 N. W., Part II, p. 9; Ed. 1873, 76

**14** ——— **Civil Procedure Code 1859, ss. 5 and 6**—Where a District Court had jurisdiction under s. 5, Act VIII of 1859 to try a suit, and defendant made no application to the Judge or communication to the plaintiff with a view to its being tried in a different district the case was held to be not one for the exercise of any special power by the High Court for that purpose. **KRISTO DASS HOONDOO v. ISSER CHUNDER CHOWHRY** (11 W. R., 169)

**15** ——— **Civil Procedure Code, 1859, s. 6**—*Notification giving jurisdiction as Small Cause Court—Power to transfer pending cases*—Where, on 3rd March 1870, the Government issued a notification under ss. 4 and 5, Madras Act IV of 1863, vesting the Additional Principal Sudder Ameer of Mangalore with exclusive jurisdiction to try Small Cause suits for sums under Rs. 100 within the jurisdiction of the District Munsif. *Held* that the Munsif had no power after the notification to transfer to the Principal Sudder Ameer an application pending before himself at the date of the notification under s. 6 of the Civil Procedure Code.

## TRANSFER OF CIVIL CASE—continued.

## 1. GENERAL CASES—continued.

1859, the notification not being retrospective in its operation. *NARAYANA MALYA v. GOVIND SHETTY* [6 Mad., 18

16. *Civil Procedure Code, 1859, s. 13.—Power of Sudder Courts.*—S. 13, Act VIII of 1859, enacted that, where a suit was brought for immovable property situated within the districts subject to different Sudder Courts, the Judge in whose Court the suit was brought should apply to the Sudder Court to which he was subject for authority to proceed, and the Sudder Court to which the application was made, with the concurrence of the other Sudder Court within whose jurisdiction the property was partly situated, might give authority to proceed. But no power was expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quare*—Whether Sudder Courts acting in concurrence had power to make such a transfer. *SKINNER alias NAWAB MIRZA v. ORDE* [I. L. R., 2 All., 241

17. *Civil Procedure Code, 1859, s. 13.—Family domains of the Maharaja of Benares.* *Held*, following S. A. No. 969 of 1877, decided the 14th December 1877, that the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immovable property was situate within the limits of the family domains of the Maharaja of Benares, those domains not constituting a district within the meaning of that section. *RAGHU NATH DASS v. KAKKAN MAL* [I. L. R., 3 All., 588

18. *Civil Procedure Code, 1877, s. 24.—Place of sving—Grounds of transfer.*—S. 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction. The defendants in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under s. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held* that, there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri. *TUGA RAM v. HARJIWAN DASS* I. L. R., 5 All., 60

19. *Civil Procedure Code, 1877, s. 25.—Power of High Court.*—The High Court cannot make an order of transfer of a case under s. 25 of the Code of Civil Procedure unless the Court from which the transfer is sought to be made has jurisdiction to try it. *PEARY LALL MOZOOMDAR v. KOMAL KISHORE DASSIA* [I. L. R., 6 Calc., 30

20. *Civil Procedure Code, 1882, s. 25.—Jurisdiction.*—An order for the transfer of a suit from one Court to another under

## TRANSFER OF CIVIL CASE—continued.

## 1. GENERAL CASES—continued.

s. 25 of the Code of Civil Procedure cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *Peary Lall Mozoomdar v. Komal Kishore Dassia*, I. L. R., 6 Calc., 30, entirely approved. *LEDGARD v. BULL* [I. L. R., 9 All., 191  
I. R., 13 I. A., 134

21. *Civil Procedure Code, 1877, s. 25.—Transfer from Court in which a suit has been wrongly instituted.* A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court, not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code, and tried it. *Held* in the High Court that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. *PETMAN v. BULL* I. L. R., 5 All., 371

But held by the Privy Council (reversing this decision) that under s. 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it. *Peary Lall Mozoomdar v. Komal Kishore Dassia*, I. L. R., 6 Calc., 30, approved. A suit having been instituted in the Court of the Subordinate Judge, who was incompetent to try it, the case was transferred by consent of parties to the Court of the District Judge for convenience of trial. *Held* that such transfer was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement and subsequently insisted upon. *LEDGARD v. BULL* [I. R., 13 I. A., 134: I. L. R., 9 All., 191

22. *High Court, Jurisdiction of—District Judge, Jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civil Procedure Code (Act XIV of 1882), s. 25.*—An appeal, the subject-matter of which was over Rs. 5,000 in value, was wrongly presented and filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under s. 25 of the Civil Procedure Code and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal. *Held* that, when an appeal is transferred under s. 25 of the Civil Procedure Code, it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court therefore had no jurisdiction to hear the appeal. *Peary Lall Mozoomdar v. Komal Kishore Dassia*, I. L. R., 6 Calc., 30, and *Ledgard v. Bull*, I. L. R., 9 All., 191: I. L. R., 13 I. A., 134,



## TRANSFER OF CIVIL CASE—continued

## 1. GENERAL CASES—continued

refitted to. *KAM NARAIN JOINT v. LAKSHMAN NARAIN MAHTA* I. L. R., 25 Cal., 39

23

*Winding-up Com-  
pany Transfer of winding-up from District Court  
to High Court—Companies Act I of 1902 s 219  
—Civil Procedure Code, s 23, 647. Atal 21 &  
25. Fact c 104 s 15—Letters Patent, High Court,  
A-B, P s 9* There is nothing in the Indian  
Companies Act (VI of 1902) or the High Court's Act  
(24 & 2 Vict. c 101) or the Letters Patent which  
prevents the High Court from calling for the record  
of the proceedings in the winding-up of a Company  
under the Companies Act, and transferring those  
proceedings to its own file. Such a power is given to  
the High Court by s. 647 read with s. 25 of the Civil  
Procedure Code. Where in the proceeding in the  
winding-up of a company under Act VI of 1902, an  
order was passed admitting the proof of a particular  
creditor of the Company before any liquidator had  
been appointed. *Held* that this was an irregularity  
which by itself would justify the High Court in  
sending for the record. Where the District Judge  
conducting the proceedings in the winding-up of a  
Company under Act VI of 1902 had after receiving  
notice of the admission by the High Court of a peti-  
tion for transfer of those proceedings to its own file  
drafted and placed upon the record an order which it  
might have been difficult for him to reconsider if the  
matter again came before him, and where the case  
appeared to be one in which serious questions of law  
were likely to arise which it would probably be  
difficult to discuss adequately in the District Court, in  
the absence of the authorities upon the subject and of  
any rules framed by the High Court for dealing with  
windings-up under the Act, and the case was of a  
kind which would probably come before the High  
Court in a variety of appeals from orders brought by  
one side or the other, *Held* that under these  
circumstances, the case was a proper one for the exer-  
cise of the High Court's jurisdiction by calling up the  
winding-up proceedings to its own file. *IN THE  
MATTER OF THE WEST HORTHAM TEA COMPANY*  
[I. L. R., 9 All., 180

21

*Civil Procedure  
Code 1852, s 25—District Court Power of, as to  
suits pending in its own Court—Ultra vires—s 25  
of the Civil Procedure Code (Act XIV of 1852) only  
enables a District Court to transfer a suit pending in  
a Court subordinate to itself, and not to transfer a  
suit which is pending in its own Court. Accordingly,  
where a District Judge made an order to retransfer to  
the original Court certain suits pending in his Court  
which had been previously transferred to his Court  
from a Subordinate Court, *Held* that the order of  
retransfer was ultra vires and should be discharged.  
*SAKHARAM v. GANGARAM* I. L. R., 13 Bom., 654*

25

*Civil Procedure  
Code (Act XIV of 1852), s 25—Transfer of exe-  
cution proceedings—Insolvency proceedings—  
Opposing creditor's right to apply for transfer of  
insolvency proceedings—The power of transfer given  
by s 25 of the Code of Civil Procedure extends to*

## TRANSFER OF CIVIL CASE—continued

## 1. GENERAL CASES—continued

execution proceedings as well as to suits. An appli-  
cation to be declared an insolvency under the Civil  
Procedure Code is a proceeding in execution, and as  
such can be made the subject of an order under s. 25  
of that code. A creditor who has received notice of an  
insolvency petition, and whose name is entered on the  
record of the execution proceedings as an opposing  
creditor, is a "party" within the meaning of s. 25 of  
the Code of Civil Procedure, and may apply for a  
transfer of the proceedings under the section. *SAR-  
SARVATI v. KARNESHI DUSSEINWARI*

[I. L. R., 23 Bom., 778

26. *Ganjam and Vi-  
ssapattam Agency Courts Act (XXIV of 1930)—  
Validity of Agency Rule No. 22 passed under the  
Act—Jurisdiction of High Court to transfer suit  
pending in the Agent's Court to the District Court  
—High Court's Charter Act (s 25 of 1930),  
s 13—An order was made by a single Judge by  
consent of the parties, transferring a case from the  
Court of an Agent to the Governor, Visapattam, &  
District Court. A further order was made by a  
single Judge, which, though in form an order of setting  
aside a review petition against the first-mentioned  
order, was in substance an adjudication upon the  
question whether the High Court has jurisdiction to  
order the transfer of a suit from the Court of such an  
Agent to a District Court. *Held* that the High  
Court has no jurisdiction to transfer a suit pending in  
the Court of the Agent to the Governor, Visapattam,  
to the District Court of Visapattam; and that  
Agency Rule No. 22 made in 1930 under the powers  
conferred by Act XXIV of 1930 is a valid rule.  
*MAHARAJAN OF JETPORE v. PAPAYANNA**

[I. L. R., 23 Mad., 329

27. *Civil Procedure  
Code, 1852, s 331—Claim below ordinary per-  
sonal limit.—By virtue of s. 647 of the Code of  
Civil Procedure, a superior Court may, for sufficient  
cause, transfer a claim, registered under s. 331, to a  
subordinate Court for trial. *SITHALAKSHMI v. V.  
THIRUNGA* I. L. R., 8 Mad., 548*

28.

*Reasons for  
transfer—Amending process—Procedure on transfer  
—The mere transfer of a suit for the convenience of the  
public, or for the acceleration of business, from one  
subordinate Court to another, does not affect the  
authority of the Judge of the District Court to transfer  
it to his own file, or to another Court, or to re-transfer  
it. If he see sufficient cause for so doing, nor  
would the circumstance that a case had been up on  
appeal to the High Court on a preliminary point, and  
been remanded for a trial on the merits, limit the  
authority of the District Court Judge to bring it upon  
his own file, or to transfer it to the file of a Court  
other than that in which it was instituted. The  
omission of the Judge to assign his reasons for trans-  
ferring the case does not vitiate his proceeding. When  
a Judge transfers a case to his own file, he is at  
liberty to amend the issues first laid down, and to  
raise additional issues, and to go into the whole case,  
except upon any question upon which there has been*

**TRANSFER OF CIVIL CASE—continued.****1. GENERAL CASES—continued.**

a judicial finding. **TARUCKNATH MOOKERJEE v. GOUREE CHUN MOOKERJEE** . 3 W. R., 147

**29. Procedure on transfer—Evidence of witnesses.**—Where a suit which was filed originally before a Principal Sudder Ameen, who had fixed the issues and recorded the evidence of witnesses, is transferred by a Judge to his own file, the Judge, his Court being a Court of original jurisdiction, ought to have the witnesses before him and take their evidence *de novo*. **UNNOPOORNA v. HURBELLUR SINGH** . 8 W. R., 465

**30. Civil Procedure Code, 1882, s. 25—Court to which suit is transferred not taking fresh evidence.**—Where the trial of a suit was commenced by a Subordinate Judge and then transferred by the District Judge to his own file under s. 25 of the Civil Procedure Code, and the latter did not retake the evidence, but dealt with the case as it came to him from the Subordinate Judge and dismissed the suit, *Held* that the District Judge had not tried the case within the meaning of s. 25 of the Code. **BANDHU NAIK v. LAKSHI KVAR** [I. L. R., 7 All., 342]

**31. Case referred to arbitration—Power of Judge to decide after transfer.**—A case having been withdrawn by the Judge, for trial in his own Court, from the Principal Sudler Ameen's Court, where it had already been referred to arbitration, *Held* that the Judge was quite competent to decide the case himself, without necessarily being bound also to refer it to arbitration. **ABOO MAHOMED v. KISHEN MOHUN SURMA** [6 W. R., 280]

**32. Suit pending in Court of Subordinate Judge with Small Cause Court powers—Transfer to Munsif's Court—Civil Procedure Code, s. 25—Munsif, Jurisdiction of—Subordinate Judge, Jurisdiction of—Provincial Small Cause Courts Act (IX of 1887), s. 35.**—The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this, the District Judge made an order, under s. 25 of the Code of Civil Procedure, transferring all cases above the value of Rs 50 then pending before the Subordinate Judge in his capacity as a Small Cause Court to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to Rs 50. The plaintiff's suit was for Rs 69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed. *Held* that, granted that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit. **MANGAL SEN v. RUP CHAND** [I. L. R., 13 All., 324]

**TRANSFER OF CIVIL CASE—continued.****1. GENERAL CASES—concluded.**

**33. Civil Procedure Code (1882), s. 25—"Court of Small Causes"—Meaning of the expression—A Court invested with Small Cause Court powers.**—The expression "a Court of Small Causes" in the last clause of s. 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes. **Mangal Sen v. Rup Chand, I. L. R., 13 All., 324**, dissented from. **RAM-CHANDRA v. GANESH** . I. L. R., 23 Bom., 382

**34. Transfer of suit by order of High Court—Duty of Court to which transfer is made.**—When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge. **FATIMA BIBI v. ABDUL MAJID** [I. L. R., 14 All., 531]

**35. Civil Procedure Code (1882), s. 25—Application to High Court after rejection of a similar application by the District Judge.**—Where an application to a District Judge to transfer a suit pending in the Court of the Subordinate Judge to his own file had been granted, the High Court declined to entertain an application for transfer of the same suit from the Court of the District Judge. **Farid Ahmad v. Dulari Bibi, I. L. R., 6 All., 233**, referred to. **MUHAMMAD SADDAR HUSEN v. PURAN CHAND** [I. L. R., 20 All., 395]

**36. Civil Procedure Code (Act XIV of 1882), s. 25—Transfer of suit from the Court of Small Causes at Calcutta to the Court of the District Judge at Dacca—Jurisdiction of the High Court.**—The High Court, in the exercise of its appellate jurisdiction, has the power to transfer a suit from the Court of Small Causes at Calcutta to any other Court having equal or superior jurisdiction. **KADAMBINI BANJI v. MADAN MOHAN BASAK** [3 C. W. N., 247]

**37. Application for transfer—Transfer of several separate suits—Separate applications.**—Where it is desired to have a number of suits transferred, a separate application should be made in each case for transfer. **KISHOREE LALL v. LUCHMUN DOSS** . 2 N. W., 147

**2. LETTERS PATENT, HIGH COURT, CL. 13.**

**38. Transfer to High Court—Jurisdiction of High Court, Calcutta—Sessions Court, Allahabad.**—The High Court at Calcutta had no jurisdiction over the Court of the Sessions Judge at Allahabad, such Court not being subject to the superintendence of the High Court under the 13th section of the Charter. **GREAT EASTERN HOTEL COMPANY v. SECRETARY OF STATE FOR INDIA** [1 Ind. Jur., N. S., 219]

TRANSFER OF CIVIL CASE—*cont. used.*

## 2. LETTERS PATENT HIGH COURT CL. 13

—*cont. used*

39

*Ground for transfer—Prejudice to interests of party.*—A suit will not be removed from a Zillah Court in which it was instituted to the ordinary original jurisdiction of the High Court unless it be clearly shown that the interests of the party petitioning for such removal will be prejudiced by a non removal. *BORRADAILE v. BOURKE, Ex. O. C., 1*

40

*Power to transfer—Grounds for transfer—Inconvenience—Expense.*—The 18th section of the Letters Patent (1865) of the High Court at Port William gives the Court power to order a suit to be transferred for trial only where the transfer is agreed on by the parties or for the purposes of justice and in the absence of agreement it must be made out that there will be inconvenience arising to the suit, that, if the case be tried in the Court in which it was originally instituted, the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred. *OSWENDERAM KHAN v. NORTONMOSEY DOSSER, 1 Ind. Jur., N. S., 396*

41

*Ground for transfer—Nature of questions for disposal—Conduct of Judge.*—On an application under the Letters Patent 1865 cl. 13 for the removal of a suit, held that, having regard to the whole circumstances connected with the case from the beginning the questions to be disposed of and the conduct of the Judge before whom the proceedings were it was proper and necessary for the purposes of justice that the suit should be removed. *THAKOOR KAPILSACHAR v. AHAT DIO v. GOVERNMENT, 10 B. L. R., 168*

42

*Ground for transfer—Nature of questions for disposal—Local prejudice.*—The Court refused to transfer a case from the mofussil where there were among other alleged reasons, suggestions that the plaintiff's case might be prejudiced by being tried in the mofussil and that difficult and intricate questions of law would arise in the case, the Court not being satisfied by the evidence that such reasons existed. *CORRIE v. CORRIE, 10 B. L. R., 10*

43

*Ground for transfer—Consent of parties—Expense.*—A suit for an account and for other relief relating to immovable property situated within the local limits of the ordinary original civil jurisdiction of the High Court, was instituted against several defendants in the Court of the District Judge of the District within which the property was situated. Upon application by one of the defendants, co-defendants to by one of the other defendants and by the plaintiff the High Court ordered the suit to be removed from the Court in which it had been instituted, to be tried and determined by the High Court as a Court of extraordinary original jurisdiction on the grounds that the parties and the witnesses resided in Calcutta, that it would be cheaper

TRANSFER OF CIVIL CASE—*cont. used.*

## 2. LETTERS PATENT HIGH COURT, CL. 13

—*continued*

to try the suit in Calcutta and that all parties appearing on the motion desired a transfer. *PATIL v. ADMINISTRATOR GENERAL OF PUNJAB, 221*

[I. L. R., 6 Calc., 766 6 C. L. R., 221]

44

*Ground for transfer—Difficult questions of English law in case.*—The Court will order a suit to be removed from the mofussil, and tried in the High Court when difficult points of English law arise, and when generally it appears to be an unfit case to be tried in the mofussil. *DORCETT v. WISE, 1 Ind. Jur., N. S., 94*

45

*Ground for transfer—Questions of English law—Former British subjects and residents of Calcutta.*—Where a case was originally tried by a Zillah Judge, and on appeal to the High Court on its appellate side the Judges of that Court remanded it to the Court below for a fresh trial intimating that it was a proper case to be transferred under cl. 13 of the Letters Patent to the High Court, and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff an officer of the High Court and resident in Calcutta, the Court ordered the case to be transferred for trial to the High Court original jurisdiction. *DORCETT v. WISE, 1 Ind. Jur., N. S., 227*

46

*Ground for transfer—Sale in execution of decree—Order of stay up company.*—On 2<sup>nd</sup> October 1870 a petition for the winding up of the B. T. E. Company of Assam was presented to the Court of Chancery in England by one of the shareholders of the Company and a provisional liquidator was appointed. On 15<sup>th</sup> November at an extraordinary meeting of the Company it was resolved that the Company should be wound up and liquidators were appointed. On 15<sup>th</sup> November the petition for winding up came on for hearing and an order was made that the voluntary winding up should continue subject to the supervision of the Court. On 15<sup>th</sup> November by deed under the hands and seals of the liquidators, M was appointed their attorney in India. On 27<sup>th</sup> October certain immovable properties in Assam belonging to the Company were attached in execution of decrees in certain suits in the Court of the Munsif of Debrajpur. On 8<sup>th</sup> December the properties were put up for sale and purchased at prices which it was alleged, were considerably under their value. Applications were made in the Munsif's Court at Debrajpur by the purchasers for confirmation of the sales, which applications were opposed by M, and pending the Munsif's decision, an application was made to the Deputy Commissioner of Luckimpore for an order to stay proceedings in the decrees-suits, on the ground of the order for winding up the company of 15<sup>th</sup> November. On 15<sup>th</sup> February 1871 the Munsif made an order confirming the sales. M then upon petition moved the High Court for the removal of the suits from Assam to the High Court, to be tried in its extraordinary

**TRANSFER OF CIVIL CASE—continued.****2. LETTERS PATENT, HIGH COURT, CL 13**  
—continued.

original civil jurisdiction, on the ground that no appeal would lie against the order of 15th February refusing to stay the proceedings in the suits; and that, if an appeal should be preferred to the Deputy Commissioner from the order of the Munsif confirming the sales, his decision would be final. The application was opposed on behalf of the purchasers. *Held* the Munsif, not having had notice of the winding-up order of 12th November, had power to sell the property on 9th December, and the sale having actually taken place, and there being nothing to show that there was any irregularity in the proceedings, the High Court would have no power, if the cases were brought down, to set aside the sale. This therefore was not a proper case for the exercise of the power which the High Court possesses under cl. 13 of the Letters Patent. *IN THE MATTER OF DECREE SUITS IN THE COURT OF MUNSIF OF DEBROGHUR*

[7 B. L. R., 305]

**47.** ——— *Law governing case.*—Where a suit was originally instituted in the Hooghly Court, and *H S*, who was a defendant, and not subject to the jurisdiction of that Court, joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted,—*Held per PHEAR, J.*, that the suit must be treated as if the plaintiff had been originally filed in the High Court, the proceedings in the Hooghly Court being without jurisdiction, and the cause of action having arisen wholly within the jurisdiction of the High Court. *Held*, on appeal by *PEACOCK, C.J.*, and *MACPHERSON, J.*, that the defendant *H S*, by joining in the application to have the suit removed to the High Court, admitted the jurisdiction of that Court to try the suit in the exercise of its extraordinary original civil jurisdiction, and could not afterwards dispute the jurisdiction. The law, therefore, to be administered by the High Court must be the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly. *Per MACPHERSON, J.*—The law which would have been applicable to the case if it had been tried at Hooghly is practically the same as the English law, whatever may be the nationality of the parties. *GROSE v. AMITAMAYI DAS*

[4 B. L. R., O. C., 1:12 W. R., O. C., 13]

**48.** ——— *Letters Patent, High Court, 1865, cl. 13—Grounds for transfer—Practice.*—In a suit for immovable property instituted in the Dinagepur Court the defendant applied for its transfer to the High Court under cl. 13 of the Letters Patent, the grounds upon which the transfer was asked for being that questions of difficulty arose in the suit; that the defendant's witnesses lived in Calcutta; that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expense; that an agreement upon which the suit was brought was executed in Calcutta; that the plaintiff resided and carried on business in Calcutta; and that all the persons who knew of the transactions in suit were residents of Calcutta or its neighbourhood. *Held*, under the circumstances, that the case was a proper

**TRANSFER OF CIVIL CASE—continued.****2. LETTERS PATENT, HIGH COURT, CL 13**  
—concluded.

one to be transferred to the High Court *HARENDRA LALL ROY v. SARVAMANGALA DABEE*  
[I L. R., 24 Calc., 183]

*SURVOMONGOLA DEBI v. HARENDRA LALL ROY*  
[1 C. W. N., 109]

**49.** ——— *Application for transfer—Before whom application should be made.*—An application to the High Court to remove a case from a District Court, and to try it as a Court of extraordinary original jurisdiction, under s 13 of the Charter, should be made to a Judge sitting on the original side of the Court. *DOUCETT v. WISE*  
[4 W. R., MIs., 7]

**3. GROUND FOR TRANSFER.**

**50.** ——— *Expense, convenience, on other good reason—Civil Procedure Code (Act XIV of 1882), s. 23—Practice*—S 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence; they should further state what are the issues and the evidence required, and then satisfy the Court that, either on the ground of expense or convenience, or otherwise, the place of trial ought to be changed. *KHATJA BIBI v. TAREK CHUNDER DUTT* . I L. R., 9 Calc., 980:13 C. L. R., 182

**51.** ——— *Portion of property in another jurisdiction—Civil Procedure Code, 1877, s. 23—Procedure*—The fact that a portion of property, the whole of which is sued for in the Court of the Munsif of A, is of less value than the remaining portion which is within the jurisdiction of the Munsif of B, is no sufficient ground for an application under the Code of Civil Procedure, s 23, for a transfer to the latter Court. A party applying under s 23, Act X of 1877, must first of all give notice to the other party or side; the application should then be received by the Munsif and transmitted to the High Court through the District Court. *PURBUNJOYE v. DEON PANDAY* . 2 C. L. R., 352

**52.** ——— *Suit for partition of property partly in Calcutta and partly in mofussil.*—In a partition suit instituted in the Second Subordinate Judge's Court of the 24 Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (a) moveable property situate in Calcutta; (b) immovable property,  $\frac{4}{13}$ ths of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court. *Held* that the case was a proper one to be transferred to the High Court to be tried on

**TRANSFER OF CIVIL CASE—concluded****3 GROUND FOR TRANSFER—concluded**

the original file and an order was made accordingly  
**JOTENDRO NATH 3 MITTAR PAJ KRISHO MITTAR**  
 [I. L. R., 16 Calc., 771]

**TRANSFER OF CRIMINAL CASE**

Col.

- 1 GENERAL CASES . . . . . 9163  
 2. LETTERS PATENT HIGH COURT  
 CL. 23 . . . . . 9163  
 3 GROUND FOR TRANSFER . . . . . 9160

*See* APPEAL IN CRIMINAL CASE—ACTS  
 BURMA COURTS ACT

[I. L. R., 4 Calc., 667]

*See* CASES UNDER COMPLAINT—POWER  
 TO REFER TO SUBORDINATE OFFICERS.

*See* CRIMINAL PROCEDURE CODES s 504.  
 [I. L. R., 15 Calc., 455]

*See* CRIMINAL PROCEEDINGS.

[I. L. R., 12 All., 66]

[I. L. R., 14 All., 346]

[I. L. R., 19 Mad., 375]

*See* HIGH COURT JURISDICTION OF—  
 MADRAS—CRIMINAL.

[I. L. R., 12 Mad., 39]

*See* MAGISTRATE JURISDICTION OF—  
 GENERAL JURISDICTION.

[I. L. R., 23 Calc., 44]

*See* MAGISTRATE JURISDICTION OF—  
 POWERS OF MAGISTRATES.

[I. L. R. 13 All., 345]

4 C W N., 831

[I. L. R., 22 Mad., 149]

[I. L. R., 23 Bom., 549]

*See* MAGISTRATE JURISDICTION OF—  
 SPECIAL ACTS—CATTLE TRESPASS  
 ACT 1871 [I. L. R., 23 Calc., 300 442]

*See* MAGISTRATE JURISDICTION OF—  
 WITHDRAWAL OF CASES.

[I. L. R. 14 Mad., 399]

[I. L. R., 15 Mad., 94]

[I. L. R., 22 Bom., 549]

*See* POSSESSION ORDER OF CRIMINAL  
 COURT AS TO—TRANSFER OR WITH-  
 DRAWAL OF PROCEEDINGS.

[I. L. R., 22 Calc., 889]

*See* SECURITY FOR GOOD BEHAVIOUR.

[I. L. R., 18 All., 9]

[I. L. R., 19 All., 291]

**1 GENERAL CASES**

1. Power to transfer—Criminal  
 Procedure Code 1892 s 178—Reference to High  
 Court—Burma Courts Act (XVII of 1905)  
 s 60—The Local Government has no power under  
 s 178 of the Code of Criminal Procedure to transfer

**TRANSFER OF CRIMINAL CASE**

—continued

**1 GENERAL CASES—continued**

for trial to the Court of a Commissioner a criminal  
 case duly committed for trial to the Court of the  
 Recorder of Panchoo; but the Local Government  
 has the power to transfer a case from the District of  
 Panchoo to the Sessions Division of Irgau. **QUEEN**  
**EMRESS v NOA THA MOON**

[I. L. R., 10 Calc., 643]

2. Criminal Procedure Code 1892 s 526—District Magistrate and  
 Civil and Sessions Judge (and Magistrate) of  
 Bangalore ordered case to High Court.—The Dis-  
 trict Magistrate and the Civil and Sessions Judge of  
 the Civil and Military Station at Bangalore are  
 Magistrates subordinate to the High Court at  
 Madras within the meaning of s 526 of the Code  
 of Criminal Procedure. The High Court there-  
 fore has power to transfer a case from the Courts of  
 those Judges to any other Criminal Court. Under  
 the circumstances disclosed, the High Court trans-  
 ferred the case. **SCOTT v RICKETTS**

[I. L. R., 9 Mad., 358]

3. Power of High  
 Court Bombay—Criminal Procedure Code 1902  
 s 526—Act III of 1883 s 11—Cantonment Ma-  
 gistrate Secunderabad.—The High Court of  
 Bombay having been vested, by notification of the  
 Governor General of India in Council No 124 of  
 23rd September 1884, with the original and appellate  
 criminal jurisdiction over European British subjects  
 being Christians resident amongst other places at  
 Secunderabad, outside the Presidency of Bombay and  
 within the territorial limits of His Highness the Nizam of  
 Hyderabad, the Cantonment Magistrate of Secunder-  
 abad in his character of a District Magistrate is  
 subordinate to the High Court in criminal matters  
 relating to Christian European British subjects at  
 Hyderabad within the contemplation of s 526 of  
 the Code of Criminal Procedure (Act X of 1892) as  
 amended by Act III of 1884 s 11; and the High Court  
 possesses, by virtue of the appellate jurisdiction so  
 vested in it, the power of transferring a criminal case  
 pending in the Cantonment Magistrate's Court either  
 to itself or to any criminal court of equal or superior  
 jurisdiction. The High Court, by an order under  
 s 526 of the Criminal Procedure Code (Act X of 1892)  
 transferred the present case of defamation from the  
 Court of the Cantonment Magistrate at Secunderabad  
 to the High Court for trial, on the ground that to  
 make every for a trial by jury existed at Secunder-  
 abad. **QUEEN EMRESS v EDWARDS**

[I. L. R., 9 Bom., 333]

4. Power of High  
 Court Bombay—Act II of 1864—Transfer  
 of case from Court of Police Magistrate at Aden—  
 Criminal Procedure Code 1892 s 526—A prisoner  
 charged with having committed murder at Aden was  
 committed by the Magistrate there on the 26th August  
 1883 for trial before the District and Police Magistrate at Aden  
 by whom he was convicted and sentenced to death on the  
 1st September 1884. On the 26th January 1886  
 the High Court of Bombay reversed the conviction

## TRANSFER OF CRIMINAL CASE —continued.

### 1. GENERAL CASES—continued.

and sentence, on the ground that the Court of the Resident had no jurisdiction over the Island of Perim, and that the Resident, not having been appointed a Judge of a Court of Session for that island, was not competent to try the prisoner. The High Court ordered a re-trial before a competent Court. On the 30th February 1886 the Government of Bombay issued the notification (No. 823) above set forth. On the 11th March 1886 an application was made to the High Court of Bombay for the transfer of the case to another Court of Session or to the High Court for trial. *Held* that Perim is a Sessions Division, and that, after the establishment, under the Code of Criminal Procedure, of a Court of Session for the Perim Sessions Division and the appointment of the Resident at Aden as Sessions Judge of that Court, the accused stood properly committed to a Court of Session. The High Court therefore could transfer the case from that Court, under s. 526 of the Code, to any other Court of equal or superior jurisdiction, or to the High Court of Bombay. *Per* BIRDWOOD, J.—The High Court cannot, under s. 526 of the Criminal Procedure Code (Act X of 1882), any more than under s. 25 of the Civil Procedure Code (Act XIV of 1882), direct the transfer of a case, which is not properly before a subordinate Court of competent jurisdiction, to receive and try it. *Peary Lal Mozoomdar v. Komul Kishore Dossia*, I. L. R., 6 Calc., 80, followed. *Queen-Empress v. Thaku*, I. L. R., 8 Bom., 312, distinguished. *Per* JARDINE, J.—After the High Court had annulled the proceedings in the Court of the Resident at Aden as without jurisdiction, the case could not be treated as still pending in his Court; and as there was no Court of Session in existence at the time of the commitment, it necessarily followed that the case remained in the Magistrate's Court. But, whether the case was considered as pending in the Court of a Magistrate, or of a Resident, or of a Sessions Judge the High Court had the power to transfer it, and that under the circumstances the case should be so transferred to the High Court for trial. *QUEEN-EMPRESS v. MANGAL TEKCHAND* . . . I. L. R., 10 Bom., 274

5. ———— *European British subject Jurisdiction of High Court to transfer—Grounds for transfer—Criminal Procedure Code (Act X of 1882), s. 526—Act XXXVII of 1855—Santhal Peronnahs.*—The Court of a Magistrate in the Santhal Peronnahs is, as regards the trial of an European British subject, subordinate to the High Court, and the High Court has power, under s. 526 of the Criminal Procedure Code, to direct the transfer of a case in which such subject is concerned. The transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him, and will in consequence be prejudiced in the trial. *IN THE MATTER OF THE PETITION OF WILSON* . . . I. L. R., 18 Calc., 247

## TRANSFER OF CRIMINAL CASE —continued.

### 1. GENERAL CASES—continued.

6. ———— *Transfer to High Court—High Courts' Criminal Procedure Act (X of 1875), s. 147 (Criminal Procedure Code, 1882, s. 526) and s. 115—"Case" referred to High Court—Reference to Police Magistrate.—Semble*—That the "case" mentioned in s. 147 of the High Courts' Criminal Procedure Act (X of 1875) must refer to some question in the nature of a criminal proceeding, and not to a matter of a quasi-civil character, such as the reference to a Police Magistrate contemplated in s. 115. *RFG. r RAMADAS SAMALDAS EX-PARTE MADATJI DHARRAYSI* . . . 12 Bom., 217

7. ———— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526)—"Other proceeding"—Commitment, Application to quash—24 & 25 Vict., c. 104, ss. 13 and 15.*—The words "or other proceeding" in s. 147 of Act X of '87 did not include a commitment, and an application to have a commitment quashed could be entertained under the provisions of that section. *IN THE MATTER OF THE PETITION OF CHAROO CHUNDER MULLICK. CHAROO CHUNDER MULLICK v. EMPRESS*

[I. L. R., 9 Calc., 397]

8. ———— *Acquittal—Presidency Magistrates Act (IV of 1877), s. 181—Calcutta Municipal Act (Bengal Act IV of 1876), ss. 75, 79*—The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured. *CORPORATION OF CALCUTTA v. BHEEGUNNAM NARIT alias BHEEGUN NARIT* . . . I. L. R., 2 Calc., 230

9. ———— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526)—Notice to prosecutor—Penal Code, ss. 202 and 294—Specific charge—Procedure on transfer to High Court.*—In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shown, that the case be removed without notice to the Crown. *Semble*—A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X of 1875, may either try the case *de novo* or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained. *QUEEN v. UPENDRONATH DOSS* . . . I. L. R., 1 Calc., 356

## TRANSFER OF CRIMINAL CASE

—continued

## 1 GENERAL CASES—continued

10 ————— *High Court's Criminal Procedure Act 1875 s. 147—Transfer of case to District Magistrate—Power to issue mandamus*  
—A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The District Magistrate heard the evidence for the prosecution and without doubting it decided it did not amount to the offence charged. Held that, assuming that an error of law had been committed, the High Court had no power to issue a mandamus to the Magistrate to commit the defendants, it was not a case where the Magistrate had declined jurisdiction. He had exercised his jurisdiction and heard the case. Held also it was not a case which the Court could transfer under s. 147 of the High Court's Criminal Procedure Act. *EMRESS v. GASPER*  
[I. L. R., 2 Cal., 278]

11. ————— *High Court's Criminal Procedure Act 1875 s. 147—Case transferred to High Court—Refund of fine on quashing of conviction—Notes of evidence taken by Magistrate*  
—The High Court had no power under s. 147, Act X of 1875 to order a fine to be refunded on quashing of a conviction. The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial. *QUEEN v. JERSON BEX*  
[I. L. R., 1 Cal., 354]

12. ————— *High Court's Criminal Procedure Act 1875 s. 147—Costs—Police Magistrates—Notes of evidence*  
—In a case transferred to the High Court under s. 147, Act X of 1875 the Court had no power to give costs. *Demble*  
—The case may be transferred after final determination by the Magistrate. None of the proceedings before them should be taken in all cases by the judicial officers of all Criminal Courts subject to the Act. *IN THE MATTER OF LOTUS IN THE MATTER OF BENGAL ACT VI OF 1866*  
[15 B. L. R., Ap., 14]

13. ————— *Power of District Magistrate—Power to call for case—Procedure when, having called for it, he finds it out of his jurisdiction*  
The Magistrate of the district has authority to call up to his own Court any criminal case without limitation as to the stage of proceeding at which it may be called. If the Magistrate having in the exercise of his authority withdrawn any case, finds that it did not come within the jurisdiction of his Magistracy, he would not merely be competent, but bound to refuse to proceed further with the case. *VLARTER KHANUM v. MEHEN ALI*

[24 W. R., Cr., 4]

14. ————— *Held that, although the Magistrate of a district is competent to order the removal of any particular case from the file of a subordinate Court to his own it is doubtful if he can by general proceeding direct the removal of cases which have no existence, and which*

## TRANSFER OF CRIMINAL CASE

—continued

## 1 GENERAL CASES—continued.

are not pending before any of his subordinate Courts. *GOVERNMENT v. GIRDHARAN LALL*

[I. Agra, Cr., 24]

15. ————— *Criminal Procedure Code (1892), ss. 525 and 192—Transfer of criminal case by the High Court to the Court of a District Magistrate—Interpretation of order—Practice*  
—When a criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate to the Court of a District Magistrate, if it is intended that the District Magistrate shall have power to transfer the case to a subordinate Court that intention will be expressed in the order of the High Court. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself; but, when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply s. 192 of the Code of Criminal Procedure and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it. *QUEEN v. MATA PRASAD*

[I. L. R., 19 All., 249]

16. ————— *Application for transfer—Criminal Procedure Code 1872 s. 64—Power of Judge acting on English committee—An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made not by letter to the English Department of the High Court, but before the Court in its judicial capacity and should be supported by affidavits or affirmations in the usual way. *QUEEN v. ZUHURUDDIN**

[I. L. R., 1 Cal., 219 22; W. R., Cr., 27]

17. ————— *Notice of transfer—Subordinate Magistrates—Criminal Procedure Code (Act X of 1872) s. 43—Notice to the parties before the transfer is made*  
—Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other subordinate Court notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made. *IN THE MATTER OF THE PETITION OF TEACOTTA SKEEDAR, TEACOTTA SKEEDAR v. AMTES MAJEN*  
[I. L. R., 8 Cal., 393, 10 C. L. R., 239]

18. ————— *Criminal Procedure Code (Act X of 1892), s. 523—Notice to accused—An order under s. 523 of the Criminal Procedure Code (Act X of 1892) transferring a case for inquiry or trial from one Magistrate to another, ought not to be made without notice to the accused. *QUEEN v. EMPRESS v. SADASHIV NARAYAN JOSHI**

[I. L. R., 13 Bom., 549]

19. ————— *Transfer of partly-heard case—Hearing of evidence—Where a case which*

**TRANSFER OF CRIMINAL CASE***—continued.***1. GENERAL CASES—concluded.**

has been partly heard by one officer is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. **KORNI NATH SANI v. KONEERAM**. . . . 14 W. R., Cr., 3

**QUEEN v. KULLIAN SINGH** . . . 2 N. W., 468

The High Court, however, declined to interfere in a case of this sort, as the prisoners did not appeal or raise any objection to the trial on this ground. **KORNI NATH SANI v. KONEERAM**

[14 W. R., Cr., 3

**2. LETTERS PATENT, HIGH COURT, CL. 29.**

**20. ————** *Transfer to High Court—Power to transfer—Criminal Procedure Code, 1872, s. 64.*—S. 29 of the Letters Patent of 1865 empowers the High Court to transfer for trial before itself an appeal to a Court of Session from the sentence of a District Magistrate, and this power was not affected by s. 64 of the Code of Criminal Procedure, 1872, which authorized the High Court to transfer an appeal from one subordinate Court of criminal jurisdiction to another. **SITAPATHI NATUDU v. QUEEN** . . . I L. R., 6 Mad., 32

**21. ————** *Power to transfer—"Competency" to investigate case.*—The construction of cl. 29 of the Letters Patent, 1865, is that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the mofussil. "Competent to investigate it" does not include competency as regards local jurisdiction, but only competency with regard to the offender, the nature of the offence, and the punishment. **QUEEN v. NABADWIP GOSWAMI**

[1 B. L. R., O. Cr., 15: 15 W. R., Cr., 71 note

**22. ————** *Power to transfer—Power of single Judge on original side of High Court.*—On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds mainly that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by these means was created such a feeling of dread and insecurity among the witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial; but these allegations were denied by the affidavits filed in opposition to the application.—*Held* (MACPHERSON, J., doubting) the High Court had power under

**TRANSFER OF CRIMINAL CASE***—continued.***2. LETTERS PATENT, HIGH COURT, CL. 29**  
*—concluded.*

cl. 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application, on the ground that a sufficient case had not been made out for the exercise of the power of the Court. *Per PHILAR, J.*—A single Judge, sitting on the original side of the Court, has power to entertain an application for the removal of a criminal case from a Court in the mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction. **QUEEN v. AMBER KHAN**  
[7 B. L. R., 240: 15 W. R., Cr., 69

**3. GROUND FOR TRANSFER.**

**23. ————** *Nature of grounds for transfer—Transfer from one Magistrate to another.*—The High Court will not, except on very strong and very clear grounds, transfer a case from one Magistrate's Court to that of another Magistrate. *IN THE MATTER OF THE PETITION OF SHANKAR ABAJI HOSHING. REG. v. SHANKAR ABAJI HOSHING* . . . . 6 Bom., Cr., 69

**24. ————** *Probability of unfair trial—Transfer from one Magistrate to another.*—It is only when there is reason to suppose that the prisoner will not have a fair trial that the High Court will transfer a case from one magisterial officer to another. **QUEEN v. KISTO CHUNDER GHOSE**

[2 W. R., Cr., 58

**25. ————** *Proof of grounds for transfer—Grounds necessary to obtain transfer when application is opposed by accused.*—Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable. *IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCE. EMPRESS v. NOBO GOPAL BOSE* . . . . I L. R., 6 Cal., 491

**26. ————** *Prosecution initiated by Magistrate—Conviction before same Magistrate—Transfer of appeal from Magistrate to Sessions Judge.*—Where the Magistrate of the district had procured the initiation of a number of prosecutions against the same person, and one of them which had resulted in conviction came up before him in appeal, the High Court, considering that it was not altogether seemly that he should hear the appeal, ordered its transfer to the Sessions Judge. **RAMZAN ALI v. DURPO KOMILLA** . . . . 24 W. R., Cr., 58

**27. ————** *Judge forming premature opinion—Convenience—Relieving judicial officer of case he wishes not to try.*—The High Court does not exercise its powers of transfer in a case of forgery or perjury solely on the ground that the Judge who is to try the case has formed an opinion that the document has been forged or the perjury committed. But when the transfer can be made



## TRANSFER OF CRIMINAL CASE

—continued

## 3 GROUND FOR TRANSFER—continued

will not risk any improper interference with the course of justice and without much inconvenience to the parties and witnesses the transfer would be proper not only as a fair occasion to the accused person but as a means of relieving the Judge from a position which he would himself desire to avoid.

IN THE MATTER OF THE PETITION OF ARYACHALLA IYER 5 Mad., 112

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## Criminal Procedure Code

*Code of Act V of 1898, s 526 Expression of opinion by Magistrate in counter case on evidence added*—Where the complaint forming the subject of trial in a case before a Magistrate related to facts forming the substance of the defence in another case already tried by the same Magistrate—Held that the Magistrate having had to express his opinion on the evidence, which formed the evidence for the defence in that case it was desirable to have the complaint tried by some other Magistrate. CHANDRAMANI SAHAI v. HUSIA RAY 4 C W N., 824

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## Reasonable apprehension

in the mind of the accused—*Criminal Procedure Code (1898) s 526 Trial bias—Incidents calculated to create apprehension of bias*—In dealing with applications for transfer what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the accused, but also the further question whether incidents may not have happened which though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. DUFREYON v. DRIVER I L R., 23 Cal., 495

PARZAND AIL v. HANUMAN PRASAD

(I L R., 19 All., 64)

## 30—Probability of unfair trial—

*Complexity of case—Transfer from one Magistrate to another—Local investigation—Magistrate trying case, Competency of the witness—Competent witness—Familiarity of Magistrate trying case as a witness*—Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity and go out of district boundaries to land, in which the accused were charged with rioting, trespass, mischief and theft and where the course of such investigation, he held a local inquiry extending over five days during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination but which, by reason of the way it was acquired, he could not properly or legally consider in arriving

## TRANSFER OF CRIMINAL CASE

—continued.

## 3 GROUND FOR TRANSFER—continued.

at an ultimate decision of the case (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercises judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record and the Assistant Magistrate tender himself while trying the case as a witness to be cross examined by either the prosecution or the defence,—Held that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case but that it must be transferred to some other Magistrate exercising first class powers for disposal. HARI KISHORE MITRA v. ANAND DIXI MIAH I L R., 21 Cal., 920

31. — Fairness and impartiality of the jury—*Criminal Procedure Code (1898), s 526, cl (e)—Expression of belief by the District Magistrate*—When two such officers as the District Magistrate and the Sessions Judge emphatically express the belief that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular jury to try the case. An order for transfer in such cases is expedient for the ends of justice under s 526, cl (e), of the Criminal Procedure Code. The importance of securing the confidence of parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal. DUFREYON v. DRIVER, I L R., 23 Cal., 495 followed. The jury in a case triable by jury constitute a part and an important part of the tribunal. It is not quite reasonable to say, where doubt is entertained as to the fairness and impartiality of the jury, that the trial should nevertheless go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. EMPRESS v. NABO GOPAL DORE, I L R., 6 Cal., 491, distinguished. LEGAL PRAMENRASER v. BHAIKAR CHANDRA CHUCKERBUTTY

(I L R., 25 Cal., 727)

IN THE MATTER OF THE PETITION OF THE DEPUTY LEGAL REMEMBRANCE, QUEEN EMPRESS v. BHAIKAR CHANDRA CHUCKERBUTTY. 2 C. W. N., 65

32. — Magistrate having bias against the accused—*Criminal Procedure Code (1898), s 526 A*—Where a Magistrate in the course of an investigation under Ch. XIV of the Criminal Procedure Code, and also in the subsequent enquiry preliminary to commitment, acted in a manner indicating some bias against the accused,—Held that the Magistrate should not proceed with the enquiry and the case should be transferred from his file. KARNESHARI PRASAD NARAYAN SINGH v. EMPRESS 2 C. W. N., 489

33. — Illegal procedure by Magistrate—*Magistrate antagonistic to accused*

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

B L R., 577 referred to BHAIRO v. PARMESHWARI  
DATAL I L R., 7 All, 516

3 ——— and s. 12—Transfers by act of parties—*Assurances by operation of law*—s. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties. IN THE MATTER OF THE WEST HORTOWN TEA COMPANY I L R., 12 All, 192

— s. 10, 11.

See RIGHT OF SETTY—CONTRACTS AND AGREEMENTS I L R., 8 All, 452

— s. 14

See PERPETUITIES RULE AGAINST  
(I L R., 20 Bom, 511)

— s. 35

See GUARDIAN—DUTIES AND POWERS OF GUARDIANS I L R., 23 Mad., 289

— s. 39

See HINDU LAW—MAI TILAK K.—RIGHT TO MAINTENANCE—WIDOW  
(I L R., 23 Bom, 342  
I L R., 27 Cal, 184  
I L R., 23 All, 320)

— s. 41.

See N W P REST ACT s. 7  
(I L R., 8 All, 409)

— *Ostensible ownership—Purchase*  
*load vide for value from ostensible owner—*  
*Laches—Decision based upon ground not specifically pleaded.*—Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarr'd him from asserting his right. Where the plaintiff had for many years left another person in possession of a house and the defendant had become at auction sale the bona fide purchaser for value of the house under a decree against such person as ostensible owner the Court found that s. 41 of the Transfer of Property Act applied and dismissed the plaintiff's suit. The Court is not precluded from interested decision upon a ground not specifically mentioned either of the parties. *THAKUR v. the sale of*  
I L R., 17 All, 280

18-2, the land  
sui instituted DECREE OF DECREE—MODE OF v. ANASTHATHA KUN—MORTGAGE

7 ——— (I L R., 18 Mad., 492)

gave decree—*Execution AND PURCHASER—Miscellaneous*  
who had obtained a decree  
his judgment debtor (I L R., 14 Mad., 459)  
mortgaged property and after several previous applications

alive to execute his decree APPLICATION—RIGHT TO 1855. The judgment-debtor objected FROM CO-PARTY that no suit had been instituted on 13 Mad., 275

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

— s. 45.

See SALE FOR ARREARS OF RENT—PRA CHARGES, RIGHTS AND LIABILITIES OF [4 C. W N., 465]

— s. 48.

See N W P REST ACT s. 7.  
(I L R., 8 All, 409)

— s. 51.

See DECREE—FORM OF DECREE—MORTGAGE I L R., 8 All, 502

— s. 52.

See FOREIGN COURT JUDGMENT OF  
(I L R., 19 Mad., 257)

See CASES UNDER LIS PENDENS.

— *Registered and unregistered interests—Transfer of property "pendente lite"*—*Act III of 1877 (Registration Act), s. 10—B*  
*held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registered, and was not registered. A purchased the same property pendente lite by a registered deed of sale. Held that there was no competition between a registered and an unregistered instrument to which s. 10 of the Registration Act could apply; and that A's purchase was, by s. 12 of the Transfer of Property Act, subject to the decree passed in B's favour. DRAGWAN DAS v. SATHU SINGH*  
I L R., 8 All, 444

— s. 53.

See LIS PENDENS.  
(I L R., 13 All, 571)

See REGISTRATION ACT 1877, s. 50.  
(I L R., 8 All, 540)

1. ——— *State 13 All., s. 5, and*  
*27 All., s. 4—Voluntary transfers as against creditors or subsequent transferees for consideration—Notice—Registration—Duty of mortgagee in searching for prior encumbrances—Post-nuptial settlement with power of appointment to wife—Deed of appointment in favour of children—Severy as evidence of fraud—Subsequent mortgage by wife and trustee of settlement without men, and by deed of appointment—In 1870 the defendant J and her husband executed a post-nuptial settlement which they assigned certain Municipal debentures to the defendant T (the brother of J) and one G "upon trust for J during her life and after her death as she should by deed or will appoint" and subsequently the trustees, in pursuance of a power given them by the settlement, sold the debentures and invested the proceeds in house property in Calcutta, such house and premises thereafter representing the trust property and being held by the trustees on the trusts of the settlement. On the 1st December 1878 T retired from the trust and made over his interest to the remaining trustee G, and on the same day J executed a deed of appointment in favour of her children representing to her solicitor that she did so to protect the property from her husband.*

### TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

The deed of appointment was witnessed by *E*, and was duly registered, but it was not mentioned in the deed which assigned the trust property to *G*, and no information of it was given to him, the deed remaining in *J*'s custody and not being made over to *G*. In 1884 *G* retired from the trust, and *E* became sole trustee in his place. In March 1884 money was raised by *J* and *E* on mortgage of the trust property to *G*, but no mention of the deed of appointment was made in the mortgage-deed. *J*'s husband died in October 1884, but neither then, nor on the occasion of another mortgage of the property in 1888, was any mention made of the deed of appointment, and there was nothing on the record of the case to show that the husband was ever in needy circumstances, or pressed his wife for money, or that he died leaving no property. In 1890 *E* and *J* mortgaged the house and premises to the plaintiffs, the mortgage-deed (which was duly registered) reciting the settlement of 1870, and that "*J* has not made any irrevocable appointment of the said trust premises under the power of appointment given to her in the settlement," but making no mention of the deed of appointment executed by her in 1878. A deed of further charge was also executed by *J* and *E* in 1891 in favour of the plaintiffs also without any mention of the deed of appointment: this was also duly registered. Before execution of the mortgage of 1890, the plaintiffs' solicitors did not search the register of deeds further back than 1884, because they were dealing with persons who must have known of the exercise of the power of appointment, and who had given a covenant that no such exercise had been made, and because they then found that *G*, the former trustee, had taken a similar security himself in 1884 and must have been satisfied that no such blot existed on the title. They had, moreover, a letter from *G*'s solicitors saying that they had searched the register up to 1884. *J* first set up the deed of appointment as a defence in the present suit, which was brought on the mortgages against *E* and *J* and their children, and in which the plaintiffs sought to recover the amount advanced with interest, and prayed that the deed might be declared void as against them. In this suit *E* did not appear. The principal grounds of defence were that the mortgage deeds were not explained to *J*, that she was ill at the time, and left all the transactions to her brother *Z*, and that she did not know the contents of the deeds which she contended were therefore not binding on her; that the deed of appointment was made in consideration of her natural love and affection for her children; and that the plaintiffs had notice of it. On the facts the lower Court (*SALE, J.*) found that she had full and complete knowledge of the contents of the mortgage-deeds and was bound by them, and that there was gross fraud towards the plaintiffs on the part of *E* in suppressing the fact of the existence of the deed of appointment. Held by *SALE, J.*, that, according to the law which existed in India prior to the passing of the Transfer of Property Act, the deed of appointment was a voluntary conveyance and fraudulent within the meaning of the Stat. 27 Eliz., c. 4, and void as against the plaintiffs as subsequent trans-

### TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

ferees for valuable consideration; the legal presumption of fraud which the Court was entitled to make on the cases decided on that statute rendering the question of notice or no notice immaterial. *Judah v. Abdool Kurcem*, 22 W. R., 60; *Doe d. Otley v. Manning*, 9 East, 59; *Doe d. Newman v. Rushan*, 17 Q. B., 724; and *Godfrey v. Poole*, L. R., 18 Ap. Cas., 497, referred to. S. 53 of the Transfer of Property Act has not altered the law in that respect. The deed of appointment came within the definition of "transfer of property" given in that Act, there being nothing in the Act to suggest that it was intended to confine its operation to transfers by contract. The words of s. 53, "may be presumed to have been made with such intent as aforesaid" (i.e., with a fraudulent intent), should be construed in accordance with the cases decided under the Stat. 27 Eliz., c. 4. Even assuming that it was intended by s. 53 to exclude voluntary conveyances of which a subsequent transferee had notice from the presumption of fraud.—Held on the facts that the plaintiffs had no notice of the deed of appointment. The doctrine of notice, if applied, must be applied in accordance with, and subject to, the definition of notice given in the Act itself. There was no actual notice, and there was not such an "abstention from inquiry or search" on the part of the plaintiffs as to fix them with constructive notice. The words "wilful abstention from inquiry and search" mean such abstention as would show want of *bona fides* on the part of the plaintiffs in respect of this particular transaction. *Agra Bank v. Barry*, L. R., 7 E. & L., 135, referred to. Held also that the doctrine of registration amounting to notice, as laid down in the case of *Lakshmandas Sarupchand v. Dasrat*, I. L. R., 6 Bom., 168, had no application to the present case. Having regard to the terms of s. 53 of the Transfer of Property Act, that doctrine, if applicable, can only apply for the purpose, either of rebutting the presumption of fraud or of preventing the presumption of fraud from arising. If the true meaning of that section be that the Court is to presume fraud only in accordance with the facts of each particular case, the facts of the present case were amply sufficient to raise the presumption as regards the deed of appointment. That deed therefore was fraudulent as against the plaintiffs, and they were entitled to a declaration that it was void and inoperative as against them. Held on appeal (by *PETHERAM, C.J.*, and *NORRIS and O'KINEALE, JJ.*) that, looking to the unusual way in which the transaction as to the deed of appointment was carried out, and the secrecy given to it, the result of which was to enable *E* and *J* to raise money on the trust property by inducing persons to believe that the whole title lay in themselves alone, and on the other facts in the case, apart from the presumption which might be made under s. 53 of the Transfer of Property Act, where a transfer is made gratuitously for a grossly inadequate consideration, viz., that it may be presumed to have been made to defraud or defeat creditors, the decree of the Court below was correct. *JOSHUA v. ALLIANCE BANK OF SIMLA*. . I. L. R., 23 Cal., 185

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

3 — *It ghts of a transferee in good faith and for consideration—Good faith*  
*Meaning of Effect of transfer made with the object to delay or defeat a creditor the transferee not be aware of such an intention*—Where a transfer for value is made with an intention on the part of the transferor to defeat or delay his creditors, but has knowledge only of an impending execution against the transferor, such knowledge of itself is sufficient to vitiate the transfer, and does not make the transferee a transferee otherwise than in good faith within the meaning of s. 53 of the Transfer of Property Act (IV of 1882). *Eam Larna Singh v Jankee Dahoo 22 W R 473 referred to. ISHAN CHANDRA DAS SARKAR v. BISHU SIRDAR [I. L. R., 24 Cal., 825 1 C W N., 665*

3 — *Transfer in fraud of creditors—Good faith*—When it is said that a deed is not executed in good faith, what is meant is that it was executed with a mere cloak the real intention of the parties being that the ostensible grantor should retain the benefit to himself. *AMASAMIA LILLAI v ALINARAYANA PILLAI [I. L. R., 20 Mad., 465*

4. *Gifts and void for intent to delay and defeat creditors—Stat 13 Eliz. c. 5*—A mere preference by a debtor to one creditor to another and a *fraud* were both *void* and *void* security given to a creditor to the extent of his debt is not within s. 53 of the Transfer of Property Act, 1882 as it is not within the English Statute of 13 Eliz. c. 5. But where a document, given by way of security goes further and secures debts that are not due, the Act is, *good* such fictitious debts, to defeat or delay the creditors. Where a party intends to rely upon a document as not within s. 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more. *VARAYANA PATTAN v VIKARA GHAYAN PATTAN [I. L. R., 23 Mad., 184*

5 — *Assignment in fraud of creditors—Interest taken under will*—B died in 1891 leaving a widow defendant No. 1) and two sons P and D (defendants Nos. 4 and 5). By this will he gave his whole estate interest in the rents and income of his property in part to the widow, and in part to maintain his children, and bringing up the children. After his death the property, movable and immovable was to be divided among his sons equally when D should attain the age of 25. He attained majority in October 1890. On the 13th June 1895 the plaintiffs obtained a decree for Rs. 6-10-10 against the widow and her son P. In execution of that decree they attached under an order dated 2nd July 1890, the immovable properties which had belonged to the testator's estate on the ground that both the widow and P had no interest in them. The defendants alleged (inter alia) that by an assignment dated the 21st February, 1896 the widow had assigned and surrendered her interest to her son D and that such interest was therefore not available to

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

satisfy the plaintiff's decree against her. As to P's interest, the defendants alleged that by a deed of settlement, dated the 9th February 1895, it was validly settled for the benefit of himself and his family, and that therefore he had no interest in him which could be attached under the order of the 2nd July 1890. That even independently of the attachment her assignment to her own son D was invalid against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors, and it was designed to defeat the plaintiff's decree and it was therefore fraudulent and void as against the plaintiffs. That the deed of settlement by P of the 9th February 1895 was void as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). That the plaintiffs were entitled to realize the shares and interest both of the widow and of P so far as might be necessary to satisfy their decree of 13th June 1895. *NATHA KERRA v DUTTA MAHA [I. L. R., 23 Bom., 1*

— s. 54.

See MARCHEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—GENERALLY [I. L. R., 18 All., 344

See PRE-EMPTION—CONSTRUCTION OF WAJIB UL-IZZ. [I. L. R., 7 All., 482, 828

See REGISTRATION ACT 1877, s. 17 [I. L. R., 10 All., 20 I. L. R., 27 Cal., 463

See REGISTRATION ACT 1877, s. 18. [I. L. R., 18 Mad., 454

See REGISTRATION ACT, s. 48. [I. L. R., 13 Mad., 324 I. L. R., 27 Cal., 468

See CASES UNDER VENDOR AND PURCHASER—COMPLETION OF TRANSFER.

See VENDOR AND PURCHASER—INVALID SALES [I. L. R., 18 Mad., 61

Opt. cl. 1 suggested on—FA GARTH C.J.—s. 54 of the Transfer of Property Act virtually also gives optional registration. *VARAN CHANDER CHUCKERBORTI v DATANAM POY [I. L. R., 8 Cal., 597 10 C. L. R., 241*

— s. 55

See LIMITATION ACT 1877, ART 116. [I. L. R., 21 Mad., 8

See VENDOR AND PURCHASER—BRIEF OF COVENANT [I. L. R., 15 Mad., 56 I. L. R., 25 Cal., 288 3 C. W. N., 223 I. L. R., 21 Mad., 8

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF [I. L. R., 13 Mad., 153

Meaning of words "material defects"—Defect in title—The expression, "material

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

defect in the property" in s. 55 of the Transfer of Property Act (IV of 1882), includes a defect in the title to an estate. *ESSA SULLFMAN v. DAYABHAI PARMANANDAS*. I. L. R., 20 Bom., 522

## s. 58.

See DECREE—CONSTRUCTION OF DECREE—MORTGAGE. I. L. R., 19 Mad., 249  
[I. L. R., 23 I. A., 32]

See LIMITATION ACT, 1877, ART. 147.  
[I. L. R., 16 Mad., 64]

See LIMITATION ACT, 1877, ART. 148.  
[I. L. R., 14 Bom., 113]

See MORTGAGE—ACCOUNTS.  
[I. L. R., 14 Bom., 113]

See MORTGAGE—CONSTRUCTION.  
[I. L. R., 12 All., 175  
I. L. R., 13 All., 28  
I. L. R., 21 All., 4]

See MORTGAGE—FORM OF MORTGAGE.  
[I. L. R., 9 All., 183  
I. L. R., 12 All., 203  
I. L. R., 14 All., 195]

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.  
[I. L. R., 22 Calc., 33]

See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-URZ.  
[I. L. R., 7 All., 258, 343]

See REGISTRATION ACT, s. 49.  
[I. L. R., 15 Mad., 253]

## s. 59.

See BENGAL TENANCY ACT, s. 12.  
[3 C. W. N., 499]

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.  
[I. L. R., 9 Mad., 103]

See CASES UNDER DEED—EXECUTION.

See DEPOSIT OF TITLE DEEDS.  
[I. L. R., 14 All., 238  
I. L. R., 17 All., 252  
I. L. R., 24 Calc., 348]

See EVIDENCE ACT, 1872, s. 68.  
[I. L. R., 18 Mad., 29  
I. L. R., 23 Calc., 228]

*Oral agreement for kanom—Suit for ejectment by a jenni.*—A jenni in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years. *Held* that, although no instrument had been executed and registered, the plaintiff was not entitled to eject the defendant. *ITTAPPAN v. PARANGODAN NAYAR*  
[I. L. R., 21 Mad., 291]

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

## s. 60.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EQUITY OF REDEMPTION.  
[I. L. R., 21 Bom., 226]

See MALABAR LAW—MORTGAGE.  
[I. L. R., 16 Mad., 328]

See MORTGAGE—REDEMPTION—REDEMPTION OF PORTION OF PROPERTY.  
[I. L. R., 17 All., 63  
I. L. R., 21 Mad., 369  
I. L. R., 20 All., 23  
4 C. W. N., 507  
I. L. R., 22 Mad., 209]

See MORTGAGE—REDEMPTION—REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM. I. L. R., 16 Mad., 486  
[I. L. R., 23 Mad., 33]

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION.  
[I. L. R., 22 All., 238]

*Right of redemption, Extinction of—Breach of condition in mortgage-deed—Conditional sale.*—The breach of a condition in a mortgage-deed to the effect that on default of payment on a certain date the mortgage shall be deemed an absolute sale does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882. *PERATYA v. VENKATA*. I. L. R., 11 Mad., 403

## ss. 61 and 62.

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION. I. L. R., 16 All., 295

## s. 62.

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE. I. L. R., 8 All., 402

See MORTGAGE—REDEMPTION—REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM. I. L. R., 16 Mad., 486  
[I. L. R., 23 Mad., 33]

## s. 63.

See MORTGAGE—ACCOUNTS.  
[I. L. R., 17 All., 282]

## s. 65.

See LANDLORD AND TENANT—TRANSFER BY TENANT. I. L. R., 10 Calc., 443

*and s. 68—Mortgagor and mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue the mortgagor personally.*—The defendants, having already mortgaged certain land to another, executed a hypothecation-bond comprising the same land in favour of the plaintiff to secure

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

a debt due by them to the plaintiff and covenanted there to pay to him half the proceeds of certain sales of firewood, of which the plaintiff was to take his part towards the security of the debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff then brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond. *Held* that the hypothecation bond contained no personal covenant by the obligors but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the plaintiff to sue them personally under the former section. *SINGEE v. TIRUVENKADAM*

[I. L. R., 13 Mad., 192]

8. 67

See LIMITATION ACT 18 "ART 12

[I. L. R., 24 Cal., 473]

See LIMITATION ACT 18 "ART 13

[I. L. R., 20 Cal., 289]

See LIMITATION ACT 18 "ART 14

[I. L. R., 16 Mad., 64]

See MORTGAGE—POWER OF SALE.

[I. L. R., 13 Mad., 109]

[I. L. R., 21 Bom., 207]

See MORTGAGE—SALE OF MORTGAGED PROPERTY RIGHTS OF MORTGAGEES

[I. L. R., 9 All., 68]

1. — *Right of suit—Suit for sale by usufructuary mortgagee*—Under s. 67 (a) of the Transfer of Property Act (IV of 1882) a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chondra Usarao Singh v. Collector of Moradabad* 5 D. A. N. 1559 p. 13 *Dutt v. Bahadur* 7 W. 55 *Ganesh Koor v. Deedar Bhat* 5 W. 128 *Venkataram v. Subramanya* I. L. R., 11 Mad. 89 and *Jabala Ram v. G. Reddy* Singh I. L. R. 6 All., 289 referred to. *UMMA v. UMMAO BEGAM*

[I. L. R., 11 All., 367]

2. — *Usufructuary mortgage—*

*Remedy of mortgagee*—A usufructuary mortgagee is not entitled in the absence of a contract to that effect, to sue for sale of the mortgaged property. *Smble* The construction placed on s. 67 (a) of the Transfer of Property Act 1882 in *Venkataram v. Subramanya*, I. L. R. 11 Mad., 89 that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong. *CHATHRU v. KENJAN*

[I. L. R., 12 Mad., 109]

to 3. — *usufructuary mortgage with a personal covenant—Suit for sale—Right of suit*—In a suit the 21st clause it appeared that the mortgagor had covenanted by the mortgage for that such interest mortgage amount, but otherwise

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

answered the definition of a usufructuary mortgage contained in the Transfer of Property Act, s. 53 (d). *Held* that the mortgage was not precluded by the Transfer of Property Act, s. 67 from bringing the property to sale under the mortgage. *SAMATTA v. GURUVA*

[I. L. R., 14 Mad., 232]

4. — *usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Right of suit*—The plaintiff at the request of the mortgagees paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder and was placed by the mortgagees in possession of a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagees so paid off, who executed a release. The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold subject to the establishment of the plaintiff's claim. The decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff then sued the mortgagees and mortgagee and the defendants alone for relief. *Held* the plaintiff was not entitled to a decree for sale. *Smble*—The plaintiff might have sued to have the sale, which had taken place as the suit of the first usufructuary mortgagee declared to be invalid as against him. *SAMATTA v. NAOLIN GAN*

[I. L. R., 15 Mad., 174]

5. — *Mortgagee's right to sue for mortgage-money and for sale—Usufructuary mortgage—Covenant to repay mortgage-money—Right of suit*—The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage-money in Chattri Kalavadi of the year 1853. This covenant was followed by the words "If I fail to pay the mortgage amount in the said Kalavadi, then you shall receive the said mortgage amount in the Chattri Kalavadi of whatever year I may pay it deliver the said lands to my possession having cleared off the arrears of Government revenue, and also give back the bond." The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property. *Held* by a Full Bench that the bond contained a covenant to pay and that therefore the suit was maintainable. *SIYAKAMI ANNAL v. GOPALA SATUNDRAM ALIAN*

[I. L. R., 17 Mad., 131]

6. — *usufructuary mortgage—Right of suit—Mortgagee instituted before payment into Court—Right of mortgagee to a decree*—In a suit to recover money due on a mortgage defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of payment into Court when he filed his suit. *Held* that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree. *SIVARAMAYYA v. VENKATRAMANA*

[I. L. R., 11 Mad., 371]

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

7. ——— and ss. 86, 89—*Usufructuary mortgage dated 20th April 1882 sued on in 1884—Form of decree.*—In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage-money, or in default for the sale of the mortgaged property. *Held* (*Semle* under the Transfer of Property Act) that the decree for sale was the right decree. *VENKATASAMI v. SUBRAMANNA*. I. L. R., 11 Mad., 38

8. ——— and s. 90—*Suit for money-decree on mortgage with personal covenant—Execution against mortgaged property—Sale of security in execution of decree.*—A mortgage-deed contained a personal covenant to pay and a suit was brought on such personal liability. *Held* that the mortgagees were entitled to waive their right to proceed against the mortgaged property and to bring a suit only for a money-decree, but that they could not bring to sale the mortgaged property in execution of such decree without recourse to the provisions of s. 67 of the Transfer of Property Act. *RAM KESHUB DEB v. SONATUN PAL* [2 C. W. N., 320]

9. ——— *Decree for payment of money by instalments on specified dates—Charge—Consent decree—Separate suit.*—Where by a consent decree it is ordered that payment of the decretal amount be made by instalments, and that the properties set forth in a schedule annexed to the decree stand charged with payment of the said instalments, the said properties cannot be sold in execution of the decree, but a separate suit must be brought under s. 67 of the Transfer of Property Act. *AUBHOYESWARY DABEE v. GOURI SUNKER PANDAY* [I. L. R., 22 Calc., 859]

10. ——— and s. 99—*Charge for maintenance created by a decree, how enforced—Civil Procedure Code (1882), s. 244 (c)—Separate suit.*—Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate.—*Held* that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution. *Aubhoyessury Dabee v. Gouri Sunkur Panday*, I. L. R., 22 Calc., 859, followed. *Ashutosh Banerjee v. Lakhimoni Debya*, I. L. R., 19 Calc., 139, distinguished. *MATANGINI DASSEE v. CHOONEYMONEY DASSEE* [I. L. R., 22 Calc., 903]

11. ——— *Usufructuary mortgage—Sudbharna bond—Covenant to repay—Construction of bond—Suit for money and for sale—Form of decree.*—In a sudbharna mortgage bond it was stipulated, "having paid the principal money in the month

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money on due date, the sudbharna bond shall remain in force." *Held* that there was in this contract no agreement to repay the principal money, and no such agreement was implied by the provisions as to taking back the document and the land, and therefore there was no right to a money-decree. *Held* that under s. 67 of the Transfer of Property Act (IV of 1882) an usufructuary mortgage cannot as such (*i.e.*, unless there is anything in the contract which would imply the right) sue either for foreclosure or for sale. *Umda v. Umrao Begam*, I. L. R., 11 All., 367; *Umda v. Kunjan*, I. L. R., 12 Mad., 109; and *Rachathu v. Guruvu*, I. L. R., 14 Mad., 232, referred to. *Venkatasami v. Subramanya*, I. L. R., 11 Mad., 38, not followed. *LUGHNESHAR SINGH v. DOOKH MOCHAN JHA*. I. L. R., 24 Calc., 677

12. ——— *Charge—Attachment with-out sale—Transfer of Property Act (IV of 1882), ss. 99, 100.*—The plaintiff, a judgment-creditor, had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of Rs. 1,63,123, and that the said sum should be a charge on certain immoveable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court and sent a copy of the decree for execution there. He obtained in that Court an order for attachment and sale of the property, but the order was reversed on appeal in May 1895, the High Court holding that the properties could not be sold in execution of the decree, but that a separate suit must be brought under s. 67 of the Transfer of Property Act. The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the mofussil Court with a view to execution. That application was refused by *SALE, J.*, who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale or to sell it except after a suit under s. 67 of the Transfer of Property Act. *Held* on appeal (reversing the decision of *SALE, J.*) that an order for attachment only as distinct from a sale could be made. *Aubhoyessury Dabee v. Gouri Sunkur Panday*, I. L. R., 22 Calc., 859, explained. *Chundra Nath Day v. Burroda Shoonidury Ghose*, I. L. R., 22 Calc., 813, referred to. *GOURI SUNKER PANDAY v. AUBHOYESWARY DABEE* [I. L. R., 25 Calc., 262]

See *CHUNDRA MONI DASSEE v. MUTTY LAL MULLICK*. 2 C. W. N., 33

s. 68.

See *LIMITATION ACT, 1877, art. 116.* [I. L. R., 21 Mad., 242]

See *MORTGAGE—POSSESSION UNDER MORTGAGE*. I. L. R., 6 All., 298

See *RIGHT OF SUIT—SALE IN EXECUTION OF DECREE*. I. L. R., 22 Mad., 332

# TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

1. — *Mortgage of non transferable property—Right to sue for mortgage money*—Where a decree was obtained by a landholder for cancellation of a lease whereby an occupier held on was mortgaged with possession and the mortgagee consequently failed to obtain possession and brought a suit against the mortgagor to recover the mortgage money. *Held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable while the mortgagee might have believed that the estate was transferable the act of the former was a default depriving the latter of his security within the meaning of s. 68 (b) of the Transfer of Property Act IV of 1882 and the mortgagee was therefore entitled to succeed. **GANESH SINGH v. SUDHANI KACHAR** I. L. R., 10 All., 47

2. — *Sale of mortgaged premises under Land Acquisition Act*—Personal suit by mortgagee—The sale of mortgaged premises under the Land Acquisition Act is no destruction of the security within the meaning of s. 68 of the Transfer of Property Act and does not enable the mortgagor to sue the mortgagee personally. **ARTHUNAGAN v. IVANAGANA** I. L. R., 13 Mad., 321

3. — *Failure of mortgagor to give possession as stipulated*—Personal suit for mortgage amount—In a suit against a mortgagor for the principal and interest due on a mortgage it appeared that the payment of interest had fallen into arrears, and that the mortgage deed provided that in such event the mortgagee should be entitled to possession of the mortgaged premises; the mortgagor, however, alleged that all the interest due had been tendered. *Held* that the mortgagee was entitled under s. 68 of the Transfer of Property Act to sue for the amount due on the mortgage. **SARATANA v. CHINNAMMAL** I. L. R., 15 Mad., 85

4. — *Personal decree against mortgagor*—Right of suit—Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay but provided that if the mortgagor repaid the secured debt before a certain date (now passed) he should be replaced in possession. The mortgaged premises had been attached in execution of a decree obtained by a third party against the mortgagor and a claim preferred by the plaintiff having been erroneously rejected and the premises sold, he was disappointed. The mortgagee accordingly brought his suit as above. *Held* that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act s. 68. **GOPALASAMI v. ARUNACHELLA** I. L. R., 15 Mad., 304

5. — *Right of suit—Usufructuary mortgage*—Mortgagee kept out of possession by mortgagor's incorrect conduct—Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession the first mortgagee may elect to sue for the money under s. 68 of

# TRANSFER OF PROPERTY ACT (IV OF 1882)—*continued*

the Transfer of Property Act, instead of for possession of the land. **LISGA KENDI v. SAKA RAO** I. L. R., 17 Mad., 469

6. — *Usufructuary mortgage—Lease of mortgaged premises by mortgagee to mortgagor*—Mortgagor holding on after expiry of lease—Right of suit—If L and others mortgagee under a usufructuary mortgage executed in their favour by one G (the usufruct being applicable in satisfaction of the interest of the debt) leased the mortgaged premises to the mortgagor. The lease was for a term certain with a covenant that the mortgagor might renew on compliance with certain conditions. The mortgagor on the expiry of the lease, did not fulfil the conditions of the said covenant but refused to give up possession of the mortgaged property to the mortgagee. *Held* that the mortgagee were entitled, either under cl. (b) (as held by **KHOOR C. J.** and **TRIGELL J.**) or under cl. (c) (as held by **KHOOR BAYENJI** and **BURKITT, JJ.**) of s. 68 of Act IV of 1882 to a money decree for the amount due under the mortgage. **Shahab Des v. Ayub Ali Prasad, Weekly Notes All (1887), p. 269 and Jashin Ram v. G. Radhakrishna I. L. R., 6 All., 238** dicta approved. **LIRA LAL v. GHASHI** I. L. R., 18 All., 318

7. — *Usufructuary mortgage—Dispossession of mortgagee by a trespasser—Suit for recovery of the mortgage money*—The words "any other person" in the concluding portion of cl. (c) of s. 68 of the Transfer of Property Act mean "any other person having a title." The disturbance of the mortgagee's possession by a trespasser will not confer upon the mortgagee a right to sue the mortgagor for the mortgage money. **Gopalasami v. Arunachella I. L. R. 15 Mad. 304**, followed. **HAKHEDI RAM v. RAM CHARITAN RAI** I. L. R., 19 All., 191

8. — *Usufructuary mortgage—Possession not given—Suit for sale*—A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim a suit for the money an order for the sale of such property. So held by the Full Bench in a case where the mortgage contained no covenant to pay. **ARUNACHALAM CHETTI v. ANNAYAYAM** I. L. R., 21 Mad., 478

— s 69

See MORTGAGE—POWER OF SALE  
I. L. R., 11 Mad., 201

— *Limits of town of Bombay*—Land situated in district of Maharashtra—Lands situated in the district of Maharashtra within the Island of Bombay, and within the local limits of the original jurisdiction of the High Court is a town within the town of Bombay in the sense in which that expression is used in s. 69 of the Transfer of Property Act. **TAIMBAK GANJADHAR BANAJI v. BHARGAVA DAS NULCHAND** I. L. R., 23 Bom., 345



# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

## s. 72.

See MORTGAGE—ACCOUNTS.

[I. L. R., 19 Mad., 327  
I. L. R., 31 Mad., 32  
I. L. R., 20 All., 401]

S. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted. *GIRDHAR LAL v. BHOLA NATH*

[I. L. R., 10 All., 611]

## s. 73.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

[I. L. R., 15 Calc., 546]

See SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE.

[I. L. R., 20 Calc., 214  
I. L. R., 24 Calc., 748]

## s. 74.

See DECREE—FORM OF DECREE—MORTGAGE . . . I. L. R., 18 All., 189

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.

[I. L. R., 19 All., 527]

*Redemption of prior mortgage—Extinguishment of prior mortgage—Title by possession.*—The trustees of a religious institution improperly mortgaged land forming part of its endowment, and put the mortgagee into possession on the 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on the 7th December 1882. On the 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufructuary mortgage of the same land to secure Rs. 1,400; the deed stated that the money was borrowed with a view to discharge a prior mortgage, and proceeded "as you have undertaken to pay Rs. 1,000 to the mortgagee, I credit you with Rs. 1,000 and receive Rs. 400 in cash." The plaintiff paid off the prior mortgage on the 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution. The plaintiff now sued for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors, being joined as defendants. *Held* that the Transfer of Property Act, s. 74, was not applicable to the case, and that the plaintiff was not entitled to a decree. *KOOPMA SAHIB v. CHIDAMBARAM CHETTI*

[I. L. R., 19 Mad., 105]

## s. 75.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

[I. L. R., 20 Bom., 380]

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.

[I. L. R., 19 All., 527]

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

## s. 76.

See LANDLORD AND TENANT—TRANSFER BY TENANT . I. L. R., 10 Calc., 443

See MORTGAGE—ACCOUNTS.

[I. L. R., 6 All., 303  
I. L. R., 15 Mad., 230]

See RIGHT OF SUI—INJURY TO ENJOYMENT OF PROPERTY.

[I. L. R., 16 All., 386]

## s. 78.

See MORTGAGE—MARSHALLING.

[I. L. R., 12 Mad., 424, 429  
I. L. R., 13 Mad., 383  
I. L. R., 15 Mad., 268]

*Transfer of Property Act (IV of 1882), ss. 3, 75—Gross negligence—How far registration amounts to notice—Registration Act, s. 50.*—Where a mortgagee prior in date duly investigated the title of the mortgagor but after the execution of the mortgage returned the title-deeds to the mortgagor, according to the custom prevailing in the Mofussil, and subsequent thereto a mortgagee in Calcutta advanced moneys on one of those title-deeds without any actual notice of the prior mortgage, but without having duly investigated the mortgagor's title or searched the register,—*Held* that the prior mortgagee was not within s. 78 of the Transfer of Property Act guilty of such gross negligence as would postpone her mortgage to the subsequent mortgage, and the conduct of the subsequent mortgagee was not such as to create any predominating equity in his favour. The fact that there is in this country a universal system of registration is one of the circumstances to be taken into consideration in determining the question of gross negligence. *Seemle*—The question whether registration is notice or not is a question of fact, and as each case arises it should be determined whether the omission to search the register together with the other facts amounts to such gross negligence as to attract the consequence which results from notice. *Tomb v. Rand*, 2 Bro. C. C., 652; *Evans v. Bicknell*, 6 Ves., 174; *Martinez v. Cooper*, 2 Russ., 198; *Parrow v. Rees*, 5 Beav., 18; *Hunt v. Elmes*, 3 DeG. F. & J., 578; and *Agra Bank v. Barry*, L. R., 7 H. of L. at p. 148, referred to. *MONINDRA CHANDRA NANDY v. TROYLUCKHOO NATH BHUT* . 2 C. W. N., 750

## s. 80.

See RIGHT OF SUI—SALE IN EXECUTION OF DECREE . I. L. R., 12 All., 546

## s. 81.

See MORTGAGE—MARSHALLING.

[I. L. R., 12 Mad., 255  
I. L. R., 23 Calc., 790  
2 C. W. N., 397]

## s. 82.

See MORTGAGE—MARSHALLING.

[I. L. R., 22 All., 284]

# TRANSFER OF PROPERTY ACT (IV OF 1882.) cont. used

1. — *Mortgage—Contribut on—Apportionment of the mortgage-debt—Mortgage decree* A Iron l t a sut upon a mortga e-bond. F of the d f e dants wh had subseq ually pur chased all the mor ga ed prop ert es, contend d that under s. 82 of the Transfer of Property Act the mortgage d bt should be apportion d b tween the various mortg ed prop ert s and that each defen dant should b allowed to pay off h s rat alle share of the mortg e-debt. *Held* that the nt on of s. 8 was not that the en of the mortgage should be split but simply to d t rmine the liability of the pur chas r *inter se* s d that therefore all the mortga ed prop ert s were liable n satisfaction of the pla ntiff s claim. **ROHNU NATH PERSHAD v. HAKMAL ADHI** [I. L. R., 18 Cal., 320]

2. — *Part of redemption of mort gage—Apportionment of mortgage debt—Contribu tion.* In 1854 A and H t n d v d both rs hypo b at d to X and l the House ov in suit, wh ch was A s fam l property n l a house belo g ing to B. In 1854 A hypothecat d the house uow lu sut to the pla ntiff. In 1854 B sold his house for H 00 by a cou eyance at sted by X and l who accept d Ros d schar e of a moiety of the debt secur d by th hypothecation of 1854, the balance of H 100 b e g r t a n d by B. In th sut the pla ntiff sou ht to reco r the principal and interest due on his security of 1854 and h contend ed that X and l who were defendants t and w remot justified in permitting B to retain H 100 of the pr ce and that that sum should accordingly be debted against them n the accoun s. *Held* that, under the Transfer of Property Act s. 8 pla ntiff was not entit led to compel defendants t and 5 to satisfy their debt against B s house so far as it extended. **NEELA MEGAN v. GOVINDAN** [I. L. R. 14 Mad. 71]

3. — *Mortgage debt Apportionment of—Contribut n, nt for Princ ples upon wh ch contribut on s to be assessed.* On the 4th of July 154 thirty- ght villages were mort s d by K and U to S the fath r of the appellant. On the 9th of February 1858 the mortg- g e obtain d a decree for sale on his mortgage. At the date of this mortga e, s me of the villages e comprised there n were l ab e under one or both of two decrees obtained on prior mortgages. Subsequently to the decree of the 9th of February 1858 four of the villages affected by that decree were sold in execu tion of a sum le money decree and were acquired from the purchasers by one A. On the 20th of August 1879 and the 20th of August 1883 these same four villages were brought to sale in execu tion of the decree of the 9th of February 1858, and were sold for H 44,000. Thereupon the former purchaser A brought a sut against the represen tative of the mortg e e of S 4 and certa other persons for contempt on alleging that the said four villages had been for considerably more than the amount for which t y were proportionately liable under the mortgage- e that the defen dants were owners of vil which we e equally liable w th his (the plant

# TRANSFER OF PROPERTY ACT (IV OF 1882.)—cont. used

decree of the 25th of February 1858, but wh ch had contributed nothing towards the satisfaction on of that decree; t at six of those villages had been sold in a seventh had been purchased by S (the predecessor in title of one of the d f e n dants H) in execu tion of a simple money decree and that a share in an e, lth r village had been similarly purchased by the predecessor in title of the other d f e n dants. *Held* that in calculating the amount to wh ch the pla ntiff was entitled by way of c ntribution the pla ntiff was bound to take into account the liability wh h exist d on most of the villages in respect of wh ch the sut was brought and r the two prior mortg- g e; that the pla ntiff was entit d to obtain contribu ion from those villages only which had not been sold in execu tion of the decree of the 25th of February 1858 that the unreal and balance of that decree wou d be regarded as the amount wh ch the villages purchased by the decree-holder h self had contributed to the decree; and further that in d t rmining the amount which the pla ntiff was entit led to recover regard must be had to the claims for contribution of the wners of such of the other mortgaged villages as had been sold i execut on of the decree of the 9th of February 1858 and had like the pla ntiff s villages, f ched more than th r quo a of liability for the decree. **ILAKI KAI INOH v. AHMAD-DUD-DIN KHAN** [I. L. R., 19 All., 545]

## s. 83.

ee RIGHT OF SUIT—REVENUE SALE FOR ARREARS OF I. L. R., 13 All., 195

See SPECIFIC PERFORMANCE — SPECIAL CASES I. L. R., 13 Mad., 318

1. — *Deposit in Court by mort gager*—The deposit intended by the Transfer of Property Act, s. 3 must be made unconditionally. Accordingly when the mortg- g eor in making the deposit prays that the amou t should be paid out to the mortgagee on his producing certain deeds the provisions of the section are not complied with. **NANU v. MANCHU** [I. L. R., 14 Mad. 49]

2. — *Deposit in Court by mort gager—Full and unconditional tender*—The fact that a certain sum of money tendered under s. 83 of the Transfer of Property Act and accepted by the mortgagee as the full amount due is a t rwards denied by him to be the full amount and that the tender is accompanied by a claim to a registered receipt (to wh ch the mortgagee agrees) and to the return of the title-deeds, does not render the tender conditional and therefore invalid. **NANU v. MANCHU**, I. L. R. 14 Mad., 49 distinguished. **KORA NAYAR v. RAMAPPA** I. L. R., 17 Mad., 267

3. — *and s. 84—Deposit on Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled to add tion to persons entitled*—A mortg- g eor before bringing a suit for redemption deposits the mortgage-money in Court to the credit of persons who were not entit led to s in addition

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

to that of persons who were entitled to it. *Held* that he was not entitled to claim the benefit of ss. 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it. *MADHAVI AMBA v. KUNHI PATHUMMA* . . . I. L. R., 23 Mad., 510

## s. 84.

*See* MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE . . . I. L. R., 8 All., 503

## s. 85.

*See* HINDU LAW—ALIENATION—ALIENATION BY FATHER. [I. L. R., 27 Calc., 724]

*See* CASES UNDER PARTIES—PARTIES TO SUITS—MORTGAGES, SUITS CONCERNING.

## s. 86.

*See* s. 2.

[I. L. R., 12 Calc., 436, 505, 583  
I. L. R., 11 Calc., 582  
I. L. R., 6 All., 282  
I. L. R., 14 Calc., 599]

*See* DECREE—CONSTRUCTION OF DECREES—MORTGAGE I. L. R., 20 Calc., 279

*See* CASES UNDER INTEREST—OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED.

*See* LIMITATION ACT, 1877, ART. 135. [I. L. R., 12 Calc., 614]

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY. [I. L. R., 13 Calc., 346]

*Power of Court to make preliminary decree absolute when appeal is pending.*—Pendency of an appeal against a preliminary decree made under s. 86 of the Transfer of Property Act does not prevent the Court which passed the decree from making it absolute. *MADAN MOHUN MITTER v. RAM HARI SAHU* . . . 1 C. W. N., 197

## s. 87.

*See* APPEAL—DECREES.

[I. L. R., 12 All., 61  
I. L. R., 14 All., 520]

*See* DECREE—CONSTRUCTION OF DECREES—MORTGAGE I. L. R., 20 Calc., 279 [I. L. R., 25 Calc., 311]

*See* LIMITATION ACT, 1877, ART. 147. [I. L. R., 16 Mad., 64]

*See* LIMITATION ACT, 1877, ART. 179—PERIOD FROM WHICH LIMITATION RUNS—DECREES FOR SALE. [I. L. R., 20 All., 357]

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

*See* MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION I. L. R., 16 Calc., 246 [I. L. R., 20 All., 358, 446  
I. L. R., 19 Mad., 40  
I. L. R., 19 All., 180  
I. L. R., 22 Mad., 133  
I. L. R., 27 Calc., 705]

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY. [I. L. R., 13 Calc., 346]

## s. 88.

*See* CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE. [I. L. R., 16 All., 259]

*See* DECREE—CONSTRUCTION OF DECREE—GENERAL CASES I. L. R., 20 All., 397

*See* DECREE—CONSTRUCTION OF DECREE—MORTGAGE . . . I. L. R., 20 Mad., 78 [I. L. R., 25 Calc., 311]

*See* HINDU LAW—ALIENATION—ALIENATION BY FATHER I. L. R., 15 All., 75

*See* CASES UNDER INTEREST—OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED—CONTRACTS.

*See* MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHT OF MORTGAGEES. [I. L. R., 18 All., 31]

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES. [I. L. R., 22 Mad., 236]

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY. [I. L. R., 23 Calc., 682]

## ss. 88 and 89.

*See* CIVIL PROCEDURE CODE, 1882, s. 244—QUESTIONS IN EXECUTION OF DECREE. [I. L. R., 18 Calc., 139  
I. L. R., 25 Calc., 133]

*See* CIVIL PROCEDURE CODE, 1882, s. 257A. [I. L. R., 19 All., 186]

*See* EXECUTION OF DECREE—PROCEEDINGS IN EXECUTION I. L. R., 13 All., 278

*See* LIMITATION ACT, 1877, ART. 179—PERIOD FROM WHICH LIMITATION RUNS—DECREES FOR SALE.

[I. L. R., 19 All., 520  
I. L. R., 20 All., 302, 357]

*See* SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY I. L. R., 18 All., 31 [I. L. R., 19 All., 205  
I. L. R., 20 All., 354]

## ss. 88, 89, 90.

*See* CASES UNDER EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.

# TRANSFER OF PROPERTY ACT (IV OF 1882) — *of and*

s. 59

See (1) PROCEDURE CODE, 1882, s. 214 —  
QUESTION IN EXECUTION OF DECREE.  
[I. L. R., 24 Calc., 473]

See SELLER'S ADEPT TESTIMONY ACT s. 44.  
[I. L. R., 23 Bom., 644]

See EXECUTION OF DECREE APPLICATION  
FOR EXECUTION AND LOWER OF COURT  
[I. L. R., 21 Calc., 818]

See INTEREST — OMISSION TO STIPULATE  
FOR OR STIPULATED TIME HAS EXPIRED  
— CONTRACTS [I. L. R., 17 All., 581]  
[I. L. R., 18 All., 316]  
[I. L. R., 19 All., 174]  
[I. L. R., 24 Calc., 789]

See LIMITATION ACT 15<sup>th</sup> ART 1<sup>st</sup>  
[I. L. R., 21 Calc., 473]

See LIMITATION ACT 15<sup>th</sup> ART 1<sup>st</sup>  
[I. L. R., 18 All., 23]  
[I. L. R., 22 Calc., 924]

See LIMITATION ACT 15<sup>th</sup> ART 1<sup>st</sup> LAW  
APPLICABLE TO EXECUTION  
[I. L. R., 23 Bom., 644]

s. 80.

See INTEREST — OMISSION TO STIPULATE  
FOR OR STIPULATED TIME HAS EXPIRED.  
[I. L. R., 24 Calc., 789]

See LIMITATION ACT 15<sup>th</sup> ART 1<sup>st</sup>  
[I. L. R., 21 All., 483]

See LIMITATION ACT 15<sup>th</sup> ART 179 —  
ORDER FOR PAYMENT AT SPECIFIED  
DATE [I. L. R., 18 All., 371]

1. — Decree for sale on a mort-  
gaged property — Sale in execution of  
a decree held by a different mortgagee — In order to  
make the remedy provided by s. 90 of the Transfer  
of Property Act available it is necessary that the  
mortgaged property should have been sold in exe-  
cution of the decree held by the person applying, for  
a further decree under s. 90. That section does not  
apply where the mortgaged property has been sold  
under a decree held by some other person. *Moham-  
mad Akbar v. Muzahid Hussain Weekly Notes All*  
*1899 908 f. 1000.* *Badri Das v. Nayab Khan*  
[I. L. R., 23 All., 404]

2. — and s. 88 and 89 —  
Decree for sale of mortgaged property — Decree not  
satisfied by sale — Recovery of balance due on  
mortgage — The decree contemplated by s. 90 of the  
Transfer of Property Act (IV of 1882) can be made  
in the suit in which the decree for sale was passed  
and it is not necessary to institute a fresh suit  
to obtain such decree. *Lal Singh v. Parnamand*  
[I. L. R., 11 All., 486]

ss. 93 and 93

See EXECUTION OF DECREE — DECREE TO  
BE EXECUTED AFTER APPEAL OR  
REVIEW [I. L. R., 15 Mad., 170]

# TRANSFER OF PROPERTY ACT (IV OF 1882) — *continued*

See CASES UNDER MORTGAGE — LIEN-  
TION — RIGHT OF LIEN

See RES JUDICATA — CAUSE OF ACTION  
[I. L. R., 11 All., 539]  
[I. L. R., 15 Mad., 303]  
[I. L. R., 17 Mad., 93]  
[I. L. R., 19 All., 202]

s. 93

See EXECUTION OF DECREE — APPLICATION  
FOR EXECUTION AND LOWER OF COURT  
[I. L. R., 23 Mad., 521]

See MORTGAGE — REDEMPTION — MO-  
OF PREEMPTION AND LIABILITY TO FORE-  
CLOSE [I. L. R., 18 Mad., 214]

*Mortgage — Redemption —  
Decree for payment and redemption with a six  
months — Application for extension of decree after  
six months had expired — s. 93 of the Transfer  
of Property Act (IV of 1882) under which a mort-  
gagor, or who has obtained a decree for redemption may  
show cause for extending the time allowed by the  
decree for redemption, does not apply to decrees made  
before the Act was put in force. CHANDRA V  
MALKATA [I. L. R., 20 Bom., 279]*

s. 95

See LIMITATION ACT 15<sup>th</sup> ART 143.  
[I. L. R., 8 All., 295]

s. 93.

See MORTGAGE — FORM OF MORTGAGE.  
[I. L. R., 12 All., 203]  
[I. L. R., 21 Mad., 1]

s. 93

See LIMITATION ACT 15<sup>th</sup> s. 9.  
[I. L. R., 16 Mad., 433]

See LIMITATION ACT, 15<sup>th</sup>, ART 179 —  
NATURE OF APPLICATION — INSUFFICIENT  
AND DEFECTIVE APPLICATIONS.  
[I. L. R., 19 All., 64]

See MORTGAGE — REDEMPTION — RIGHT OF  
REDEMPTION [I. L. R., 23 Bom., 624]  
[I. L. R., 23 Bom., 119]  
[I. L. R., 23 Mad., 347, 372]  
[I. L. R., 23 Mad., 377]

See RES JUDICATA — COMPETENT COURT —  
GENERAL CASES.  
[I. L. R., 18 Mad., 481]

See RES JUDICATA — COMPETENT COURT —  
REVENUE COURTS.  
[I. L. R., 18 All., 323]

1. — *Hindu law — Personal de-  
cree against managing member of joint family not  
impled as such — Effect of sale in execution of  
such decree — Sale of mortgaged property in exe-  
cution of decree on a money bond for interest due on  
the mortgage — The managing member of a joint  
Hindu family executed in 15 a mortgage on certain  
lands, the property of the family, to secure a debt*

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond, and, having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person. *Held* that the sale did not convey the interest of another undivided brother who was not a party to the decree. *Held* further *per* KERNAN, J., that the sale in execution was invalid under the Transfer of Property Act, s. 99. **SATHUVAYYAN v. MUTHUSAMI**

[I. L. R., 12 Mad., 325]

2. — Money-decree "on the responsibility of" mortgaged premises—Attachment and sale of mortgaged premises—Purchase by mortgagee.—A usufructuary mortgagee left the mortgaged premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagor "on the responsibility of the defendants mulgeni right" in the mortgaged premises. The decree-holder attached the mortgaged premises in execution, and having brought them to sale and purchased them himself, he sued for possession. *Held* that the sale was invalid under the Transfer of Property Act, s. 39. **DURGAYYA v. ANANTHA**

[I. L. R., 14 Mad., 74]

*See* VIGNESWARA v. BARAYYA

[I. L. R., 16 Mad., 436]

3. — Usufructuary mortgage—Suit by usufructuary mortgagee for sale of equity of redemption of mortgaged property in execution of a decree for mesne profits and costs.—Certain usufructuary mortgagees, not having been put in possession of the mortgaged property by the mortgagor, sued and obtained a decree for possession with mesne profits and costs. Under this decree, the mortgagees were put in possession of the mortgaged property. They then applied for attachment and sale of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property, reserving their rights and interests under the mortgage. *Held* that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act, 1882. **Azim-ullah v. Najm-un-nissa, I. L. R., 16 All., 415, and Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry, I. L. R., 21 Calc., 34, referred to.**

**MAHADEB SINGH v. SAIBA BIBI**

[I. L. R., 17 All., 520]

4. — and s. 2—Suit to set aside sale by mortgagee prior to coming into force of the Act—Construction of Statute.—In a suit brought to set aside a sale effected by a mortgagee prior to the date when Act IV of 1882—(Transfer of Property Act) came into force,—*Held* that the Transfer of

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

Property Act (ss. 2 and 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force. **NARANAPPA v. SAMACHARLU . I. L. R., 19 Mad., 382**

5. — and s. 67—Sale of mortgaged property in execution of money-decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.—A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. S. 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act. *Quare*—Whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment. **JADUB LALL SHAW CHOWDHRY v. MADHUB LALL SHAW CHOWDHRY**

[I. L. R., 21 Calc., 34]

6. — and s. 67—Usufructuary mortgage—Lease by mortgagee to mortgagor of mortgaged premises—Suit for recovery of rent—Attempt to sell mortgaged property in execution of money-decree for rent.—*Held* that a usufructuary mortgagee who had leased the mortgaged premises to his mortgagor could not, in execution of a simple money-decree for rent against the mortgagor, attach and sell the mortgaged premises, but must bring a suit as provided by s. 67 of Act IV of 1882. **AZIM-ULLAH v. NAJM-UN-NISSA . I. L. R., 16 All., 415**

7. — Sale of mortgaged property—Zur-i-peshgi mortgage—Purchase by the mortgagee—S. 99 of the Transfer of Property Act (IV of 1882) applies to zur-i-peshgi mortgages, and a purchase of the mortgaged property by the mortgagee in execution of a decree for rent due by the mortgagor under a katkina lease of the property was held to be not merely irregular, but absolutely void. **SHEODENI TEWARI v. RAMSARAN SINGH**

[I. L. R., 26 Calc., 164]

**MOTI RAM TEWARI v. RAM LAKHAN SINGH**

[3 C. W. N., 290]

8. — and s. 67—Application for the attachment and sale of mortgaged property in execution of a decree obtained not in accordance with the Transfer of Property Act, though suit instituted after the passing of the Act.—A mortgagee obtained a decree on the 15th February 1883 upon a mortgage-bond dated the 18th January 1879. The decree simply provided that the plaintiff do obtain the amount of his claim, and that the mortgaged property should remain liable for the satisfaction of the debt. The judgment-creditor, in execution of that decree, sold one of the mortgaged properties, and afterwards assigned over the decree, and the assignee, on the 18th August 1894, applied for the execution of the decree by attachment and sale of another of the mortgaged properties. *Held*, on the objection of the judgment-debtors, that s. 99 of the Transfer of Property Act was applicable

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

to the case and that the mortgaged property could not be sold unless a suit under s. 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property however could be attached as there is nothing in s. 69 prohibiting such attachment. *CHUDRA NATH DUTT v BUREDDA SHOONDARY GHOSH* [I. L. R., 22 Cal., 813]

9. *Mortgage-decree—Transfer of Property Act (IV of 1882): Decree regarded as mortgage-decree under—Sale of mortgaged property in execution of decree—In a suit for recovery of mortgage-money by sale brought after the Transfer of Property Act (IV of 1882) had come into force the decree of the Court was "That a decree be passed in favour of the plaintiffs in respect of Rs. 387 10-13 together with costs and interest at the rate of 6 per cent per annum up to the date of realization and that the mortgaged properties be made liable (see *bandhooji*) for realization on of the decretal money. Held that the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act though not made in the form prescribed by that Act and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter and without obtaining an order under s. 90 of the said Act. *Jogmaya Dassi v Thakomani Dassi* I. L. R. 24 Cal., 473 and *Parsi Howlader v Krishna Bandhoo Roy* I. L. R. 20 Cal., 590 referred to. *Chandra Nath Day v Burredda Shoondary Ghosh*, I. L. R., 23 Cal. 813 distinguished. *LAL BEHARY SINGH v HANUM RANMAN* I. L. R., 26 Cal., 166*

10. — and s. 67—Landlord becomes mortgagee as tenant Power to sell tenants in execution of rent-decree—When a landlord has taken a mortgage of the holding of a tenant he is debarred by s. 67 of the Transfer of Property Act from bringing the tenure to sale in execution of his rent-decree otherwise than by instituting a suit under s. 67 of that Act. *I AMANI LAL v SHREEDRA NATH DUTT* [I. C. W. N., 80]

## s. 100

See CO-SHARERS—GENERAL RIGHTS IN JOINT PROPERTY

[I. L. R., 14 All., 273]

See LIMITATION ACT 1877 ART. 148.

[I. L. R., 8 All., 295]

See MORTGAGE—CONSTRUCTION

[I. L. R., 13 All., 28]

See MORTGAGE—FORM OF MORTGAGE.

[I. L. R., 9 All., 158]

11. — Charge on immovable property—Mortgage—Construction of document—Limitation Under s. 100 if the Transfer of Property Act, s. 67 a document to create a charge on immovable property it must be a document that creates such charge immediately on its execution and not operates only as a charge at some future time such as in the event of non-payment of the money

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

secured by it the latter being the possibility of a charge ultimately arising on the land and not "a charge within the meaning of that section. A lent B Rs. 9 and B executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Basakh 189 P.S. (April 1882) and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that A should take possession thereof and that after A took possession of the land no interest should be paid by him, B and that A should pay the rent of the land out of the profits of the land without any objection. A instituted a suit on the 3d August 1880 to recover the Rs. 9. Held that the document did not amount to a mortgage nor did it create a charge under s. 100 of the Transfer of Property Act, and that the sum was barred by limitation on three years being the period applicable. *MADHO MISHRA v SIDA BEMAL UPADHYA alias BENA UPADHYA* [I. L. R., 14 Cal., 687]

2. — and s. 58—Hypothecation bond suit on.—The period of limitation for suits upon hypothecation bonds which contain no power of sale or effect no transfer of property executed before the Transfer of Property Act came into operation, is twelve years under sch. II art. 162 of the Limitation Act of 1877. *Aliba v Venu*, I. L. R., 9 Mad. 218 followed. *Per MURTHU KAMI ATTAR, J.* "The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages. *RANGASAMI v MUTHUKUMARAPPA* [I. L. R., 10 Mad., 509]

3. — and s. 68—"Charge"—Bengal Tenancy Act s. 65—The provisions of s. 63 of the Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section. *Semle*—The "charge" referred to in s. 63 of the Bengal Tenancy Act (VIII of 1885) is not such a charge as that defined by s. 100 of the Transfer of Property Act. *Loist Mohan Roy v Dindodas Dabot* I. L. R. 14 Cal., 14 explained. *POTICK CHUNDER DEY SIKHAN v POLY* [I. L. R., 15 Cal., 493]

## s. 101

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.

[I. L. R., 18 Mad., 94]

I. L. R., 20 Mad., 274

s. 104, Rules framed under—

See SALE IN EXECUTION OF DECREE—SITTING ASIDE ALIAS—IRREVOCABILITY

[I. L. R., 25 Cal., 703]

4 C. W. N., 474

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

*Sales made by High Court under s. 136, Effect of—Applicability of Code of Civil Procedure for sale in execution of mortgage-decree.*

—S. 104 of the Transfer of Property Act is an enabling section, and the rules made by the High Court (Circular Order No. 18 dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not limit the applicability of the provisions of the Code of Civil Procedure as regards sales held in execution of mortgage-decree. *Kaler Nath Prasad v. Kali Charan Das*, I. L. R. 25 Cal., 733, explained. *DANESHA MOHAN ROY v. BISHWAN DEBI*. . . . . 4 C. W. N., 474

## s. 105.

*See LANDLORD AND TENANT—FORFEITURE*  
—DENIAL OF TITLE.

[I. L. R. 24 Cal., 440  
2 C. W. N., 292

## s. 106.

*See FISHERY, RIGHT OF.*

[I. L. R., 20 Cal., 446

*See LANDLORD AND TENANT—EJECTMENT*  
—NOTICE TO QUIT.

[I. L. R., 7 All., 596, 599  
I. L. R. 17 All., 45  
I. L. R., 20 Bom., 759  
I. L. R., 23 Bom., 754  
3 C. W. N., 883  
4 C. W. N., 572, 730

*See OUTH OF PROOF—LANDLORD AND TENANT*. . . . . I. L. R., 18 Mad., 60

## s. 107.

*See REGISTRATION ACT, s. 17, cl. (d).*

[I. L. R., 17 Mad., 975  
I. L. R., 21 Mad., 109

*See REGISTRATION ACT, s. 18.*

[I. L. R., 24 Cal., 20

*Hill, Lease of—General Clauses Act (I of 1868), s. 2, cl. 5—Immovable property—Registration Act (III of 1877), s. 17.—A suit was brought for rent of a hit on the basis of a verbal settlement for three years at an annual jamma of Rs. 70. The defendants denied the settlement. The first Court found for the plaintiff, but on appeal an objection having been raised by the defendants that the verbal lease was illegal under the Transfer of Property Act, the suit was dismissed. Held a hit is a benefit arising out of land, and therefore within the definition of "immovable property" as given in s. 2, cl. 5, of the General Clauses Act (I of 1868). The lease of a hit comes within s. 107 of the Transfer of Property Act (IV of 1882), and can be effected only by a registered instrument. *SCANDRA NABAIN SINGH v. BHAI LAL THAKUR*. . . . . I. L. R., 22 Cal., 753*

## s. 108.

*See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS.*

[I. L. R., 23 Cal., 520

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

*See LANDLORD AND TENANT—DAMAGE TO PREMISES LET*. . . . . I. L. R., 17 Mad., 98  
[I. L. R., 23 Bom., 15

*See LANDLORD AND TENANT—FORFEITURE*  
—DENIAL OF TITLE.

[I. L. R., 24 Cal., 440

*See LANDLORD AND TENANT—TRANSFER BY TENANT*. . . . . I. L. R., 17 Mad., 595  
[I. L. R., 22 Cal., 494  
4 C. W. N., 574

*See OUTH OF PROOF—LANDLORD AND TENANT*. . . . . I. L. R., 18 Mad., 60

*Transfer before passing of Transfer of Property Act.—s. 103 of the Transfer of Property Act does not apply to transfers which took place before the passing of the Act. *HARI NATH KISHANIAS v. RAJ CHANDRA KISHANIAS* [3 C. W. N., 132*

## s. 111.

*See LANDLORD AND TENANT—EJECTMENT*  
—NOTICE TO QUIT.

[I. L. R., 7 All., 596, 599  
I. L. R., 20 Bom., 759

*See LANDLORD AND TENANT—FORFEITURE*  
—DENIAL OF TITLE.

[I. L. R., 20 Bom., 854  
I. L. R., 24 Cal., 440

*See LEASE—CONSTRUCTION.*

[I. L. R., 17 All., 526

## s. 114.

*See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—IMMOVABLE PROPERTY*. . . . . I. L. R., 17 Mad., 216

## s. 116.

*See LANDLORD AND TENANT—EJECTMENT*  
—NOTICE TO QUIT.

[I. L. R., 20 Bom., 759

## s. 117.

*See BENGAL TENANT ACT, sec. III, art. 2*  
[I. L. R., 27 Cal., 205

*See LANDLORD AND TENANT—FORFEITURE*  
—DENIAL OF TITLE.

[I. L. R., 20 Bom., 854

*See LEASE—CONSTRUCTION.*

[I. L. R., 17 Mad., 98

## s. 118.

*See PRE-EMPTION—CONSTRUCTION OF WAIVER-CLERK*. . . . . I. L. R., 7 All., 625

*See TRANSFER OF PROPERTY.*

[I. L. R., 11 Mad., 459

*Exchange—Partitions.—Some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties. Held that this transaction was not an exchange*

# TRANSFER OF PROPERTY ACT (IV OF 1882)—*cont. and*

with the making of s. 118 of the Transfer of Property Act but the completed transaction amount to a part of which is not required by law to be effected by an instrument in writing. *Fish v. Osborn* 1 R. 3 Cal. D. 618 referred to. *GUJARATI S.A. v. MOHARAKANNESSA* I L. R. 25 Cal. 210 [2 C. W. N., 91]

s. 119—*Exchange—Mutual covenants*—*as a quantum entered into to support title—Max v. "expressum facit cessare tacitum"*—The plaintiff and defendant effected an exchange of land subsequently they executed to each other documents of which that executed by the defendant recited the exchange and contained. If any claim or dispute arises I hereby bind myself to settle. If I do not so get the dispute settled I hereby bind myself to pay an amount not exceeding Rs. 404 8-6 at the rate of Rs. 4-0 per kul of land for lands which go out of your possession. The plaintiff alleges that he had been ousted from the land conveyed to him, now sued to recover his land which he had given in exchange. Held that the operation of the Transfer of Property Act s. 119 was excluded by the express covenant in the document quoted above. *SC. BRAMANIA ATTAR v. AMINATHA ATTAR*

[I L. R. 21 Mad., 69]

ss. 122-123

See GIFT I L. R. 20 All. 392

s. 123.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—ANXIETY OR PENSION

[I L. R. 8 All., 634]

See GIFT I L. R. 19 Mad., 433

*Hindu law—Gift—Del. very of possession*—*Immoveable and moveable property*—

Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property that law has been abrogated by s. 123 of the Transfer of Property Act. The first paragraph of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only nothing more being necessary. *Same*. The same is the case under that section with regard to moveable property provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer. *DHARMODAR DAS v. DISTABHAI DASI*

[I L. R. 14 Cal., 446]

RAI RAMBAI v. RAI MONI

[I L. R. 23 Bom. 234]

ss. 123 and 129

See HINDU LAW—GIFT REQUISITES

FOR GIFT I L. R. 18 Cal., 446

[I L. R. 20 Cal., 464]

I L. R. 23 Bom., 234

s. 127

See GIFT I L. R. 23 Bom., 234

# TRANSFER OF PROPERTY ACT (IV OF 1882)—*cont. and*

s. 131.

See LAND REGISTRATION ACT s. 8

[I L. R. 23 Cal., 87]

1. — *Transfer of debts*—*Not ce. of transfer—Assignment of mortgagee—Mortgagor Liability of to assignee of mortgagee when no notice of assignee given*—An assignment is perfectly valid, though the notice referred to in s. 131 of the Transfer of Property Act has been given, though the title of the assignee as against third parties is not complete until such notice has been given. The object of such notice being the protection of the assignee. s. 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Fyall v. Rowles* 2 H. & T. L. C., 777. The first portion of the section merely fixing the time when the section comes into operation and the latter portion for the protection of the debtor if he deals with the debt before that time. Where therefore an assignee of a mortgage brought a suit on the mortgage against the mortgagor and the mortgagee and no notice of the assignment had been given to the mortgagor and s. 131 of the Transfer of Property Act—Held that the Court was wrong in dismissing the suit merely on the ground that no notice was served as after the suit was instituted the mortgagor became aware of the assignment and the transfer accordingly came into operation on the date when he thus became aware of it. *LALA JUDGE SARKI v. LALA HEMJI LAL* I L. R., 12 Cal., 505

2. — *Decree—Debt*—A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act. A debt under that section means an actionable claim and not a claim which has already passed into a decree. *ARZAL v. RAM KUMAR BHOPRA* [I L. R., 13 Cal., 610]

3. — *Transfer of debt*—*No*—*to debtor*—Held that an assignment by endorsement of a registered bond hypothecating certain crops was not void by reason that notice thereof was not proved to have been given to the obligor inasmuch as the effects of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time when such notice was received that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit and that, if he had prior notice and sold the property to a third party transferee for value without notice either of the charge created by the bond or of the assignment, such transferee would be protected from liability. *Lola Judge Khan v. Begum Behari Lal* I L. R., 13 Cal. 600 referred to. *KALKA PRASAD v. CHANDAN SINGH* I L. R., 10 All., 20

4. — *and s. 135—Notice*—*Assignment of actionable claim—Rights of transferee for value*—A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment



# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff. *Held* that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage. *SUBBAMMAL v. VENKATARAMA* . . . I. L. R., 10 Mad., 289

5. ———— "Debt"—Transfer of a debt—Assignment of decree—Notice of assignment—Civil Procedure Code (Act XIV of 1882), s. 232.—A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act so as to make a transfer thereof void without express notice. When a decree is assigned, a notice given under s. 232 of the Civil Procedure Code is sufficient. *Afzal v. Ram Kumar Bhudra*, I. L. R., 12 Calc., 610, followed. *DAGDU v. VANJI* . . . I. L. R., 24 Bom., 502

s. 132.

See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS.

[I. L. R., 12 Mad., 500

——— Assignment of debt—Notice to debtor of assignment—Service of the summons in suit for debt—Stat. 37 Vict., c. 60, s. 25.—Under s. 132 of the Transfer of Property Act (IV of 1882), the assignee of a debt is under no obligation to give notice of the assignment to the debtor. All that is required is that the debtor shall become aware of it, and it is sufficient if he becomes aware of it on being served with a writ in a suit by the assignee. *Lala Jugdeo Sahai v. Brij Behari Lal*, I. L. R., 12 Calc., 505; *Subbammal v. Venkatarama*, I. L. R., 10 Mad., 289; and *Kalka Prasad v. Chandan Singh*, I. L. R., 10 All., 20, followed. *RAGHO v. NARAYAN* . . . I. L. R., 21 Bom., 60

s. 135.

See LIMITATION ACT, 1877, Art. 120.

[I. L. R., 15 Mad., 382

1. ———— Transferee of a claim for smaller value—Recovery of full amount of debt.—It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor. *GRISH CHANDRA v. KASHISAUHI DEBI*

[I. L. R., 13 Calc., 145

2. ———— Right of suit—Suit to set aside a document—Actionable claim.—The co-sharers of a Hindu family, one of whom was a minor, owned certain immovable property in Munshigunge near Dacca. In 1873 a perpetual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882 the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to, and for possession of, his

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to A for Rs. 600. *Held* that A's purchase was an actionable claim within the meaning of s. 135 of the Transfer of Property Act. *RAJANKANTH NAGRAI v. CHOWDHURI v. HARI MOHAN GUHA*

[I. L. R., 12 Calc., 470

3. ———— and s. 52—Sale of immovable property by person out of possession—Actionable claim.—A transfer of ownership of immovable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. A and B, being owners of an 8 annas share of certain immovable property, sold it under a kotala to C and D. At the time of the sale X and Y were in adverse possession of the share. *Held* that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Ch. VIII of the Act, specially those of s. 135, were inapplicable. *Semble*—S. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immovable property. *MCDONALD v. MOHUN DUT v. FUTARUNISSA*

[I. L. R., 13 Calc., 297

4. ———— Transfer of a claim for smaller value—Transferee not entitled to recover more than price paid for claim.—S. 135 (d) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another has put into Court and has proceeded to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability that the process of the Court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses. The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before. *Grish Chandra v. Kashisauri Debi*, I. L. R., 13 Calc., 145, dissented from. *Chedambara Chetty v. Renga K. M. V. Puchaiya Naickar*, L. R., 1 I. A., 211; 13 B. L. R., 509, and *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, L. R., 1 I. A., 23; I. L. R., 2 Calc., 233, referred to. The assignee, under an instrument dated the 18th December 1885, and in consideration of Rs. 600 of a share of Rs. 10,000 out of Rs. 20,000 claimed by his assignors as unpaid dower-debt, joined with the assignors in instituting a suit for recovery of the dower-debt on the 22nd December of the same year. *Held* that the assignee's proceedings were of the

# TRANSFER OF PROPERTY ACT (IV OF 1882) *continued*

nature con. on plate 1 by s. 135 of the Transfer of Property Act (IV of 1882) and that he was not entitled to a decree for any sum in excess of Rs. 10,000 the price paid by him for the Rs. 10,000 share of the 1st JANI BEGAM JAHANGIR KHAN

[I. L. R., 9 All., 476]

5

*Actionable claim—Transfer of a claim for amount less than its value—*

*Recovery of full amount of debt—* s. 135 of the Transfer of Property Act does not protect a defendant in payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim where the money is recovered by suit after a court as to the liability of the defendant. *Grish Chandra v. Kosh Sauri Debts* I. L. R. 13 Calc. 145 followed. KHOSHDEB B SWAN v. SATAR MOYDOL

[I. L. R., 15 Calc., 438]

6

*and ss 136 137—Apportionment—*

*As used as assignee of a bond payable in 18 2) both amounts laid in the mortgage B A s assignor was a sh. pract. n. u. the High Court. B had obtained an assignment of the 1/2 interest in the bond s. 10 and also another bond for Rs. 10000 betw. the same party after the 1st July 1882 for Rs. 400. B had previously purchased the two bonds at a sale in execution of the decree of the Subordinate Judge's Court at N for Rs. each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond, and no tender had been made to plaintiff. Held on the evidence, that there was no consideration for the bond sued on or that it had failed. *Per cur.*—The true construction of s. 135 of the Transfer of Property Act appears to be that the officers mentioned in it habitually exercising the functions in a particular Court are precluded from buying any actionable claim cognizable by that Court. In the absence of evidence showing that B practised as a pleader regularly in the Subordinate Court at N the Court declined to hold that the assignment to him was inoperative altogether. There was however the Court held no doubt that the assignments to him and by him were governed by s. 135 and that under s. 137 the person to whom a debt transferred takes subject to the liabilities to which the transferor was subject at the date of the transfer. Upon the facts of the case B was clearly entitled to recover more than Rs. 1500 whatever might be due on the document. As he was the purchaser of an actionable claim s. 135 of the Transfer of Property Act applied to him and he could not recover more than the price he paid and the interest due thereon. The second foundation for the suggestion that where two actionable bonds are brought together for Rs. 1500 and only Rs. 900 are recovered upon one of them the assignee is precluded from recovering the difference but that he must submit to a loss arising from an apportionment RATHNASAMI v. SUBRAMANIAM*

I. L. R. 11 Mad., 58

7

*Transfer of actionable claim.*

—The first paragraph of s. 135 of the Transfer of Property Act has no application to a case in which the

# TRANSFER OF PROPERTY ACT (IV OF 1882) *—continued—*

debtors deny the existence of the claim altogether and where the purchaser of the claim has to take judgment as to the genuineness of any satisfaction made or tendered. CL (1) of that section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the claim is made clear by evidence before the sale of the claim. *Grish Chandra v. Kosh Sauri Debts* I. L. R., 13 Calc. 145. *Akhoshdeb B Swar v. Satar Mendol* I. L. R. 15 Calc., 436 and *Abdhammal v. Venkatarama* I. L. R. 10 Mad., 259 followed. *Jani Begam v. Jahangir Khan* I. L. R., 9 All. 476 discredited from. *RAJENDRA NARAIN BHAGTI v. WATSON & Co.*

[I. L. R., 18 Calc., 510]

8

*Assignment for value of a debt—Decree to which the assignee is entitled—* In a suit against a debtor an assignee for value of the debt is precluded by the Transfer of Property Act, s. 135 from recovering more than the proceeds of the debt for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam v. Jahangir Khan* I. L. R., 9 All. 476 approved. *MEAKANTA v. KRISHNABAMI*

[I. L. R. 13 Mad., 235]

9

*Transfer of actionable claim—Adjudication on claim—* In a suit upon a hypothecation bond brought by an assignee for value from the obligor it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching creditor of the obligors. Held that there had been no adjudication on the claim to exclude the rule in the Transfer of Property Act, s. 135 and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree. *RAMACHANDRA v. VENKATARAMA*

I. L. R., 13 Mad. 516

10

*Actionable claim—Transfer of claim for an amount less than its value—* In a suit by transferee to enforce claim—*Defendant is entitled to plead that terms of transfer were unenforceable—* A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806 his heirs who were out of possession, executed a deed of assignment to a third person transferring to him the right to acquire by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee the defendants being the conditional vendors and also the assignors under the deed above mentioned. The latter made no defence but admitted the justice of the claim and a decree was passed in favour of the plaintiff against them as well as against the other defendants. Held that the answerers, defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor. *Held* also that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the price and incidental expenses of the sale with the interest on that price from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begum v. Jahangir Khan, I. L. R., 9 All. 476*, followed. *Grish Chandra v. Kashiauri Debi, I. L. R., 13 Calc., 145*, and *Khoshdeb Biswas v. Satar Mondol, I. L. R., 15 Calc., 436*, dissented from. *HAKIM-UN-NISSA v. DEONARAIN, I. L. R., 13 All., 102*

11. ———— *Actionable claim—Mortgage-bond hypothecating immovable property.*—*Per PETHERAM, C.J., NORRIS, O'KINEALY, and GHOSE, JJ. (PRINSEP, J., dissenting).*—The right to recover a loan secured by a mortgage of immovable property is an "actionable claim" within the proviso of s. 135 of the Transfer of Property Act. *Per PETHERAM, C.J., NORRIS and GHOSE, JJ.*—Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it; provided that such payment is made at any time before a judgment of a competent Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned, the assignee is entitled to judgment for the whole debt. *Per PRINSEP, J.*—The provisions of s. 135, cl. (d), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. *Jani Begum v. Jahangir Khan, I. L. R., 9 All., 476*, and *Nilakanta v. Krishnasami, I. L. R., 13 Mad., 225*, approved of. *Rajendra Narain Bagchi v. Watson & Co., I. L. R., 18 Calc., 510*, referred to. *Per O'KINEALY, J.*—Cl. (d) of s. 135 refers to circumstances arising before the transfer of the actionable claim, and cls. (a), (b), and (c) refer to circumstances coming into existence at the time of the transfer. *MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI, I. L. R., 21 Calc., 568*

12. ———— *Mortgage—Actionable claim—Assignment of mortgage—Liability of mortgagor—Steps to be taken by mortgagor to obtain benefit of s. 135.*—A mortgage is an actionable claim under s. 135 of the Transfer of Property Act. In order to obtain the benefit of that section, the mortgagor must pay "the price and incidental expenses, etc., with interest" into Court either or before the action. *Muchram Barik v. Ishan Chunder Chuckerbutti, I. L. R., 21 Calc., 568*, followed. Where a mortgagor some months after suit was brought tendered the amount due, on the assignment

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

of the mortgage to the assignee, and the tender was refused and no actual payment was made into Court.—*Held* (by PETHERAM, C.J., NORRIS and O'KINEALY, JJ., affirming the judgment of HILL, J.) that, under the circumstances, the mortgagor was not entitled to the benefit of s. 135. *RUSSICK LALL PAL v. ROMANATH SEN, I. L. R., 21 Calc., 792*

13. ———— *Assignment of mortgagee's rights under his mortgage—Actionable claim.*—An assignment of a mortgagee's rights under a mortgage is not an assignment of an "actionable claim" within the meaning of s. 135 of the Transfer of Property Act (IV of 1882). *MOTI RAM v. JETH MAL, I. L. R., 16 All., 313*

14. ———— *Actionable claim—Rights of usufructuary mortgagee whose mortgagor has failed to put him in possession of the mortgaged property—Assignment of mortgagee's rights.*—The transfer by a usufructuary mortgagee, whose mortgagor has failed to give him possession of the mortgaged property of his rights as such mortgagee against his mortgagor, is a transfer of an actionable claim within the meaning of s. 135 of the Transfer of Property Act (IV of 1882). *RANI v. AJUDHIA PRASAD, I. L. R., 16 All., 315*

15. ———— *Assignment of an actionable claim—Suit by the assignee—Recovery of the full amount of debt.*—*V* owed a sum of Rs 153 to *G*, who assigned the debt to the plaintiff for Rs 200. The plaintiff sued *V* to recover the whole amount. *Held* that, under s. 135 of the Transfer of Property Act (IV of 1882), the plaintiff was entitled to recover the whole amount of the debt. *VISHNU MAHADEV SONAR v. DAGADU, I. L. R., 19 Bom., 290*

16. ———— *Actionable claim—Mortgage—Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses.*—Where the debtor without denying the claim offers to pay the purchaser the actual price paid by him with interest and expenses of the sale and merely disputes the amount of these items,—*Held* that such a case does not come under the exception in cl. (d) of s. 135 of the Transfer of Property Act, and the first paragraph of that section applies. *Held* also that it is not necessary to deposit the money in Court in order to gain the benefit of s. 135 of the Transfer of Property Act. *DEBENDRA NATH MULLICK v. PULIN BEHARY MULLICK, I. L. R., 23 Calo., 713*

17. ———— *Actionable claim—Tender.*—When the plaintiff, as an assignee of an actionable claim, brought a suit for its enforcement without having previously given a notice to the defendants of his purchase, and on the suit being called on for hearing the latter prayed to be discharged from liability by paying the price paid by the plaintiff in purchasing the same with costs and all incidental expenses and asked for a month's time to pay the money,—*Held* that the plaintiff was entitled to a decree for the full amount of his claim, and not simply the amount

# TRANSFER OF PROPERTY ACT (IV OF 1882)—cont. next.

at which he purchased the bond in question with costs and incidental expenses, inasmuch as there was neither an assignment before judgment was delivered nor was any tender of payment made at the time. *PUNDIT CHARAN SIKHAN v GANGADHAR DAS* [3 C W N., 147]

18. — *Actionable claim—Assignment of a simple mortgage before due date*—The term "actionable claim" as used in a 130 of Act IV of 1882, means a claim in respect of which a cause of action has already matured, and which subject to procedure may be enforced by suit. *Held* that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within the meaning of a 130 of Act IV of 1882. *Pani v Ajmal & Prasad* 1 L R., 16 All 310 referred to and explained. *SUBI LALL v AZMAT ULLAH* [1 L R., 18 All. 265]

19. — *Mortgage—Actionable claim—Transfer of Property Act s 54* Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses—A debtor claiming the benefit of a 130 of the Transfer of Property Act (IV of 1882) is discharged of his liability if he pays or offers to pay at any time before final judgment the amount actually paid with interest and incidental expenses. *Muckram Bantik v Isham Chandra Chuckerbitt*, 1 L R., 21 Calc., 568 followed. The amount of interest is governed by s. 54 of the Transfer of Property Act. *DRESDRA NATH MULLICK v FELIX BERNAT MULLICK* [1 L R., 24 Calc., 763]

20. — *and s. 133—Insolvent Act (Stat 11 & 12 Vict., c 21) s 86—Purchaser of scheduled debts—Right of purchaser to be paid full amount of such debt*—An insolvent, having filed his schedule in April 1881 obtained his personal discharge in September 1881 and on the same day judgment was entered up against him for the amount of his scheduled debts under s. 86 of the Insolvent Act (11 & 12 Vict., c 21). The schedule contained the names of thirteen creditors. The insolvent afterwards settled with four of them. The remaining nine whose aggregate claims amounted to Rs 1400-0-0 sold their claims. Certain assets belonging to the insolvent's estate having subsequently come into the hands of the Official Assignee the purchasers claimed to be paid the full amount of the scheduled debts which they had bought. It appeared that the debts in question were debts incurred on certain promissory notes passed by the insolvent. The insolvent contended that under a 135 of the Transfer of Property Act (IV of 1882) the purchasers were only entitled to the amount which they had actually paid for the debts they had bought. *Held* that they were entitled to be paid the full amount of the scheduled debts. If the debts at the time of purchase were to be regarded as debts in respect of promissory notes, s. 135 of the Transfer of Property Act applied, and if the claim was under the

# TRANSFER OF PROPERTY ACT (IV OF 1882)—continued

judgment entered up against the insolvent, then clause (d) of s. 130 applied. *IN THE MATTER OF RUCHON KUTSAL* 1 L R., 21 Bom., 573

21. — *Assignment of mortgage by mortgagee—Suit by assignee—Payment into Court by defendants (representatives of mortgagee) of price paid to the assignee (mortgagee) without admitting the mortgage or assignment—Interest—Payment in grain—Damages*—In a suit by the assignee of a mortgage to recover the amount due on it, the defendants (who were representatives of the mortgagee) without admitting the mortgage or the assignment was due under it, paid into Court the amount which the plaintiff had paid for the assignment with interest and expenses, but said that they did not admit the assignment to the plaintiff or the assignee's right to the mortgage, but that they were willing that the amount should be paid to the plaintiff if he proved that he was the person entitled to recover the mortgage debt. *Held* that the plaintiff was entitled to recover the whole amount legally due on the mortgage, and that a 130 of the Transfer of Property Act did not apply. Payment into Court under such circumstances was only a conditional tender and such a conditional tender is not a payment under the section. *ANANDRAO BHARAT DARS v DUTTAJI* [1 L R., 23 Bom., 761]

22. — *Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree—Assignment of the widow and legatees of the depositor claimed a sum of money in the hands of a bank, to which B asserted an adverse claim. P brought an application by A for a succession certificate, B sued the bank and the widow for the money and A was joined as a defendant. A decree was passed in 1883 by which it was ordered that the bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1891. A meanwhile had obtained the succession certificate, and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money. *Held* that the suit was not barred by limitation and that the plaintiff was entitled to a decree, not that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within the Transfer of Property Act, s. 130 (d), since on the true construction of the decree of 1883, A had been decided as who should hold the money pending the settlement of the rights of the rival claimants. *CHANDRANATHA SASTRI v RAMAKRISHNA PANTICHER* [1 L R., 21 Mad., 253]*

23. — *Actionable claim—Person claiming the benefit of s. 135 not obliged to pay before judgment the amount paid by the assignee*—*Held* that a person who is entitled to claim the benefit of s. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the

## TRANSFER OF PROPERTY ACT (IV OF 1882)—continued.

section to preclude the debtor from securing his discharge by payment of the decree. *Rani v. Ajudhia Prasad*, I. L. R., 16 All., 315; *Muchiram Barik v. Ishan Chunder Chuckerbutti*, I. L. R., 21 Calc., 568; *Jani Begam v. Jahangir Khan*, I. L. R., 9 All., 476; *Hakim-un-nissa v. Deonarain*, I. L. R., 13 All., 102; and *Nilakanta v. Krishnasami*, I. L. R., 13 Mad., 225. *PHUL CHAND v. CHHOTI LAL*

[I. L. R., 20 All., 327]

24. *Actionable claim—Sale of mortgagor's interest in mortgaged property—*The sale by a mortgagor of his interest in the property mortgaged is not the sale of an actionable claim within the meaning of s. 135 of the Transfer of Property Act, 1882. *TOTA RAM v. LALA*

[I. L. R., 20 All., 468]

25. *Sale of actionable claim—Mortgagee by assignment—Assignee of prior lien.*—The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been Rs75, though it purported to have been a much larger sum. On the appellant contending that s. 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum,—*Held* that the appellant was only entitled to a lien for the price paid by him for the assignment. *RAMA SASTRI v. NARASIMHA AYYAR*

[I. L. R., 22 Mad., 301]

26. *Judgment of a competent Court—"Actionable claim"—Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount.*—The assignee of a judgment for Rs12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in British India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration; and the Subordinate Judge, finding as a fact that only Rs5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of s. 135 of the Transfer of Property Act and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court,—*Held* that the plaintiff was entitled to recover the whole amount of the judgment. *Semble.*—The word "judgment" in cl. (d) of s. 1-5 of the Transfer of Property Act include a foreign judgment. *VITHILINGA PADAYACHI v. SETHARAM AYYAR*

I. L. R., 23 Mad., 449

1. s. 136—*Purchase of elephant with authority to recover the same from a stranger.*—The owner of certain land, in consideration of a sum of money, transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and

## TRANSFER OF PROPERTY ACT (IV OF 1882)—concluded.

was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had brought an actionable claim within the meaning of s. 136 of the Transfer of Property Act, 1882. *Held* that the section was not applicable. *RAMAKRISHNA v. KURUKAL*

I. L. R., 11 Mad., 445

2. *Purchase of actionable claim by officer of Court—Jurisdiction, Meaning of term.*—S. 136 of the Transfer of Property Act, 1882, provides that no officer connected with a Court of justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions. The plaintiff, an officer in a District Court, having purchased the rights of the mortgages in a bond, sued to recover Rs2,225 due upon it in the Court of the District Munsif. *Held* that, as the claim did not fall under the immediate jurisdiction of the District Court, s. 136 was not applicable. *SINGARACHARI v. SIVABAI*

[I. L. R., 11 Mad., 498]

## TRANSFER OF PROPERTY ACT AMENDMENT ACT (III OF 1885), s. 3.

*See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.*

[I. L. R., 19 Calc., 623]

## TRANSLATION.

*See COPYRIGHT.* I. L. R., 14 Bom., 586

[I. L. R., 19 Bom., 557]

## TRANSPORTATION.

*See SENTENCE—TRANSPORTATION.*

*Absence by reason of—*

*See LIMITATION ACT, 1877, s. 7.*

[I. B. L. R., S. N., 25]

## TRANS-SHIPMENT PERMIT.

*See SEA CUSTOMS ACT, s. 123.*

[I. L. R., 4 Bom., 447]

## TREASON.

*See WAGING WAR AGAINST THE QUEEN.*

[7 B. L. R., 63]

## TREASURE TROVE.

1. *Beng. Reg. V of 1817—Hidden treasure—Duty of finder of hidden treasure—Rights of finder, zamindar, and Government.*—Some persons, while digging a field in certain zamindari, found an earthen pot containing money. The finder and the zamindar both claimed to be entitled to the treasure, but the provisions of Regulation V of 1817, with regard to the finding of hidden treasure, were

## TREATY, CONSTRUCTION OF—

Money settled upon members of Royal Family of Oudh and their heirs—*Perpetual pensions by payments arranged between sovereign powers*—Construction of the word “issue,” as used in a treaty between them, and in subsequent correspondence.—An arrangement between two sovereign powers, viz, the King of Oudh and the East India Company, whereby members of the Royal Family of Oudh had secured to them and to their issue pensions in perpetuity, although a settlement of pensions in perpetuity could not, under the Mahomedan law, be validly made by a private individual, took effect as a contract or treaty between the powers. *Held*, on the construction of a treaty made in 1838 between the King of Oudh and the East India Company, that it was the intention of the King thereby to provide pensions for certain members of the Royal Family in perpetuity; that if any of the pensioners should die without issue, his or her pension should revert to the King; that the words “heirs” and “issue” were used as convertible or equivalent terms; and that they meant persons who would be heirs according to Mahomedan law. *Held* also that the King intended in 1842 to provide for the ancestress of the plaintiffs an additional pension of the same kind as the pension which he had provided for her in 1838; and that, according to the letter written by the King in that year to the Government of India, after her death, if she should have left issue, the additional pension was to be payable to such of her issue as should be also her heirs, according to the rules of the Mahomedan Law of Inheritance. *MARIAM BEGUM v. MIRZA WAZIE BEGUM v. MIRZA*. I. L. R., 17 Cal., 234 [L. R., 16 I. A., 175]

## TREES.

See BOMBAY REVENUE JURISDICTION ACT, s. 4. I. L. R., 18 Bom., 319

See CASES UNDER LANDLORD AND TENANT—PROPERTY IN TREES AND WOOD ON LAND.

See LIMITATION ACT, 1877, s. 28 (1871, s. 29). I. L. R., 3 All., 435

See LIMITATION ACT, ART. 144—IMMOVABLE PROPERTY. 2 Agra, 300 [4 N. W., 167 I. L. R., 16 Bom., 353 I. L. R., 19 Bom., 207]

See OWNERSHIP, PRESUMPTION OF. [22 W. R., 405 I. L. R., 16 Bom., 547]

See PRESCRIPTION—EASEMENTS—TREES. [I. L. R., 19 Bom., 420]

See SMALL CAUSE COURT, MOFUSSIL JURISDICTION—MOVABLE PROPERTY. [I. L. R., 5 All., 564 24 W. R., 394 3 Mad., 237 I. L. R., 3 All., 168]

## TREES—continued.

Document giving right to cut and enjoy.

See REGISTRATION ACT, 1-77, s. 17, cl. (d). [I. L. R., 20 Mad., 58]

## Liability for cutting—

See MASTER AND SERVANT [I. L. R., 23 Cal., 922]

## Order to cut down—

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES. 5 B. L. R., 131

## Removal of, Suit for.

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [2 Agra, Part II, 183: I. L. R., 8 All., 448 I. L. R., 9 All., 35 I. L. R., 20 All., 519]

See LIMITATION ACT, 1877, ART. 32.

[I. L. R., 8 All., 446 I. L. R., 10 All., 634 I. L. R., 20 All., 519 I. L. R., 24 Cal., 160]

## Restriction as to felling—

See MADRAS RENT RECOVERY ACT, s. 11. [I. L. R., 15 Mad., 47]

## Right to cut—

See FOREST ACT, SS 75 AND 76. [I. L. R., 18 Rom., 670 I. L. R., 23 Bom., 518]

See GRANT—CONSTRUCTION OF GRANTS. [I. L. R., 23 Bom., 518]

See PRESCRIPTION—EASEMENTS—TREES. [I. L. R., 19 Bom., 420]

1. ——— Standing timber—*Mango tree*—Custom of a locality—Registration Act (XX of 1866), s. 3.—By the term “timber” is meant properly such trees only as are fit to be used in building and repairing houses. A mango tree, which is primarily a fruit tree, might not always come within the term “standing timber” used in the definition of immovable property in s. 3 of the Indian Registration Act (XX of 1866). But it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses. *KRISHNARAO v. BABAJI* [I. L. R., 24 Bom., 31]

2. ——— Tree-pottah—Right to land on which trees stand—Tree-pottahdars, Rights of.—*Held per DAVIES and MOORE, JJ.*, affirming the judgment of *BENSON, J.* (*SUBRAMANIA AYYAR, J., diss.*), that persons holding a pottah for palmyra trees in Tinnevely are not *ipso facto* entitled to an ordinary raiyatwari pottah for the land on which the trees stand. *Per SUBRAMANIA AYYAR, J.*—Land on which a man plants a palmyra tree is in his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay any assessment or assessments which the Government may from time to

**TREES—concluded**

time be sent to impose and apply it also to all other lawful incumbrances attaching to a holding of that description. The rights of a *tr-o-pottahdar* and the nature of the revenue levied on such *pottahdars* considered. *THEIVU PANDITHAN v. SECRETARY OF STATE FOR INDIA* I L. R., 21 Mad., 433

**TRESPASS.**

- 1 GENERAL CASES CJ  
2 HOUSE TRESPASS. 28  
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See CALCUTTA MUNICIPAL COMMISSIONER ACT 1888, s. 2 I L. R., 21 Calc., 525

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See DAMAGES SUITS FOR DAMAGES—  
TORTS 8 Bom. A. C. 177  
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See DEBTOR AND CREDITOR.  
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See EXECUTION OF DECREE—LIABILITY  
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[3 B. L. R., A. C. 413  
12 B. L. R., 203 note

See INJUNCTION—UNDER CIVIL PROCEDURE CODE I L. R., 22 All. 449

See MADRAS FOREST ACT s. 21  
[I L. R., 12 Mad., 228

See MADRAS POLICE ACT s. 21  
[I L. R., 17 Mad., 37

See MASTER AND SERVANT  
[2 B. L. R., A. C., 227  
2 B. L. R., O. C., 140

See MISJOINDER OF PARTIES  
[I L. R., 18 Mad., 335

See RAILWAYS ACT 181 s. 1  
[I L. R., 1 Bom., 25

See RECORDER OF MORTGAGES  
[8 W. R., Civ. ReL., 4

See RECORDER OF RANGOON  
[I L. R., 20 Calc., 689

See RIGHT OF EJECTMENT—INJURY TO ENJOYMENT OF PROPERTY  
[I L. R. 18 All., 153

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See WRONGFUL DETRAINMENT  
[5 W. R., Act X, 67  
3 B. L. R., A. C., 591

by cattle.

See CATTLE TRESPASS AND CATTLE TRESPASS ACTS.

See VICISSITUDE—UNDER CRIMINAL PENAL  
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on burial ground.

See RELEVANT OFFENCES RELATING TO  
[I L. R., 10 Mad., 128  
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**1. GENERAL CASES.**

1. Landlord and tenant—Damage to reversionary interest—Right of landlord to sue for damage—English law—Application of—Many of the tenures in India are in the nature of a partnership, in which he to whom the land belongs participates with the cultivator in the crop. Therefore the law of England, that a landlord who has parted with the possession to a tenant cannot sue in trespass for damage to the property, is less applicable to the case of a tenant who has parted with the possession to a tenant. In India, *VENKATACHALAM CHETTI v. ANJALAPPA ANJALAM* I L. R., 3 Mad., 232

2. Wrongful distraint of crops—Distraint without notice—Penal Code s. 79—Resistance to wrongful distraint—A zamindar was held to be justified in exercising his right of private distraint of crops if he had served the defaulter with written notices under Act X of 1859 s. 115, and, in such a case, raiyats, who knowingly resisted the distraint were held to be not protected by the Penal Code s. 79. But if the zamindar's people enter upon crops with intention of distraining without notice the raiyat owners are justified in considering such action as trespass. *QUEEN v. KANHAJI KHANU* [23 W. R., Cr., 40

3. Land taken by Government without formality prescribed by Beng. Reg. I of 1855—*L. g. h. c. f. o. n. e. r. t. a. m. a. l. a. n. a. t. a. g. a. l. Government for rent*—Lands were occupied by the Government for the purpose of making an embankment without the observance of the formality required by Regulation I of 1855. Held that the owner of the land was entitled to maintain a suit against Government for the rent of the land during the time he was kept out of possession. *JOYKARAN BOSH v. COLLECTOR OF 41 REGENTIAHS* [Marsh., 56

COLLECTOR OF 24 REGENTIAHS v. JOYKARAN BOSH W. R., F. B., 18 May, 193

4. Suit to prevent trespass—Suit to close doors—Cause of action—Possibility

## TRESPASS—continued.

## 1. GENERAL CASES—continued.

*of injury.*—No suit can lie to close doors opened by a person in his own wall, on the ground of a possibility of his committing trespass on the land of the plaintiff, or of his having actually committed such trespass. It will only lie when the opening of the doors is in itself such an irremediable injury that the plaintiff would not be sufficiently compensated by money damages. *GIBBON v. ABDUL RAHMAN KHAN*. . . . . 3 B. L. R., A. C., 411

5. — Sale for arrears of rent—*Sale under defective notice—Reversal of sale for irregularity.*—*A*, a zamindar, sold the right of *B*, his patnidar, for arrears of rent under Regulation VIII of 1819. This sale was subsequently set aside at the suit of *B* for irregularity. *A* then sued *B* for the arrears under Act X of 1859, and *B* pleaded limitation. *Held* that *A* was not guilty of a trespass in bringing the property to sale under a defective notice, and *A* could not have sued for arrears pending the proceedings to set aside the sale. *SWARNAMAYI v. SHASHI MUKHI BARMANI*. . . . . [2 B. L. R., P. C., 10]

S. C. SUBNOMOYEE v. SHOOSHEE MOKHEE BURMONIA . . . . . 12 Moore's I. A., 244 [11 W. R., P. C., 5]

6. — Suit for arrears of rent for a period during which zamindar had been in possession as purchaser at a sale for arrears of rent afterwards set aside.—In a suit by a zamindar against his patnidars for arrears of patai rent for the years 1294, 1295, and part of 1296, it appeared that the patnidars had been out of possession during a portion of that period when the zamindar himself had been in possession, having purchased the tenure at a sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside owing to the proceedings having been instituted against the predecessor of the patnidars who was then dead, and thereupon the zamindar gave notice to the patnidars to retake possession, which they accordingly did. During the time he was in possession the zamindar himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrongdoer and trespasser, and that consequently the defendants could not be held liable for rent during that period. *Held* that this was no reason for refusing the plaintiff a decree for such arrears, as upon the authority of the decision in *Surno Moyee v. Shooshee Mokhee Burmonia*, 2 B. L. R., P. C., 10 : 12 Moore's I. A., 244, the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon. *DHUNPUT SINGH v. SARASWATI MISHRA*. . . . . I. L. R., 19 Calc., 267

7. — Trespass on burial-ground—*Penal Code, s. 297—Trespass by co-owner.*—*A*, *B*, *C*, and *D* were co-owners of a plot of land in which they were accustomed to bury their dead. *A* and *B* opened a saw-pit close to the graves of *D*'s relatives, but did not disturb any of the graves. *Held* that

## TRESPASS—continued.

## 1. GENERAL CASES—concluded.

they were wrongly convicted under s. 297 of the Penal Code. *IN RE MUHAMMAD HAMIN KHAN*. . . . . [I. L. R., 3 Mad., 178]

8. — Liability for trespass by defendants not actually committing it—*Committee under Act XX of 1863.*—*Held*, in a suit under Act XX of 1863, that where the evidence showed that certain acts of trespass by one of the defendants were for the benefit and on behalf of the members of the committee, and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass. *VENKATASA NAIKER v. SRINIVASSA CHARIAR*. . . . . 4 Mad., 410

## 2. HOUSE-TRESPASS.

9. — Breaking open chest in house by inmate of house—*Penal Code, s. 457.*—*T*, being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under s. 457 of the Penal Code. *Held* that he could not properly be convicted under that section. *QUEEN v. TASUDUK HOSSEIN*. . . . . [6 N. W., 301]

10. — Breaking open door in execution of decree—*Penal Code, s. 456.*—Where the accused persons, execution-creditors, in company with an authorized bailiff, broke open complainant's door before sunrise with intent to distrain his property for which they were convicted on a charge of lurking house-trespass by night or house-breaking by night,—*Held* that, as they were not guilty of the offence of criminal trespass, there being no finding of any such intent as is required to constitute that offence, and that as criminal trespass is an essential ingredient of either of the offences with which they were charged, the conviction must be quashed. *IN THE MATTER OF JOTHARAM DAYAY*. . . . . [I. L. R., 2 Mad., 30]

11. — Cattle-yard—*Building used for custody of property—Penal Code, ss. 442, 457.*—The Court inclined to hold that a cattle-yard which was originally walled on four sides, and in one side of which, fallen out of repair, there was a gap stopped with a thorn, was a building used as a place for the custody of property, within the meaning of s. 442 of the Penal Code. *QUEEN v. DULLER*. . . . . [6 N. W., 307]

12. — Entry into house with forged warrant of arrest—*Penal Code, s. 452.*—Where *A* goes with a forged warrant of arrest into a house, and takes away one of the inmates against his will under the authority of such warrant, he is guilty of house-trespass, by putting such person in fear of wrongful restraint, under s. 453 of the Penal Code. *QUEEN v. NUNDMOHUN SIKHAR*. . . . . [12 W. R., Cr., 33]

13. — Right of wife to enter husband's house—*Wife excommunicated from caste.*



## TRESPASS concluded

## 2 HOL &amp; TRESPASS—concluded

—Escommuniement from estate per se d. s. not de-  
prive a Hindu wife of her right of joint enjoyment of  
her husband's house so as to make her a trespasser if  
she takes the house to claim as a tenant. Q. 357  
v. MARINETTE I. L. R., 4 Mad. 243

14. Entering lock up with intent to convey food to prisoner—Penal Code  
s. 442. h. s. p. n. c. r. d. to a havalat w. h.  
intent to convey a gift to a thief to a  
person under trial, a charge of this part did not  
amount to house-t. s. p. w. h. in the mean g. f.  
s. 442 of the Penal Code h. m. p. s. I. L. R., 3 All. 301

## TRESPASSER.

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TENANCY EJECTMENT ON BEHALF OF  
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See JURISDICTION OF CIVIL COURT LEFT  
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[7 N. W., 228 257 258 318  
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MENT AND CALCULATION  
I. L. R., 1 All., 518  
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TASTA I. L. R., 18 Bom., 721

Suit by—

See SPECIFIC RELIEF ACT & C. S.  
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## TRESPASSER—concluded.

See WAGHARL POSSESSION

[I. L. R., 4 Calc., 588

## "TRIAL," COMMENCEMENT OF—

See WITNESS—CRIMINAL CASES—S. W.  
MOVING WITNESSES.  
[I. L. R., 25 Calc., 683

## TROVER

See HURDI—ILLUMINATION  
[I. L. R., 18 Bom., 540

See SMALL CAUSE COURT JURISDICTION  
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[I. L. R., 13 Bom., 573

Suit in—

See HURAND AND WIFE.  
[I. L. R., 1 Calc., 255

1. ——— Right of stoppage in transitu  
—Contract to go de fr. s. on board—Inside reg-  
G. O. s. contracted to be sold and delivered "free on  
board," to be paid for by cash or bills at the option of  
the purchaser, were taken over on board and received  
by the sellers, who handed the same over to them. The  
sellers apprised the purchasers of the date and who  
declined to pay for the goods by a bill which the  
sellers had drawn, was duly accepted by the pur-  
chasers. The sellers retained the mate's receipts for  
the goods, but the master signed the bill of lading in  
the purchasers' names, who, while the bill had been  
accepted was running, became insolvent. In such  
circumstances, held by the Privy Council (reversing the  
decision of the Supreme Court at Bombay) that the  
bill would not lie for the goods, for that on their delivery  
on board the bill was not received or taken as a receipt  
as to be stopped by the sellers; and that the retention  
of the receipts by the sellers was immaterial as after  
their delivery to be paid by a bill the receipts of the  
mate were not essential to the transaction between the  
bill and purchaser. FRANKIE COWAN & SONS  
3 Moore & L. A., 423

2. ——— Conversion—Assignment of  
goods—Criteria warehouses—Advance—Security  
of goods—Advance and assignment—Assignment  
of goods—Incomplete assignment—A bill of sale and  
assignment of goods described as being in certain  
warehouses belonging to A was given by him for the  
loan of a sum expressed to have been paid on the  
day of the date thereof. Upon an action of  
trover brought against the assignee of A, who  
had seized the goods, it appeared in evidence that  
a portion only of the goods was in the warehouse  
specified at the date of the sale and that no part  
of the loan was paid on that day the same being  
discharged by instalments a few days afterwards.  
Whereupon the Judges of the Supreme Court held  
that there had been no valid transfer and conse-  
quently no conversion and gave an interlocutory  
judgment in accordance with such view. It is by  
the Judicial Committee on appeal from that decision.

**TROVER—concluded.**

and from an order refusing a new trial, that the decision was not justified by the evidence, and must be reversed and a new trial granted. *MUTTYLOLL* SEAL v. O'DOWDA . . . 4 Moore's I. A., 382

3. ——— Suit to recover notes lost by gambling—*Act XXI of 1848—Illegal consideration—Bonâ fide holder for value—Trust for specific purpose.*—The plaintiff, the manager of the Oriental Bank, placed in the hands of D, a broker, thirteen Government currency notes for Rs. 1,000 each on D's representation that there was some Company's paper at a certain place which he could procure at a certain place which he could procure at a more reasonable rate than in the Calcutta market, if the money were given him to purchase it. If the Company's paper was not procurable, the notes were to be returned to the plaintiff. D did not go to the place stipulated to purchase the Company's paper, but, meeting the defendant and others, he went into a house hired for gambling, and lost at cards, and paid away to the defendant some of the notes he had received from the plaintiff. The plaintiff now sued the defendant to recover the notes so entrusted to D, on the allegation that they had been entrusted by him to D for a specific purpose, and that the defendant was not a *bonâ fide* holder for value. He (the plaintiff) stated in evidence "that if the paper had been bought, he would either have taken the papers at the most favourable market price for the bank, or have sold them and given D the profit." Held the plaintiff was entitled to recover. The defendant was not a *bonâ fide* holder for value. *Per PARL, J.*, in the Court below, and *per NORMAN, J.*, on appeal.—The notes were especially entrusted to D for the purchase of the Company's paper. *Per PHEAR, J.*—Upon the case put forward by the plaintiff, the transaction was a short loan, and not a bailment, and did not bear the character of a trust. But upon the evidence the notes were the property of the bank, and remained so in D's hands, and therefore the plaintiff was entitled to recover on behalf of the bank. *BRIDGES NARAIN v. SCRYMGEOUR* . . . 6 B. L. R., 581

**TRUST.**

See DEED—CONSTRUCTION.

[I. L. R., 20 Bom., 310

See ECCLESIASTICAL TRUST.

[2 Ind. Jur., O. S., 12

See ENGLISH LAW—TRUST, DECLARATION OF . . . 4 Mad., 460

See HINDU LAW—ENDOWMENT—ALIENATION OF ENDOWED PROPERTY.

[I. L. R., 8 Mad., 286

See HINDU LAW—ENDOWMENT—CREATION OF ENDOWMENT.

[1 Ind. Jur., N. S., 14

14 B. L. R., Ap., 175

I. L. R., 9 Bom., 169

I. L. R., 4 Calc., 56

I. L. R., 12 Bom., 247

I. L. R., 10 All., 18

I. L. R., 25 Calc., 112

**TRUST—continued.**

See HINDU LAW—PARTITION—AGREEMENTS NOT TO PARTITION, ETC.

[I. L. R., 6 Calc., 106

I. L. R., 12 Mad., 287

See CASES UNDER HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS AND REMOTENESS.

See JURISDICTION—SUIT FOR LAND—TRUSTS.

See CASES UNDER LIMITATION ACT, 1877, s. 10.

See LIMITATION ACT, 1877, ART. 113 (1871, ART. 113) . . . I. L. R., 2 Calc., 323

See CASES UNDER MAHOMEDAN LAW—ENDOWMENT.

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . . I. L. R., 19 All., 277 [L. R., 24 I. A., 10

See CASES UNDER RIGHT OF SUIT—CHARITIES AND TRUSTS.

See WILL—CONSTRUCTION.

[I. L. R., 4 Calc., 420

I. L. R., 9 Mad., 325

1 Ind. Jur., O. S., 86

I. L. R., 15 Mad., 424

**Declaration of—**

See STAMP ACT, 1879, SCH. I, ART. 36.

[I. L. R., 12 Mad., 89

**Deed of—**

See LIMITATION ACT, 1877, s. 10.

[I. L. R., 20 Bom., 511

See STAMP ACT, 1879, SCH. I, ART. 54.

[I. L. R., 20 Bom., 310

**Disavowal of—**

See LIMITATION ACT, 1877, ART. 144 (1871, ART. 145)—ADVERSE POSSESSION.

[I. L. R., 1 All., 403

**for benefit of creditors.**

See BILL OF EXCHANGE.

[I. L. R., 3 Calc., 174

See DEBTOR AND CREDITOR.

[11 Moore's I. A., 317

3 Agra, 104, 321

8 Bom., A. C., 245

1 Bom., 233

I. L. R., 7 Bom., 101

I. L. R., 25 Calc., 642

I. L. R., 16 Bom., 1

I. L. R., 19 Bom., 12

I. L. R., 20 Mad., 91

**for specific purpose.**

See LIMITATION ACT, 1877, s. 10 (1871, s. 10) . . . I. L. R., 4 Calc., 455, 897

[2 C. L. R., 370

I. L. R., 6 Mad., 402

I. L. R., 14 Bom., 476

See TROVER . . . 6 B. L. R., 581

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— Giving power to sell land in  
 mortuall.

See JFR EJECT OV—SUITS FOR LAND—  
 TRUSTS

— Instrument of—

Stamp Act 18 9 Sec 1 ART 50.  
 [I. L. R. 15 Mo 1, 389]

— Notice of—

See LIMITATION ACT 18 " ART 1834 (1871,  
 ART 1341. I. L. R., 1 Bom. 239

— Precatory Trust—

See WILL CONSTRUCTION  
 [I. L. R., 3 All. 55  
 I. L. R., 4 All. 500  
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— Revocation of—

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 10 B. L. R., 19  
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— Suit relating to—

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 TIES AND TRUSTS.

See SMALL CAUSE COURT MOVTABIL—  
 JURISDICTION—TRUSTS.

— Suit to set aside—

See LIMITATION ACT 18 ART 120  
 [I. L. R., 20 Bom., 511]

1. **Creation of trust—Owner of property constituting himself as trustee—Father opening an account in name of his son.**—In order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself a trustee or must use language which, taken in connection with his acts, shows a clear intent on his part to divest himself of all beneficial interest in it and to exercise dominion and control over it exclusively in the character of a trustee. From the single circumstance that an account has been opened by a father in his books in the name of his son, in which money is credited to the son, no presumption can be raised in India that the father intends to create a trust in favour of his son, of the sums appearing in the account. *ASHABAI v. TITEN HAJI RAHIMTELLA*  
 [I. L. R., 9 Bom., 115]

2. **Subsequent disposition by settlor—Disposition out of income.**—Held that where a trust has been once perfectly created, although there may have been no transmission of possession it cannot be defeated by any subsequent act of the settlor and apparent dispositions of portions of the property afterwards made by him to particular members of a family the individuals con-

**TRUST—cont. next**

stituting which have as a class, a beneficial interest in the whole must be regarded not as gifts to them for creation of new trusts in it in favour of him but as the acts of a trustee and a trustee only to the extent of the shares to which such persons may be entitled. But this applies only to dispositions out of the principal of the fund, and not to payments made out of income a particular member of the family for their maintenance or other expenses as there may be circumstances which would render it iniquitous to take an account of the latter so as to charge such persons with what they may have received beyond their respective shares. *JAMABAI JIS SHAH v. ASHABAI*  
 [3 Bom., 130 2nd Ed., 133]

3. —

**Local & declaratory of trust—Incentive to a son of property—Incomplete gift—Evidence of interest of parties.**—The plaintiff H was the daughter of one A deceased. A some two years before his death in 1866 executed a will in which a bequest to the extent of Rs 500 on each of his daughters, H and H For H he bought a house at Zanzibar and settled it on her by a formal deed of settlement with various limitations. For H too, he at first intended to buy a house; but finding houses in Bombay were too dear he purchased a Government promissory note of the nominal value of Rs 500. The note was purchased in his own name and a separate account of it opened in his books, headed "The account of one promissory note bearing 5 per cent interest." This account he debited with all expenses over and above the Rs 500 incurred in and about the purchase of the note, such as for premium carriage hire, etc., charging moreover 9 per cent interest on these items of debit (which interest he carried as a debit to his general interest account) and he credited the account with the interest collected on the note from time to time, allowing interest at 6 per cent on these items of credit. He kept also a separate account of the proceeds of the note headed "The account of interest on one promissory note for Rs 500." The plaintiff stated that on the day when the note was bought her father A bought it and showed it to her saying "This is one note; take it when you want it," and that she left it in his custody saying "I will take the note when my sons grow up and do business." Corroborative evidence—which however differed in details from and was in some respects inconsistent with the evidence of the plaintiff—was given by the plaintiff's son and husband, as well as by a fourth witness not interested in the case. No interest was ever paid to the plaintiff by A himself although he lived for two years after the purchase of the note; but after A's death his son recognised some claim in the plaintiff to the income of the sum of Rs 500 set apart by A and he paid her sums equivalent to the proceeds of the note, with more or less regularly down to the date of his death. The note itself however he sold without communication with the plaintiff and appropriated to himself the sum realised by the sale, although he continued the account of interest on the note and even headed that account a H's name.

**TRUST—continued.**

Later still, after the death of *K*'s son, his grandsons, the defendants, made similar payments for some time, but irregularly, and finally they refused to pay anything further. The plaintiff sued for the note or its value, and for arrears of interest accrued due thereon, asserting that the evidence established a declaration of trust in respect of the note. *Held* that the evidence was insufficient to establish a valid declaration of trust, for while *K*'s books of account might very well be held to corroborate the testimony of a trust which was itself of a satisfactory description, they were insufficient of themselves to establish such a trust; while the oral testimony—which, if taken together and accepted as reliable, might well suffice to establish the acknowledgment of a trust—contained such discrepancies and was so generally misty and uncertain in character that it ought not to be accepted unless corroborated by undisputed facts in the case incapable of being explained except on the hypothesis advanced by the plaintiff. *Per SARGENT, C.J.*—The equitable doctrine of the transfer of ownership by acknowledgment of trust, when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties speaking as to conversations which took place seventeen years ago without the corroboration derived from other evidence pointing irresistibly in the same direction would be to introduce a most dangerous mode of appreciating evidence in this country, and would offer a direct encouragement to perjury. The suit dismissed, but without costs, *K*'s intention that *H* should have the benefit of the Rs5,000—to which, however, he had failed to give effect—being clear. *HIEBAI v. JAN MAHOMED KHALAKDINA*. I. L. R., 7 Bom., 229

**Gift—Requisites**

4. — *Gift—Requisites to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representative of donee—Trustee, Liability of.*—The plaintiffs, *M* and *R*, were Parsis, and were married in the year 1851. The defendant was the widow of *B M*, who was the father of the plaintiff *R*. The plaintiffs sued to recover from the defendant certain Government promissory notes which they alleged had been presented by *B* to *M* at her marriage for her sole and separate use. They alleged that the said notes, then of a nominal value of Rs1,500, were endorsed in the name of the said *B*, and had been deposited by him for safe custody with *M*'s grandfather *J*; that the said *B* during his life used from time to time to receive the said notes from *J* and draw the interest thereon for *M*; that *B* died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw the interest for *M*; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for *M*; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied

**TRUST—continued.**

that her husband *B* had ever presented *M* with Government notes for her separate use. She alleged that the notes which had been deposited by *B* with *J* were her own separate property, and not *M*'s; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with *J* had been disposed of by *B* in his lifetime with her consent; that in 1869 she obtained the remaining notes from *J* and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiff's marriage, presents were made to *M* both by her own family and by that of the bridegroom *R*. Two accounts were then opened in the books of the firm of *J N & Co.*, of which *M*'s grandfather *J* was a partner, one of which showed her acquisitions from her own family, and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August 1854) to the effect that *B*, the father-in-law of *M*, had bought two Government notes for Rs1,500 in *M*'s name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of *B* and *J*, in which the said Government notes were alluded to as the property of *M*, and as having been purchased with her moneys. In 1864 *B* died without having endorsed the notes over to *M* or to any one in her behalf, and they remained in his name in the hands of *J* until 1869, when the defendant got possession of them. *Held* that *B* was liable to answer for the notes as a trustee, and after *B* the defendant as his executrix and representative. In the documents put in evidence, *B* alluded to the notes as *M*'s property. His placing them, as he did, with *M*'s grandfather was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. He thus sufficiently admitted an obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from *B* to the defendant as his representative, and could be enforced against her. *Held* further that, having regard to the general practice among Parsis, the conduct of *B* in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by *M* and her children. *MERBAI v. PEROZBAI*

(I. L. R., 5 Bom., 236)

**5. — Parol trust—**

*Trustee—Executor de son tort—Donatio mortis causa—Appeal as to costs—Limitation.*—One *T C* in anticipation of death handed over his property to the defendant, his brother, and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family. *Held* that a good trust was created, at any rate so far as the debts were concerned. The defendant claimed to have paid to *S*, the widow of one *L*, the deceased



**TRUST—continued.**

*Held* in a suit by the widow next in order that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life. **RAMANUND KUAR v. RAGHUNATH KUR, ANANT BAHADUR SINGH v. RAGHUNATH KUAR**

[I. L. R., 8 Calc., 769; 11 C. L. R., 149  
L. R., 9 I. A., 41]

11. ——— Cessation of trust—*Cessation of performance by congregation of particular form of worship—Commencement of different form of worship.*—If the congregation of a church as a body cease to follow the observances of a particular form of worship, and in preference for forty years follow those of a different form of worship, there would be no one left for whom and by whom the original form of worship can be continued, the objects of the original trust cease to exist, and the church funds and property become impressed with a trust for the performance of the later form of worship. **MELLUS v. VICAR APOSTOLIC OF MALABAR**

[I. L. R., 2 Mad., 295]

12. ——— Suit to enforce trust—*Suit for enforcing religious or charitable trusts—Right of suit—Pleading—Security for costs.*—The representatives of a testator who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administration of religious or charitable trusts by information at the relation of some private individual, as is possessed by the Attorney General in England. A suit for this purpose should not be admitted unless the plaintiff gives sufficient security for costs. In order that a decree for an account may be made in favour of the plaintiff in such a suit, he must allege substantially in his plaint that which must be a distinct breach of trust; it is not sufficient for him to make out a case of mere suspicion, or to rely on particular passages in the defendant's written statement. **БРОЖОВИЦА Досс v. ХУНДОЛЛ Досс** I. L. R., 5 Calc., 700

13. ——— Religious and charitable trust—*Mortgage of trust property—Right of trustee to impeach acts of his predecessor in office—Endowment for charitable purposes.*—Property granted for religious and charitable purposes is inalienable, except under special circumstances. No person, other than the duly authorized trustee, can alienate by sale or mortgage the property of a religious trust. When a trustee does any act in breach or repudiation of the trust, such act is not binding on his successor in the trust. On the death of D, the hereditary trustee of a devasthan (or religious endowment), disputes arose between G and C as to the succession. G claimed to succeed as D's adopted son. C denied the adoption and claimed as D's heir and nearest kinsman. C obtained a decree against the widow of D for possession of the savasthan property and took possession in 1874. G, in the same year, obtained a decree against D's widow, awarding him possession and management of the property. He

**TRUST—continued.**

sought to execute this decree, but was successfully resisted by C, who had already got possession under his decree. Pending this litigation, the widow of D, the deceased trustee, who was *de facto* manager, mortgaged two villages forming part of the devasthan property. To pay off this mortgage, G mortgaged the villages to the plaintiff in 1875. The mortgagee sought to take possession of the village, but he was resisted by C. Thereupon G filed a suit, *in forma pauperis*, against C to recover possession and management of the whole devasthan property. Pending the inquiry into G's pauperism, both G and C referred their disputes to arbitration, and an award was made in 1881, by which the mortgaged villages and some other property belonging to the devasthan were assigned to G and his heirs in perpetuity. In 1884 the plaintiff sued to enforce his mortgage lien by sale of the mortgaged villages. *Held* that, the villages being trust property, it lay upon the mortgagee to prove circumstances justifying a charge on such property. *Held* also that, even assuming that the mortgage-money was actually applied to the purposes of the endowment, the mortgage could not be enforced against the property, as the mortgagor was not a duly authorized trustee. *Held* further that the award made between C and G was not binding on C's successor in the trust, as C professed to act in the matter not as a trustee, but as full owner of the devasthan property and in repudiation of the trust. **GANESH DHARNIDHAR MAHARAJDEV v. KESHAVRAV GOVIND KULGATKAR** I. L. R., 15 Bom., 625

14. ——— Assignment of religious trust—*Delegation of trust—Appointment by trustee of an agent for nine years.*—A person holding land on trust to supply a temple with rice, etc., out of the income of the land placed the defendant in possession of it under a lease, and subsequently in 1888 demised it to the plaintiff for nine years under an instrument which provided that the plaintiff should collect the income, pay part of it to the executant of the instrument, and with the rest perform the trusts above mentioned. In a suit for rent the defendant denied the plaintiff's title, questioning the validity of the instrument of 1888. *Held* that the instrument was valid, as it merely appointed the plaintiff an agent, and did not amount to an assignment of the trust. **KRISHNAMACHARU v. RANGACHARU**

[I. L. R., 16 Mad., 73]

15. ——— Charitable trust—*Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustees—Limitation Act (XV of 1877), s. 10, and sch. II, art. 120—Fraud—Accounts—Discretion of Court to order accounts—Jurisdiction of High Court where charity established by will is outside the jurisdiction—Advocate-General, Right of—Decree in prior suit brought by trustees of charity—Civil Procedure Code (1882), s. 43.*—One B R, a Jain, died in February 1863, leaving a will. His widow P (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpura property." The remaining half share belonged to two other persons, *viz.*, H D

## TRUST—continued

and M T By his will the testa or directed that a moiety of the rental of his half share should be spent on the sadharm, charitable or religious endowment of a temple at Jackho in Cutch and the other moiety thereof in establishing two satharats, one at Jackho and the other in Palitana. He also set apart a sum of Rs 2500 of which Rs 1000 were to be expended in building a temple at Jackho, and the balance of Rs 1500 in erecting a market near the temple at Jackho or if that was impossible it was to be spent in Palitana. The plaintiff complained that of the Rs 2500 about Rs 600 had been spent in buying a property in Bombay called the "school property" for the purpose of establishing a school there and also Rs 1500 had been expended in erecting a temple at Jackho, but that nothing had been done with the balance nor had a market been established at Jackho. All that had been done there was to erect three shops which cost about Rs 2000. The plaintiff further stated that in 1848 P (defendant No. 1) had made over the "school property" and the Bhumpara property" to the trustees on trusts not strictly in accordance with the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in sadharm or a religious endowment at Jackho and Palitana, (2) in feasting the cast people in Bombay and Jackho annually, (3) in the worship called satharbhadi at the dharas (temples) in Bombay and Jackho, and (4) in entertaining and clothing the poor (poor) in Bombay and Jackho. Of the remaining moiety of the rents (5) one-half was to go to sadharm (charities) of the dharas (temples) at Jackho; and (6) the other half to charities at such places as the trustees should think fit. In the following year, viz. on the 17th April 1869 P (defendant No. 1) and the owners of the other moiety of the "Bhumpara property" conveyed the whole of that property to trustees, who were to apply a moiety of the rents (which was to be considered as rent from P's share of the property) (1) in sadharm and religious endowment at Jackho and Palitana, (2) in feasting the caste people in Bombay and Jackho annually on the anniversary of P's death, (3) in the worship of the dharas called satharbhadi, and in the entertainment and clothing of the poor in Bombay and Jackho. The deed also directed the application of the rents of the other moiety of the "Bhumpara property" part of which was to go to a temple at Sera in Cutch and part to another temple at Jackho. This later deed it will be observed omitted altogether trusts (5) and (6) of the earlier one of 1868 in favour of sadharm for the temple of Jackho and for sadharm generally. The trustees appointed by the two deeds were not the same, though some of the trustees of the first were also the trustees of the second. The second deed did not recite or in any way refer to the first. At the date of suit all the trustees named in the deeds were dead except the second defendant. By subsequent deeds, however, new trustees had been appointed and they were all parties to the present suit. Defendants Nos. 2, 3, 4, 5, 6, and 7 were trustees of the Bhumpara property and defendants Nos. 8, 9, 10 and 11 of the school property. The plaintiff filed on

## TRUST—continued

the 10th March 1892, at the relation of two members of the Jain community of Cutch prayed that the charitable trusts of the testator's will might be carried out, and sought for accounts against the widow of the testator and the trustees of both the deeds, and for a scheme etc. Held that the High Court of Bombay had jurisdiction to make a decree declaring the trusts upon which the trustees of the deed of October 1868 held the property comprised in that deed and for rectifying the deed in accordance with such declaration, but that the Court could not go further in settling a scheme. *Verdict*—When money is bequeathed for the purpose of founding a charity out of the jurisdiction, the Court hands the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be established to settle the scheme. It is also that the suit was not barred by limitation. It was not one for rectification of the deed of 1868 but rather one against P (defendant No. 1) and her assigns, the trustees of the deed of 1868 and 1869 for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust, and therefore came within s. 10 of the Limitation Act (XX of 1877). Charges of fraud and dishonesty made against trustees of a charity must be established at the hearing of the case, and cannot be allowed to be reserved and proved subsequently in the course of taking accounts. Where the trust-deed of a charity, executed subsequently to the death of a testator under whose will the charity was established, does not strictly conform to the provisions of the will, it is not the practice of the Court, when the discrepancy has been made by mistake, to visit the past consequences of the mistake upon the trustees. The plaintiff in this suit demanded an account from P of the Bhumpara property from the testator's death to the execution of the deed of the 10th October 1868, and of the school house property from the date of her purchase to the same time, and also an account against the trustees of the deed of 17th April 1869, of the income of the Bhumpara property, and of its application. Held that accounts ought not to be required from P. She had made over the property in question to trustees in 1868. There was no evidence that she had ever used any of the income for her own purposes, and the presumption was that she had faithfully discharged her duty. The account was probably barred by art. 120 of the Limitation Act (XX of 1877). The trustees of the deed of 1869 had paid over the income received by them to the trustees of the earlier deed of 1868, who were entitled to receive it, and therefore no account would be decreed against them. The plaintiff further prayed for an account against the representatives of R B, who had been trustee of the deed of 1868, from the date of its execution to his death in 1869. Under a decree passed in a previous suit (No. 113 of 1889) dated the 10th August 1893 brought by the trustees, they had received from R B a estate the balance which in that suit they had claimed to be due from him to the charity. In that suit the trustees had not asked for an account against him. Held that the Advocate-General as plaintiff in this

**TRUST—continued.**

present suit was barred by the decree in that suit under s. 43 of the Civil Procedure Code (Act XIV of 1882). The trustees, having then omitted to ask for an account, could not sue again. The Advocate-General represented the same interests as they did, and was therefore equally bound. Even, however, if that were not the case, the Court in the exercise of its discretion would not direct the account asked for. **ADVOCATE-GENERAL OF BOMBAY v. BAI PUNJABAI** . . . **I. L. R., 18 Bom., 551**

**16. — Transfer of property on trust—Transfer of property by convict sentenced to transportation.**—*B*, having been sentenced to transportation for life, presented a petition in the Revenue Court, in which, stating that he owned a certain zamindari estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers, and that of *P* be recorded in its stead. *Held* that the transfer of the property by *B* to *P* was in the nature of a trust. **DURGA PRASAD v. ASA RAM, I. L. R., 2 All., 361**, referred to. **HAIR RAM v. DURGA PRASAD** . . . **I. L. R., 5 All., 609**

**17. — Property held on trust—Assignment by trustees—Limitation.**—In 1870 the purchasers and recorded proprietors of a four-biswas share of a certain village caused a statement to be recorded in the village record-of-rights to the effect that *B* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M* purchased such share and became its recorded proprietor. In 1877 *K*, the son of *B*, sued the representative of *M* for possession of a moiety of such share, alleging, with reference to the statement recorded in the record-of-rights, that such moiety had vested in *M*'s assignors in trust to surrender it to *B* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into Court a moiety of such sum. *Held* that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration. **KAMAL SINGH v. BATUL FATIMA** . . . **I. L. R., 2 All., 460**

**18. — Holder of missing person's estate—Possession.**—The possession by the widow, or some other member of the family, of a missing person's estate may, in the absence of an indication of its being adverse, be considered to be that of a trustee until the expiry of the term fixed for his return. **NARAIN SAKAI v. POSOO** . . . **2 Agra, 78**

**19. — Absconding shareholder—Custom for his share to be considered as held in trust for a certain time—Failure to reclaim share.**—The plaintiffs sued to recover a share in a village on the allegation that it had been taken by the other shareholders of the village in trust for their

**TRUST—continued.**

father, according to custom, on his absconding from the village by reason of his inability to pay his quantum of Government revenue. The only evidence of the custom was a provision in a wajib-ul-urz that the share of a person who absconded should be held in trust for him for twelve years only. *Held* that, as the father of the plaintiffs did not reclaim his share within twelve years, the plaintiffs' right was forfeited. **NAHANA v. DYA RAM** . . . **5 N. W., 170**

**20. — Wajib-ul-urz—Absconding co-sharer.**—Where a clause of the wajib-ul-urz of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such wajib-ul-urz was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such wajib-ul-urz, alleging that their property had vested in such co-sharer in trust for them,—*Held* that, before such co-sharer could be taken to have held their property as a trustee, there must be evidence that he accepted such trust, and this fact could not be taken as proved by the wajib-ul-urz. **PIAREY LAL v. SALIGA** . . . **[I. L. R., 2 All., 394]**

**21. — Wajib-ul-urz—Absent shareholders.**—*Held* that a village administration-paper which provides for the surrender to absent shareholders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust. Where a village administration-paper provided for the surrender to certain absent shareholders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent shareholders and the occupiers of their lands at the time such administration-paper was framed,—*Held* that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. **HARBHAI v. GUMANI** . . . **I. L. R., 2 All., 493**

**22. — Absent co-sharer—Wajib-ul-urz.**—*S* and his brother owned an 8 annas share of a village, and *H* and *D* owned the other 8 annas share, the parties being related to each other by blood. In 1865 (Sambat 1921), at the settlement of the village, the following statement was recorded by the settlement officer in the wajib-ul-urz at the instance of *H* and *D*, with whom the settlement was made, *S* and his brother being absent from the village and having been absent for some ten years: "We, *H* and *D*, are equal sharers of one 8 annas and *S* and (his brother) of the other 8 annas in the village according to descent: ten years ago *S* and (his brother) went away into Orai; their present residence is not known; they have not left woman, child, or heir of any kind in the village: on that account the entire 16 annas of the village are in possession of us, *H* and *D*. At the time of the preparation of the khewat we made a gift of 4



**TRUST—continued.**

annas of our own eight annas to P and have given him possession of 4 annas of the 8 annas belonging to S and (his brother) keeping the remaining 4 annas in our own possession when S and (his brother) in turn to the village, we three who are in possession shall give up the 8 annas share of the affairs of persons. In March 1889 S sued P for possession of the 4 annas mentioned in the wajib-ul-uraz as having been made over to him by H and D out of the 8 annas share belonging to S and his brother. He based his suit upon the wajib-ul-uraz, but did not expressly state that the share in suit had been entrusted to H and D on the understanding that it should be returned to him when he reclaimed it. The lower Appellate Court dismissed the suit as barred by limitation on the ground that P's possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when S having returned to the village had claimed the share and P had refused to surrender it. On second appeal it was contended by S that under the terms of the wajib-ul-uraz P's possession was that of a trustee and his possession could not be held to be adverse. *Per PARKE J.*—That inasmuch as there was no direct evidence that the share in suit had been entrusted by S to H and D on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the wajib-ul-uraz, which amounted to nothing more than an acknowledgment of S's title and an offer to surrender possession when he returned, and as when he did return in 1866 or 1867 P refused to surrender possession, S was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation. *Per PARSONS J.*—That although no mention was made in the wajib-ul-uraz of such a trust as was contended for yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the wajib-ul-uraz, and to the fact that S and his brother were not strangers to H and D nor merely co-shares, but near blood-relations, probably residing together in the same premises and partners in agricultural labours, further inquiry should be made with the view of elucidating the nature of the acquisition of H and D of the share and of their subsequent possession. *PERMAN SAHAY v. PIRAN NINGH* I. L. R., 3 All., 453

23. — Retirement and disability of trustees—*Effect of on trust.*—Where property is assigned to trustees by an insolvent trader for the purpose of having it equally distributed among his creditors, such a trust does not become inoperative by reason of the retirement of two out of three trustees, and of the inability of the third to discharge his duties properly. *BACHMARTNER v. STEPHENSON*

[3 Agra, 321]

24. — Creditor's trust fund—*Unclaimed dividends, Suit for distribution of.*—Where a creditor's trust-deed contained no provision for redistribution of unclaimed dividends, and a suit was brought by the representatives of one of the creditors, party to the deed, for the administration and dis-

**TRUST—continued**

tribution of funds in the defendant's possession allotted to other creditors by way of dividends, but unclaimed by them for forty years.—*Held* that the plaintiff was not entitled to such relief. *WILDE v. HANNOY, L. R. 2 Eq. 577, distinguished. MASTERS v. MCDONALD & ARTHURSON & Co.*

[I. L. R., 4 Mad., 404]

25. — Resulting trust—*Inaction of party—Implied trust, Presumption of.*—Suit brought to recover possession of a taluk, upon the alleged ground that the moneys with which the purchase was made were not the moneys of the person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favour. The Privy Council considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged, but that, if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts. *AMERGOOYKISSA KHALIF v. ASHARTON, NISSA*

[17 W. R., 250; 14 Moore's L. A., 433]

26. — Statute of Frauds—*Stat. 29 Car. II, c. 3.*—The plaintiff, who was the widow of G, sued the defendant, the executrix of J, to recover a sum of Rs. 334-9-6, part of the purchase-money of a house which had been sold by J in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband to J in trust to sell and hold the proceeds in trust for G's family. The defendant denied the trust, and insisted that J had purchased the house from G for valuable consideration. Both J and G were Parsis. *Held* that, even assuming that no consideration was given by J to G for the house, the plaintiff was not entitled to succeed. In the absence of consideration, the trust of the house, which was admittedly conveyed by G to J, would have resulted to G unless, under the provisions of s. 7 of the Statute of Frauds (29 Car. II, c. 3), he (G) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to G, he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he had, the plaintiff had not qualified herself to sue as he representative. Probate had not been obtained of the will and, until the will was proved, it could not be said that G had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix, the plaintiff could not recover property or enforce rights equitably vested in her deceased husband. *BAT MATEENBAI v. BAT MERRAI*

[I. L. R., 8 Bom., 363]

**TRUST—concluded.**

27. ———— **Breach of trust—Parties—Defaulting trustees—Breach of trust beneficial to trust-estate.**—The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the breach may have been beneficial to the trust-estate. *BARRY v. STEEL*

[I. C. L. R., 80

28. ———— **Revocation of trust—Voluntary settlement.**—A, being at the time unmarried, executed a voluntary settlement by which he created trusts for himself for life, and after his death for his issue and widows (if any), with ultimate trusts over. The deed contained a provision empowering A at any time, with the consent of the trustee, to revoke the trusts and to declare any new or other trusts. A subsequently married, and after his marriage executed a deed of revocation, declaring that the trust-property should be held for himself absolutely. The trustees refused to hand over the trust-property, and A thereupon instituted a suit to have the trust set aside. His wife was a minor, and there was no issue of the marriage. *Held* that, although there might be cases in which, where no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by the settlor, yet that, in the present case, there being an infant beneficiary, the deed could not be revoked. *GOLAM YASSIN v. OFFICIAL TRUSTEE OF BENGAL*

[I. L. R., 8 Calc., 887

**TRUST-PROPERTY.**

*See* COURT FEES ACT, 1870, s. 19D.

[I. L. R., 23 Calc., 980

*See* COURT FEES ACT, 1870, SCH. I, ART.

11 . . . 6 B. L. R., Ap., 138

[11 B. L. R., Ap., 39

7 B. L. R., 57

14 B. L. R., 184

I. L. R., 20 Calc., 575

*See* HINDU LAW—PARTITION—PROPERTY  
LIABLE OR NOT TO PARTITION.

[I. L. R., 19 All., 428

**TRUSTEE.**

*See* COSTS—SPECIAL CASES—TRUSTEES.

[13 B. L. R., 383

I. L. R., 11 Calc., 628

*See* COSTS—TAXATION OF COSTS.

[I. L. R., 18 Bom., 189

I. L. R., 20 Bom., 301

*See* EXECUTOR I. L. R., 2 Bom., 388

*See* HINDU LAW—ENDOWMENT—SUCCESSION IN MANAGEMENT 5 B. L. R., 181

[I. L. R., 7 Mad., 499

**TRUSTEE—continued.**

*See* HINDU LAW—ENDOWMENT—TRANSFER OF RIGHT OF WORSHIP.

[3 C. L. R., 112

*See* INSOLVENT ACT, s. 40.

[I. L. R., 3 All., 799

*See* CASES UNDER LIMITATION ACT, 1877,  
s. 10 (1871, s. 10; 1859, s. 2).

*See* MAHOMEDAN LAW—ENDOWMENT.

[I. L. R., 18 Bom., 401

*See* MALABAR LAW—JOINT FAMILY.

[I. L. R., 2 Mad., 323

I. L. R., 1 Mad., 153

*See* OUDH ESTATES ACT.

[I. L. R., 3 Calc., 522, 645

L. R., 4 I. A., 178

I. L. R., 26 Calc., 879

*See* PARTIES—PARTIES TO SUITS—DEBTOR  
AND CREDITOR, SUITS BETWEEN.

[3 Agra, 104

I. L. R., 3 All., 799

*See* CASES UNDER TRUST.

*See* CASES UNDER TRUSTS ACT.

*See* VENDOR AND PURCHASER—VENDOR,  
RIGHTS AND LIABILITIES OF.

[7 B. L. R., 113

*See* WILL—CONSTRUCTION.

[4 B. L. R., O. C., 53

I. L. R., 2 Calc., 45

I. L. R., 5 Calc., 228

————— **Appointment of—**

*See* ACT XX OF 1863.

[I. L. R., 3 Mad., 401

I. L. R., 17 Mad., 212

I. L. R., 19 Mad., 285

————— **Appointment of, Prayer for—**

*See* VALUATION OF SUIT—SUITS.

[I. L. R., 19 All., 60

————— **Assignment of property to—**

*See* DEBTOR AND CREDITOR.

[3 Agra, 104

I. L. R., 19 Bom., 12

————— **Commission allowed to—**

*See* WILL—CONSTRUCTION.

[I. L. R., 24 Calc., 44

————— **Constructive—**

*See* ENDOWMENT.

[I. L. R., 23 Bom., 659

*See* INSOLVENCY—ORDER AND DISPOSITION . . . I. L. R., 2 Bom., 542

————— **Distinction between trustee and director.**

*See* COMPANY—POWERS, DUTIES, AND  
LIABILITIES OF DIRECTORS.

[6 B. L. R., 278

**TRUSTEE—cont. and****Nomination of—**See **ENDOWMENT** I L R., 18 All., 227**of temple**See **CASES UNDER ACT XX OF 1863.****of temple, Breach of trust by—**See **JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION**

[I L R., 1 Mad., 55]

**Right of, to sue.**See **CERTIFICATE OF ADMINISTRATION—RIGHT TO SEE OR EXECUTE DECREE WITHOUT CERTIFICATE**

[I L R., 20 Mad., 163]

L R., 24 I. A., 73

See **DEBTOR AND CREDITOR.**

[I L R., 20 Mad., 61]

**Suit by—**See **HINDU LAW WILL—CONSTRUCTION OF WILLS—TESTED AND CONTINGENT INTERESTS** I L R., 1 Bom., 289**Suit by, to eject trespasser**See **RIGHT OF SUIT—CHARITIES AND TRUSTS** I L R., 18 Bom., 721**Suit for removal of—**See **ACT XX OF 1863, s. 14.**

[I L R., 2 Mad., 197]

I L R., 19 All., 104

See **ENDOWMENT** I L R., 18 All., 227

[I L R., 21 Bom., 556]

I L R., 23 Bom., 659

See **LIMITATION ACT 1877 ART 134.**

[I L R., 24 Cal., 418]

See **CASES UNDER RIGHT OF SUIT—CHARITIES AND TRUSTS**See **VALUATION OF SUIT—SUITS.**

[I L R., 18 All., 104]

1 — **Relinquishment by one trustee** *Effect of relinquishment* In a contest between three trustees or managers of an endowment, each entitled to a third share in the profits of the property if one of them withdraws from the contest his share is held to have been relinquished in favour of the remaining partners, and to have merged in the general account to be rendered by the trustees or managers. **BRAJ PRAKASH LUTAY HOSSEY KNOXDOONASSA BIKER LUTAY HOSSEY**

[W R., 1884, 171]

2 — **Breach of trustee's duty—Mixing trust funds with money of trustees—Common law on trust money.**—It is a grave breach of duty in trustees, or administrators taking out letters of administration to retain in this country under powers of attorney from executors or next of kin abroad, to mix the income raised by them from trust property, or the funds of the estate, in one

**TRUSTEE—continued**

common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liability. **IN THE MATTER OF THE ESTATE OF OWIE**

[I L R., 8 Cal., 70 7 C L R., 18]

**3.****Appointment of new trustees**

—*Probate—Executors—Executors at meeting property of the testator's estate before obtaining probate—Title of alienation to such property—Right of holder of property to vote at a meeting of trustees before obtaining probate—Trustees elected by debenture holders—Meeting of debenture-holders to elect a trustee—Exclusion from meeting of holders of debentures obtained from executors before probate—Validity of election of trustee elected at meeting from which such debenture-holders were excluded.*

In order to secure certain money which it had borrowed by the issue of debentures, the D Company on the 23rd November 1853 conveyed certain lands to three trustees, A G and D, by way of mortgage. With regard to the appointment of new trustees in case any trustee should die, etc., the indenture of mortgage provided that, in certain events, the surviving or continuing trustees might convene a meeting of the debenture-holders for the purpose of nominating a new trustee; and that at such meeting the election of such new trustee should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote and in case of an equality of votes, then the chairman of the meeting should have a casting vote. A one of the trustees appointed under the deed, died on the 9th February 1856, leaving a will whereby he appointed three executors. At the time of his death A was the holder of one moiety of the debentures, viz. 1,500 debentures of the value of Rs 60,000. The two remaining trustees, G and D called a meeting of the debenture-holders for the 27th February 1856 to elect a trustee. Previously to the meeting and for the purpose of having the large interests of A's estate adequately represented, the executors of A distributed some of the debentures in their hands belonging to A's estate among nominees for the purpose of voting at the meeting and they also sold some of the debentures. Among the persons to whom debentures were sold were the first three plaintiffs. Pursuant to the notice convening the meeting the plaintiffs and other persons, to whom debentures belonging to the estate of A had been given or sold, presented themselves and claimed to attend the meeting; but none of them except the three executors (plaintiffs 4, 5, and 6) of A were allowed to attend, and they were admitted only in their capacity as executors. Defendant No. 1 was chairman of the meeting and he ruled that the three executors had a joint right, in their capacity as executors, to give one vote upon any proposition that might be submitted to the meeting. At the meeting it was proposed that the holders of the debentures, who claimed admission to the meeting, should be permitted to attend. The chairman ruled the motion irrelevant, and would not allow it to be put. The executors therefore withdrew from the meeting. After they had withdrawn the third defendant, P, was elected a trustee. At the date of

**TRUSTEE—continued.**

the meeting the executors had not obtained probate of K's will. On behalf of the defendants it was contended that P's election was valid; and that the persons to whom the executors had given or sold debentures belonging to K's estate had been properly excluded from the meeting of the 27th February, inasmuch as the executors had not at that time obtained probate, and consequently the title of their alienances to the debentures was still incomplete. *Held* that P (defendant No. 3) had not been validly appointed a trustee to the indenture of the 23rd November 1883. Under that indenture, debenture-holders had the right to vote, and the debentures were payable to bearer. The fact that the executors had not at the date of the meeting obtained probate did not affect the rights of those to whom they had given or sold debentures, and such persons had consequently been improperly excluded from the meeting. *MAHENDRAS LOWJI v. GOVINDAS MADHWAJI*

[I. L. R., 10 Bom., 468]

4. ———— **Breach of trust—Liability of passive trustee.**—A trustee who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee. *BAI JADAV v. TRIBHUVANDAS JAGJIVANDAS*

[9 Bom., 333]

5. ———— **Fiduciary relationship—Assignment by married woman.**—L M died in 1856, having bequeathed certain personal property to J S, who then and at the time of the subsequently-mentioned suit was a married woman, and who executed a power-of-attorney, authorizing O G & Co. to receive payment of the legacy and to execute a settlement of a portion of the same according to articles contained in the power. This settlement was made, and under it a portion of the legacy was assigned to trustees, who did not execute the deed or undertake the trust, and no other trustee was substituted for them. O G & Co. at various times advanced money to J S, and in acknowledgment received promissory notes from her for a portion of such advances; and in a suit by O G & Co. to recover the amount of these advances, it was held that O G & Co., standing in a fiduciary relation to J S, before they could avail themselves of her acts, must show that she did them with a full knowledge of the circumstances of the case and of her own position with regard to it. *SMITH v. STEWART*

[Bourke, O. C., 292]

6. ———— **Cause of action—Adverse possession—Limitation.**—When property is placed in the hands of another by way of trust, no cause of action arises to the owner until there has been a demand by the owner for the restoration of the property and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession. *RAKHARAS MADAK v. MADHUSUDHAN MADAK*

[3-B. L. R., A. C., 409: 12 W. R., 319]

**TRUSTEE—concluded.**

7. ———— **Suit to set aside alienations by trustee—*Bona fide* purchasers.**—A suit brought by a *cestui que* trust to set aside as fraudulent certain alienations made by the trustee was dismissed by the lower Appellate Court as barred by limitation, merely on the ground that more than twelve years had, at the commencement of the suit, elapsed since the execution of such deeds of alienation. *Held* (1) that this was not sufficient, and that the Court should have tried whether the purchasers were cognizant at the time of their purchase of a subsisting trust affecting the property, for if so, they would have taken it subject to the trust, and would stand in the shoes of the original trustee, and would not be *bona fide* purchasers from trustees entitled to the benefit of the law of limitation; (2) that if the trustee had power to make valid parts, the grantees would have a perfectly good title, if they took for valuable consideration without notice of the trust. *LUTHEFUN v. BEGO JAN. BEGO JAN v. CHERAG ALI*

[5 W. R., 120]

8. ———— **Suit for mesne profits where estates had been under care of Court of Wards—Cause of action—Fiduciary relationship.**—Plaintiff, the zamindar of Shivaganga, sued to recover two villages which she alleged formed part of the Shivaganga zamindari. The villages originally belonged to P, mother of the present defendant, B, the ex-zamindar of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of B, who was then a minor, with part of the rents and profits of the zamindari, and in 1860 were given by him to his mother. In 1864 B was ousted by a decree of the Privy Council, and became liable to the present plaintiff for the mesne profits of the zamindari. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-zamindar. Plaintiff now sued P, and, she dying, the suit was continued against B as her representative. *Held* that, there being in the decree of the Privy Council nothing directly giving a right to maintain the suit, there was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase. *Held* also that such relation did not exist. *KATTANA NACHIAR v. BOZHAGUTSAMI TEVAR*

6 Mad., 293

**TRUSTEE ACT.**

— (XXIV of 1841)—**Application for appointment of new trustees.**—Trustees were appointed for a company in 1845, and the partnership was to last twenty years, which expired on December 31st, 1864. The shareholders thereupon appointed S, a new trustee, to sell the business, and he sold it to R. The old trustees had left the country. In an application, with the consent of all parties, under Act XXIV of 1841, that S might sign the deed of transfer, the Court held that it was necessary to show that the old trustees had no lien on any other property in the concern before the order asked for could

**TRUSTEE ACT—continued**

be made IN THE MATTER OF FORT GLOUCESTER MILLS CO. Bourke, O C. 200

(XXVII of 1866), s 3—*Hindu trusts*  
—*Equity to jurisdiction of High Court—Appointment of new trustee—Supreme Court Charter 1823*

—The High Court may exercise the summary powers conferred for it by the Trustee Act (XXVII of 1866) in the case of Hindu trusts s 3 of the Trustee Act which provides that the power and authority given by the Act to the High Court shall be exercised only in cases to which English law is applicable cannot be intended to limit the operation of the Act only to cases to which in their whole extent the law prevailing in England applies with equal force or reserve as this would virtually exclude the Act in any case or which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which English law is in some measure applicable but in what measure is not indicated in the Act. English law must be (and is as applied) in the case intended for the principle is followed by the English Equity Courts are applicable. At the date of the grant of the Charter to the Supreme Court of Bombay in the year 1823 English equity had become a system which no individual with a touch of quasi-common law in his mind could fail to know and uniform rules. When applied to the method to the determination of the constitution of a right even based on the Hindu or Mahomedan law it admitted English law. In this sense English law was applicable at the date of the passing of the Trustee Act 1866 to all cases in which regularly equitable doctrine had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity. Trusts are recognized in the Hindu as well as in the English system of law. But where the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to the principles of trusts. If the Court is called on to give effect to a trust in any given case it looks to the Hindu law of property to determine the estate of the trustee but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no more there that it can apply. In meeting an emergency, or in taking cognizance of a form of trust not directly provided for in the Shastras the Court in exercising its jurisdiction under s 41 of the Charter of 1823, may apply Hindu law. But taking Hindu law as one of its data, it applies English law also in the form of equity to all or nearly all the questions that arise. IN RE KAHANDAS KAHANDAS

[L. L. R., 5 Bom., 154

—ss. 20 and 32—*Appointment of person to convey property on behalf of persons out of the jurisdiction and under other disabilities.*—Where property has been, by an order of Court, directed to be sold and where some of the parties in-

**TRUSTEE ACT—concluded**

terested in such property are either out of the jurisdiction, married women, or minors and the place of abode of others of them is unknown, the Court will on petition, under the Trustee Act, appoint a person to convey the interest of such persons to any purchaser notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. But the Court cannot make such an order with respect to the interest of a party who has not been served, and who has not entered appearance, LACKENSTEY v. ROSTAY

[L. L. R., 7 Cal., 32

—s 35—*application for removal of trustee—Ground for removal—Stat. 13 & 14 Vict. c. 67 s. 32*—Where a petition was presented to the High Court praying for the removal under s 35 Act XXVII of 1867 of certain trustees of a will on the grounds stated of appropriation, waste, and breach of trust, and for the appointment of new ones,—*Held* that the matters alleged were much too grave to be disposed of on a mere application, and that, as the respondents opposed the appointment of new trustees, the petitioners should institute a regular suit. Act XXVII of 1866 s 35 is analogous to 13 & 14 Vict., c. 67 s. 32. The Courts in this country ought, in analogy to the rulings of the English Court of Chancery to refuse jurisdiction under this section on a mere application alleging misconduct or any other cause when the trustees whom it is sought to remove are willing to act and refer the applicant to a suit. IN THE GOODS OF POWELL

[6 N. W., 41

**TRUSTEES AND MORTGAGEES ACT**

—(XXVIII of 1888), s 43—*Administrator-General—Taking opinion of Court on question respecting the administration—Question of selling rights of part to enter as—Refusal of Court to express opinion.*—The Administrator-General of Bombay, having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of one A. B. deceased and having a balance in his hands to the credit of the said estate after having fully administered the same was applied to by G. B., the brother of the said A. B. deceased, who had taken out letters of administration in England to the estate of his deceased brother to hand over to him the said G. B., the balance in question,—the said G. B. claiming to be the administrator of the domicile of the deceased and as such to be entitled to all the personal assets of his estate wheresoever situated. Being in doubt as to whether he might safely accede to the request the Administrator-General of Bombay, by petition under s 43 of the Trustees and Mortgagees Act, XXVIII of 1888, submitted the question to the High Court for its opinion, advice and direction. *Held* that the question being one of considerable difficulty and importance, and involving moreover in its decision questions which might seriously affect the rights of parties to enter as it was not a question such as was contemplated by s 43 of the Trustees and Mortgagees Act, XXVIII of 1888, nor one upon which the Court ought to give any

**TRUSTEES AND MORTGAGEES ACT***—concluded.*

opinion merely on an *ex-parte* petition of this character. IN RE THE GOODS OF BREERION. IN THE MATTER OF THE TRUSTEES AND MORTGAGEES ACT, 1882. I. L. R., 7 Bom., 381

**Powers of Court—**

*Power to sanction lease.*—J S, a Hindu, died in 1865, possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J S, still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs 900 per annum, was insufficient to keep up the said charity. She stated that a sum of Rs 12,000 was urgently required for certain purposes connected with the said charity, and that she had agreed, in September 1887, with one Z B, that he should advance the said sum to her, to be repaid as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs 50 per mensem. In October 1887, however, her adopted son served her with a notice to desist from granting the said lease. She therefore presented this petition to the Court under s. 43 of the Trustees and Mortgagees Powers Act XXVIII of 1860, praying (a) that she might be advised whether she had power to grant the said proposed lease; (b) that the said lease might be sanctioned or directed by the Court; and (c) that the Court might give such opinion, advice, or direction in the premises as the Court might think fit. *Held* that under the section the Court had no power to sanction the proposed lease or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, etc. *Held* also that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount or as to the work to be done, the Court refused to give any opinion. IN RE LAKSHMIBAI. I. L. R., 12 Bom., 638

**TRUSTS ACT (II OF 1882).**

s. 34—*Application for directions by trustees of charitable institution—Questions of detail and difficulty—Procedure.*—The management of the Doveton charities is vested in a committee of management, who are empowered under the trust-deed to require the trustees of the funds of the charities to invest the trust-funds in excess of two lakhs of rupees "in the purchase or building of any

**TRUSTS ACT (II OF 1882)—continued.**

additional land, building, and premises." Certain buildings, having been erected under these provisions of the trust-deed, were now stated to be in urgent want of repair. The current income of the charities was not sufficient to meet the cost of carrying out the repairs, and the committee of management and the trustees were agreed that a sum of Rs 700 in the hands of the latter (in excess of two lakhs of rupees) should be employed in carrying out this work. The trustees now applied to the High Court under the Trusts Act, s. 34, for its opinion on the question whether this should be done. *Held* that the question was not one with which the Court could deal under the Trusts Act, s. 34. The Court (SUBRAMANIA AYYAR, J.) was of opinion that the proposed expenditure could, on the Court being satisfied of its necessity, be sanctioned, if the matter came before it in the form of a suit in its original jurisdiction; and that in the exercise of such jurisdiction the Court has power to deal with a case like this hardly admitted of doubt. IN RE MADRAS DOVETON TRUST FUND

[I. L. R., 18 Mad., 433]

— s. 49.

*See* ACT XX OF 1863.

[I. L. R., 17 Mad., 312]

— ss. 55, 60, 61.

*See* APPEAL—DECREES.

[I. L. R., 11 All., 131]

— s. 56.

*See* PARTIES—PARTIES TO SUITS—TRUSTS, SUITS RELATING TO.

[I. L. R., 23 Mad., 239]

— ss. 63 and 64—*Trust not established.*—A claim made for a share of property by inheritance from a deceased relation who had been in joint possession of it with the defendant was met by the defence that the estate had been jointly held for religious and charitable purposes under a will, the deceased having had no beneficial or heritable interest. The defendant alleged that the original owner of the property had bequeathed the property in trust for these purposes. The claimant alleged a revocation of the will, and denied that there was such a trust. The judgment of the High Court, decreeing the claim, observed that, even assuming that there had been a trust under the will recognized by the deceased and the defendant, the property which had come into their possession had been by them appropriated from the first to their own purposes, and had been so long held by them adversely to the trust title that the defendant could not now allege that there was no beneficial interest transmissible by inheritance. Upon this the Judicial Committee pointed out that no trustee could have actually acquired a title by such an appropriation against the trust: Indian Trusts Act, 1882, ss. 63 and 64. They added that, at the same time, the judgment of the High Court had come to the right conclusion, for the will and the trust alleged had not been established. BIRTO KUNWAR v. KESHO PRASAD MISHA. I. L. R., 19 All., 277 [I. L. R., 24 I. A., 10 1 C. W. N., 265]

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s 31 I. L. R. 23 All 434

s 88.

See MORTGAGE REDEMPTION — RIGHT OF  
REDEMPTION I. L. R. 23 Mad 377

s 91.

See VENDOR AND PURCHASER—COMPLETION  
OF TRANSFER

[I. L. R. 24 Bom 400]

See VENDOR AND PURCHASER—INVALID  
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[I. L. R. 21 Mad., 353]

## TURN OF WORSHIP OF IDOL.

Right to—

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TORTS I. L. R. 3 Calc 390

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ART 131) I. L. R. 4 Calc 883  
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## U

## UGANDA CONSULAR COURT OF—

See JURISDICTION OF CRIMINAL COURT—  
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[I. L. R. 22 Bom., 54]

## UMPIRE

See ASSES UNDER ARBITRATION—APPOINTMENT  
OF ARBITRATORS AND UMPIRES

## UNCHASTITY

See HINDU LAW—ADOPTION—WHO MAY  
OR MAY NOT ADOPT 5 B. L. R. 362  
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## UNCHASTITY—concluded

See HINDU LAW—MAINTENANCE—RIGHT  
TO MAINTENANCE—WIDOW

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TO MAINTENANCE—WIFE 1 Mad., 32

[2 Mad., 437]

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See HINDU LAW—SUIT AS—EFFECT OF  
UNCHASTITY I. L. R., 1 All 43

See CASES UNDER HINDU LAW—WIDOW  
—DISQUALIFICATION—UNCHASTITY

UNCOVENANTED SERVICE FAMILY  
PENSION FUND

See MUTUAL BENEFIT SOCIETY

[I. L. R. 7 Calc., 1]

I. L. R. 23 Bom., 451

Entrance Certificate of—

See STAMP ACT 18 2 s. 3 sub-s 1  
[I. L. R., 19 Calc. 499]

## UNDERTAKING NOT TO SUE

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RENT—INCUMBRANCES

See CASES UNDER SALE FOR ARREARS OF  
RENT — PORT OF OF UNDER-TENURE,  
SALE OF

Avoidance of—

See CASES UNDER SALE FOR ARREARS OF  
RENT—INCUMBRANCES

Suit to cancel—

See LIMITATION ACT 1877 ART 121  
18 1 ART 119) I. L. R., 4 Calc., 880  
[I. L. R. 25 Calc., 167]

**UNDERWRITER.**

See INSURANCE—MARINE INSURANCE.  
 [I. L. R., 2 Bom., 550  
 12 Bom., 23  
 3 Bom., A. C., 1  
 Cor., 2: Hyde, 107]

**UNDUE INFLUENCE.**

See ACQUIESCENCE.  
 [I. L. R., 17 Mad., 275]

See CHAMPERTY . 13 B. L. R., 509  
 [L. R., 1 I. A., 241]

See CONTRACT — ALTERATION OF CONTRACTS — ALTERATION BY COURT (INEQUITABLE CONTRACTS).  
 [L. R., 4 I. A., 101  
 I. L. R., 10 All., 535  
 I. L. R., 22 All., 224]

See DEED—CANCELLATION.  
 [I. L. R., 10 All., 535]

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT ADOPT.  
 [I. L. R., 13 Mad., 214]

See MAHOMEDAN LAW—ENDOWMENT.  
 [I. L. R., 22 Calc., 324  
 L. R., 22 I. A., 4]

See MAHOMEDAN LAW—GIFT—VALIDITY.  
 [I. L. R., 13 Mad., 43]

See ONUS OF PROOF—DECREES AND DECREES, SUITS TO ENFORCE OF SET ASIDE.  
 [I. L. R., 13 Calc., 545  
 L. R., 18 I. A., 144  
 I. L. R., 12 All., 523]

See VENDOR AND PURCHASER—INVALID SALES . 1 B. L. R., A. C., 95  
 Cor., 57  
 I. L. R., 5 Bom., 450]

See WILL—EXECUTION.  
 [I. L. R., 22 Bom., 17  
 L. R., 24 I. A., 148]

See WILL—VALIDITY OF WILL.  
 [I. L. R., 7 Mad., 515]

Onus of proof—*Third party not in confidential relationship.*—A third person who stands in no confidential relation to a grantor who is under age is not bound in the first instance to show that undue influence was used in a transaction. The subject of undue influence considered. *RAJ COOMAR ROY v. ALFUZUDDIN AHMED* . 8 C. L. R., 419

**UNLAWFUL ASSEMBLY.**

See CHARGE—FORM OF CHARGE—SPECIAL CASES—RIOTING.  
 [I. L. R., 21 Calc., 827, 955  
 I. L. R., 26 Calc., 630  
 3 C. W. N., 805]

See CHARGE—FORM OF CHARGE—SPECIAL CASES—UNLAWFUL ASSEMBLY.  
 [4 C. W. N., 190]

**UNLAWFUL ASSEMBLY—continued.**

See CHARGE TO JURY—SPECIAL CASES—RIOTING . I. L. R., 21 Calc., 955

See CHARGE TO JURY—SPECIAL CASES—UNLAWFUL ASSEMBLY.  
 [4 C. W. N., 196]

See CASES UNDER RIOTING.

1. ————— Penal Code, s. 141—*Rioting—Assembly originally lawful.*—An assembly, lawful in its inception, may become unlawful by its acts. If force is used, the higher offence of rioting is committed. *QUEEN v. KHEMEE SINGH*  
 [1 W. R., Cr., 19]

2. ————— Common object.—In order to convict of the offence of being members of an unlawful assembly, it must be shown that the accused were actuated by a common object, and that the acts done by them were of such a nature as to make them guilty under s. 141 of the Penal Code. *QUEEN v. DINOBUNDO RAI* . 9 W. R., Cr., 19

IN THE MATTER OF THE PETITION OF KOYLASH CHUNDER DASS . . . 20 W. R., Cr., 78

3. Penal Code (Act XLV of 1860), ss. 141 and 147.—A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of M for the purpose of either repairing or erecting a bund across it to cause the water to flow down a channel on the lands of their master T. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M., they proceeded to work at the bund until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with lathies and headed by the prisoners, who were servants of M, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked T's men, some five of whom were more or less severely wounded with the lathies. The occurrence resulted in the conviction of some of M's servants for rioting under s. 147 of the Penal Code. M's people wholly denied any right on the part of T to construct or repair the bund, and had previously denied the existence of such right, and refused permission to T to exercise it. It was contended that the assembly of M's people was not an "unlawful assembly"; that the interference by T's people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so. *Held* that the prisoners had been rightly convicted. It was further contended that M's people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one. *Held* that they were members of an assembly the common object of which was by show of criminal force, and by criminal force if necessary, to enforce



**UNLAWFUL ASSEMBLY** *cont. nued*

the right to keep the river channel clear by preventing the construction of the bund and by demolishing the same as far as it was constructed and that the case came within s. 141 para. (4) *Queen v. Mito & agt 3 W. 1 Cr. 41 Shanker Sagar v. Burmah Ma. 1 23 W. 1 Cr. 5 and B. 700 d. agt. A. 100 Lali 19 W. 1 Cr. 66* referred to and commented on. *L.A. & IAL DAS v. QUEEN EMPRESS*

[I. L. R. 10 Calc., 208]

4. — **Penal Code, ss. 141 and 154—Owner of land on which unlawful assembly is held—Common object—***Held* that the owner or occupier of land on which an unlawful assembly is held cannot be convicted under s. 154 of the Penal Code unless there is a finding that the riot was premeditated. Where two opposite factions come to a riot it is irregular to treat both parties as constituting an unlawful assembly and to try them for their inasmuch as they do not have one common object, whereas the main object of s. 141 of the Penal Code *QUEEN v. THE OFFICER OF CHANDER LAL*

[12 W. R., Cr., 75]

5. — **Penal Code, ss. 141 and 154—Affray and unlawful assembly—**There is no ground for the distinction between an unlawful assembly as a premeditated act and an affray as a sudden one for according to s. 141 of the Penal Code an assembly which was lawful when it assembled may subsequently become an unlawful assembly. *In THE MATTER OF THE PETITION OF LOKENATH HAN*

[18 W. R., Cr., 2]

6. — **Penal Code, ss. 141 and 154—Maintenance of rights—Intent on part of—**Charge of members of an unlawful assembly under s. 141 Penal Code can be sustained, where the intention of the parties was not to enforce a right or supposed right, but to maintain undisturbed the actual state of enjoyment of a right which was at that time being exercised. *SUGLAL SINGH v. BURMAN MANTO*

[23 W. R., Cr., 25]

7. — **Penal Code, ss. 141 and 154—Person joining to aid and abet to prevent or resist to property—**It can not be said that a person intentionally joins an unlawful assembly or continues in it when it appears from the evidence that he went to the place where the members of the unlawful assembly were gathered, to prevent mischief being done to his own property which he had a right to protect. *BIRJOO SINGH v. ANTHE LALL*

[19 W. R., Cr., 66]

8. — **Penal Code, ss. 141 and 154—No sale carrying away crops—**Where the defendants' servants of a portion of a zamindari sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's protest and refused to allow the purchaser's peyle to seal and mark grain which had been reaped and the servants were assembled in such numbers and so armed that nothing could be done against them—*Held* by the High Court that the acts of the defendants did not amount to an offence under s. 141 of the Penal Code. *ANONYMOUS*

[4 Mad., Ap., 60]

**UNLAWFUL ASSEMBLY—continued**

9. — **Penal Code, ss. 141 and 154—Interruption of procession as a nuisance—***Held* that the act of the defendants in assembling and forcibly interrupting a procession was forbidden by cl. 4 of s. 141 of the Penal Code although the defendants acted upon the ground that the procession was a nuisance or annoyance to them or their community. *ANONYMOUS*

[5 Mad., Ap., 6]

10. — **Penal Code, ss. 141, 143—Assertion of right—**One of two village factions objected to the other passing in procession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 20th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first faction were assembled there to prevent the procession by force. The police ordered them to disperse, this order having been neglected the police prevailed on the other faction to end the procession. *Held* that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly. *QUEEN EMPRESS v. THAKADU*

[I. L. R., 14 Mad., 128]

11. — **Penal Code, s. 143—Dispute as to possession of land—Assembly going with armed men to sow land—**On the trial of certain persons charged with being members of an unlawful assembly it was proved that there was a dispute of land, standing between the accused and certain other parties regarding the possession of certain land, that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with lathis, that they were prepared to use force if necessary, and that the lathis kept off the opposite party by brandishing their weapons while the land was sowed. *Held* that the accused were rightly convicted of being members of an unlawful assembly under s. 143 of the Penal Code. *Shanker Sagar v. Burmah Ma. 23 W. R., Cr., 25* distinguished. *In THE MATTER OF PHARY MOHUN SIRCAR, PHARY MOHUN SIRCAR v. EMPRESS*

[I. L. R. 9 Calc., 639]

*v. C. In THE MATTER OF PHARY MOHUN SIRCAR*  
[13 C. L. R., 60]

12. — **Penal Code, ss. 143 and 353—Using criminal force to public servant to execute an order of duty—Resistance to search warrant—**Where the officer in charge of a police station required the officer in charge of another police station to cause a search to be made in a house within the limits of his station and such officer on being required, deputed two officers subordinate to him to make the search without obeying to them the order in writing required by s. 9 of Act X of 18—It was held that the persons resisting the search attempted could not be lawfully convicted under s. 353 and s. 143 of the Penal Code. *QUEEN v. NARAIN* 7 N. W., 209

13. — **Penal Code, s. 147—Abolition of nuisance—**A joint owner of a parcel of land erected on it an edifice without the consent of

**UNLAWFUL ASSEMBLY—continued.**

*B*, another joint owner. A dispute arose, and the Magistrate on inquiry ordered, under s. 530 of the Criminal Procedure Code, 1872, *A* to be put in possession of the part of the land on which the edifice had been erected. *B* subsequently brought a suit in the Civil Court to establish his title to joint possession of the whole parcel, and for a declaration that *A* was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. *B* obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. On the 8th October the accused, who were the servants of *B*, found the men in the employ of *A* were putting up this erection, a nawbat-khana, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of *A*, throwing to the ground one man who was clinging to the bamboos. On the 9th October 1877 these servants were charged before the Magistrate with rioting, and convicted under s. 147, Penal Code. *Held per JACKSON, J.*, that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal. *Held per CUNNINGHAM, J.*, that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence. *EMPRESS v. RAJCOOMAR SINGH* . . . I. L. R., 3 Calc., 573

S. C. IN THE MATTER OF THE PETITION OF RAJCOOMAR SINGH . . . 2 C. L. R., 62

14. ——— Penal Code, s. 147 and s. 105, cl. 4.—*Mischief—Right of defence of property—Penal Code, s. 105, cl. 4.*—Where land in the possession of *A* was encroached on by the servants of *B*, who committed mischief on the land, and the servants of *A* assembled and resisted the encroachments, the High Court declined to interfere with the Magistrate's order convicting the servants of *A* of unlawful assembly, as there was error in law in the order of the Magistrate, who found as a fact that the right of defence of private property had ceased under cl. 4, s. 105 of the Penal Code. *QUEEN v. RAJ KISTO DOSS* . . . 12 W. R., Cr., 43

15. ——— Penal Code, s. 149—*Common object.*—S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. *QUEEN-EMPRESS v. BISHNESAR* . . . I. L. R., 9 All., 645

16. ——— *Encouraging members of unlawful assembly.*—Where persons join an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encourage them to do so, they are in the same position as those members of the unlawful assembly who struck the blows. *QUEEN v. DASHRUTH ROY* . . . 7 W. R., Cr., 58

**UNLAWFUL ASSEMBLY—continued.**

17. ——— *Riot in which man was killed—Culpable homicide.*—In a case of riot in which a man was killed, the whole of the members of the unlawful assembly, as well the victorious as the worsted, were held equally guilty of culpable homicide not amounting to murder. *QUEEN v. MANA SINGH* . . . 7 W. R., Cr., 103

18. ——— *Constructive murder under s. 34, Penal Code—Effect on others charged under s. 149.*—*Per FIELD, J.*—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder. IN THE MATTER OF THE PETITION OF JHUBBOO MAHTON. *EMPRESS v. JHUBBOO MAHTON*

[I. L. R., 8 Calc., 739]

S. C. JHUBBOO MAHTON v. EMPRESS

[12 C. L. R., 233]

19. ——— *Common object.*—Where a person was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother,—*Held* that all those who were members of the assembly at the time such person was killed were guilty of the offence of killing her. IN THE MATTER OF GOLAM ARFIN

[4 B. L. R., Ap., 47]

S. C. QUEEN v. GOLAM ARFIN

[13 W. R., Cr., 33]

20. ——— Penal Code, ss. 149 and 300, except 2—*Common object—Murder.*—One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land, the title to which was disputed, fired at and killed one of such persons. *Held by COUCH, C.J., and JACKSON, PHEAR, and PONTIFEX, J.J. (AINSLIE, J., dissenting),* that the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code, but of rioting armed with a deadly weapon under s. 148. *QUEEN v. SABED ALI*

[11 B. L. R., F. B., 347; 20 W. R., Cr., 5]

21. ——— *Common object—Murder.*—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. *Held (by NORMAN, J., whose opinion prevailed)* that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under s. 149 of the Penal Code, be made liable for the subsequent murder. *Held (by JACKSON, J.)* that he remained a member of the unlawful assembly. *QUEEN v. KABUL CAZER*

[3 B. L. R., A. Cr., 1]

22. ——— *Prosecution of common object.*—If a body of men armed with lathies

**UNLAWFUL ASSEMBLY—cont. and**

and under the leadership of one who to the knowledge of the rest is armed with a gun assembled for the purpose of forcibly carrying off an other man's property, and in effecting that purpose any one of the party taking the gun shoots and kills a person who is making a lawful resistance the whole party may properly be convicted of murder under s. 149 of the Penal Code. *Queen v. Saled Ali* 11 B. L. R., 347 20 W. R. Cr. 5 et id. HARI SHAN v. EMPRESS

[3 C. L. R., 40]

23 ——— *Acts taking place after unlawful assembly is over*—Where after the object of an unlawful assembly had been accomplished and the opposite party driven away one of the members entered into altercation with another and wounded him with a fish spear it was held that the act was not one done with a view to accomplish the common object of the assembly or one which the r. at knew would be likely to be committed in the prosecution of that object. *Queen v. Bixon*

[24 W. R., Cr., 66]

24. ——— Penal Code ss. 151 and 158 — *Assembling five or more persons—Lawful command*—Where the object of six three persons was to draw a crowd and their action was such as was calculated and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace. *Held* that the gathering constituted an assembly of five or more persons within the meaning of s. 151 of the Penal Code (Act XLV of 1860) and that a refusal to disperse after being lawfully commanded to disperse rendered every member of the gathering liable to conviction under the said section. An order given by an officer superior in rank to an officer in charge of police stations commanding an assembly of five or more persons likely to cause a disturbance of the public peace to disperse is a lawful order within the meaning of s. 480 of the Code of Criminal Procedure (Act X of 1872). *EMPRESS v. TUCKER*

[I. L. R. 7 Bom., 42]

25. ——— Penal Code (Act XLV of 1860), ss. 302, 304—*Good faith—Order of superior officer—Firing on an unlawful assembly*—A cause of crops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on half of B. the servants of A went to the place with the station house officer and some constables who were armed. The station house officer ordered the reapers to leave off reaping and to disperse, but they did not do so. He then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer without attempting to make any arrests and without warning the reapers that if they did not desist from reaping they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them. *Held* that the station house officer and the constable were not acting in good faith and that the order to shoot was illegal and did not justify

**UNLAWFUL ASSEMBLY—cont. and**

the constable and that both he and the station house officer were guilty of murder. *Queen v. Empress v. SUBBA NAIR* I. L. R., 21 Mad., 249

26. ——— Penal Code ss. 147, 148, 149 and 304—*Being armed with a deadly weapon—Common object of unlawful assembly—Statement of charges—Error in charges as to accused—Criminal Procedure Code (1852) s. 223.*

—Before a conviction can properly be maintained for the offence of rioting it is necessary that there should be a clear finding as to the common object of the unlawful assembly and also that the common object so found should have been stated in the charges in order that the accused person might have an opportunity of meeting it. Where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge sheet, *Held* that, inasmuch as it was impossible to say which of the two common objects had been accepted by the jury and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting the conviction must be set aside. If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under s. 148 of the Penal Code. It is only the actual person who can be charged under that section. *SABIR v. QUEEN EMPRESS*

[I. L. R., 23 Cal., 276]

27. ——— Penal Code, s. 149—*Common object—Murder—Prosecution on common object*—Neither of the cases of *Queen v. Saled Ali* 11 B. L. R. F. B. 347 20 W. R., Cr., 5, and *Hari Singh v. Empress* 3 C. L. R. 49 lays down any hard and fast rule as to the circumstances under which one member of an unlawful assembly can be deemed guilty of an offence committed by another under the provisions of s. 149 of the Penal Code and every case must be decided on its own merits. In dealing with such cases, while on the one hand it is necessary for the protection of the accused that he should not, in reply to reason of his association with others as members of an unlawful assembly be held criminally liable for offences committed by his associates, which he himself neither intended nor knew to be likely to be committed. On the other hand it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. These two cases respect very emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to the information at his command but also according to the extent to which he shares the community of object and as a consequence of this the effect of s. 149 may be

**UNLAWFUL ASSEMBLY—concluded.**

different on different members of the same unlawful assembly. *JAHIRUDDIN v. QUEEN-EMPRESS*  
[I L. R., 22 Calc., 308]

**UNLAWFUL COMPULSION.**

*See* COMPOUNDING OFFENCE.

[I L. R., 21 Calc., 103]

**Unlawful compulsory labour—**  
*Criminal force—Slavery—Wrongful confinement—*  
*Penal Code (Act XLV of 1860), ss. 344, 352, 374.*  
—The accused induced the complainants, who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts. The complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants. He insisted on their working for him, and punished them by beating them if they did not do so. The complainants in addition alleged that they were prevented leaving the accused's premises, and that they were locked up at night. On these allegations the accused was convicted by the first Court of offences under ss. 344, 370, and 374 of the Penal Code. On appeal the convictions under the two former sections were quashed, the evidence as to detention being disbelieved, but that under s. 374 was upheld on the ground that by magnifying the complainants' debts to him and never settling their accounts the accused had unlawfully compelled them to go on working for him against their wills. On a rule to show cause why the conviction should not be quashed, —*Held* (by PETHERAM, C.J., and BEVERLEY, J.) that the conviction was erroneous and must be set aside. PETHERAM, C.J.—A person who insists that another, who has consented to serve him, shall perform his work, does not unlawfully compel such person to labour against his will within the meaning of s. 374 of the Penal Code, because it is a thing which such person has agreed to do; but if he assaults such person for not working to his satisfaction, he commits an offence punishable under s. 352. *Held* by NORMAN, J.—That upon the facts of the case the complainants never gave their full and free consent to work and labour for the accused, and that the accused therefore did unlawfully compel them to labour against their will, and that the conviction under s. 374 was right. *MADAN MOHAN BISWAS v. QUEEN-EMPRESS* . I L. R., 19 Calc., 572

**UNLIQUIDATED DAMAGES.**

*See* INSOLVENT ACT, s. 40.

[13 B. L. R., Ap., 2]

*See* INTEREST—MISCELLANEOUS CASES—  
UNLIQUIDATED DAMAGES.

[7 Bom., A. C., 89  
9 Bom., 7]

*See* SET-OFF—GENERAL CASES.

[17 W. R., 113

2 Mad., 286

3 Agra, 43, 97

22 W. R., 1

I L. R., 4 Bom., 407

I L. R., 11 Calc., 557

I L. R., 7 All., 284

**UNNATURAL OFFENCE.**

*Penal Code, s. 377—Charge—Particulars as to time, place, and person—Criminal Procedure Code, 1892, s. 222.*—*Held* where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable. *QUEEN-EMPRESS v. KHAIRATI*  
[I L. R., 6 All., 204]

**UNPROFESSIONAL CONDUCT.**

*See* CASES UNDER PLEADER—REMOVAL,  
SUSPENSION, AND DISMISSAL.

**UNSEAWORTHINESS.**

*See* CONTRACT—CONDITIONS—PRECEDENT.  
[2 B. L. R., O. C., 127]

*See* DAMAGES—REMOVAL OF DAMAGES.  
[6 B. L. R., Ap., 20]

*See* INSURANCE—MARINE INSURANCE.  
[Cor., 5: 2 Hyde, 107  
5 Moore's I. A., 361]

**UNSETTLED POLLIAM.**

**Hereditary tenure—Evidence of possession or receipt of rent.**—There is no long uniform current of decisions at Madras sufficient to show that every polliam, not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it has been held, are matters judicially determinable on legal evidence. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a polliam and an ordinary zamindari. *OOLAGAPPA CHETTY v. ARBUTHNOT. COLLECTOR OF TRICHINOPOLY v. LEKAMANI. PEDDA AMANI v. ZAMINDAR OF MARUNGAPURI*

[14 B. L. R., 115: 21 W. R., 358

L. R., 1 I. A., 268, 282

S. C. in High Court. *ARBUTHNOT v. OOLAGAPPA CHETTY* . . . . . 5 Mad., 308

And *LEKHAMANI v. RANGA KRISTNA MUTTA VIRA PUCHAYA NAIKAR* . . . . . 6 Mad., 208

**UNSOUNDNESS OF MIND.**

*See* INSANITY.

*See* LUNATIC.

## UNSTAMPED DOCUMENTS.

Admissibility of in evidence.

See CASES UNDER APPELLATE COURT—  
REJECTION OR ADMITTANCE OF EVIDENCE  
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See CASES UNDER EVIDENCE—CIVIL CASES  
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## UPAN CHOWKI TENURE

See MEANS PROFITS—RIGHT TO AND LI-  
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## USAGE

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## USE AND OCCUPATION

See LANDLORD AND TENANT HOLDING  
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See SMALL CAUSE COURT MORTGAGE—  
JURISDICTION—RENT SUIT FOR.

[L. L. R. 5 Bom., 572  
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(5 N. W., 85)  
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## USER.

See FERRY 1 L. R., 18 Cal., 652

See FISHERY RIGHT OF  
[L. L. R. 12 Mad., 43]

See POSSESSION—ADVERSE POSSESSION  
[L. L. R., 18 Bom., 338]

See CASES UNDER PRESCRIPTION

See CASES UNDER RIGHT OF WAY

Before the Limitation Act of 1871 no precise time  
had been laid down as an element to create a right of  
user

## USER—cont. used

See MULLICK HABIB HASAN v. HARRISAN  
MANDAM 5 B. L. R., 174 13 W. R., 442

KISTO MOHUN MOOKERJEE v. JAGDEWAI: ROY  
JOOFFE 11 W. R., 233

HURO GOONDER DEBIA v. RAM DEB BHUTTA  
CHARJEE 7 W. R., 278

1 ——— Proof of right of user—"all  
along" or "from time to time"—A user "all along" or  
from before does not necessarily prove a right.  
Its existence must be proved from a time from which  
the right would be gained or presumed to have been  
gained. MOOKTARAM BHUTTACHARJEE v. HURO  
CHUNDER ROY 7 W. R., 1

3 ——— Right to cut  
for water—Easement.—In a suit to close up an out-  
let of water opened by the defendant the lower  
Appellate Court found that the "outlet or sough" was  
used (barabar) all along and that therefore the  
defendant had a right of user. Held that an enjoy-  
ment for at least twelve years is necessary to create  
a right by user and that user by the defendant for  
that period at least had been found. KARTIK CHAY  
DRA SINKAR v. KARTIK CHANDRA DEY  
[3 B. L. R., A. C., 168, 11 W. R., 522]

3 ——— Use for many  
years.—In a suit for a declaration of the right of  
user over the water of a tank which right was  
denied the finding of the lower Appellate Court  
from the evidence of witnesses adduced by plaintiff  
that plaintiff had used the water for many years was  
held to be sufficient to prove a continuous and un-  
interrupted user on the part of the plaintiff. TOOLBAR  
DOSS KOBBERAJ v. BHIMES LALL TEWARI  
[8 W. R., 311]

4. ——— Prescription—  
Ancient and uninterrupted right—Easement.—A  
party claiming the right of user by prescription over  
the property of another must show not only that  
the right has existed from ancient days, but also  
that it has been exercised as of right and has not  
been interrupted. MALLIK JAWAD-UL-HAQ v. RAM  
LAL DAS 3 B. L. R., A. C., 231

HEERALALL KOOR v. PURMESHER KOOR  
[15 W. R., 401]

5 ——— Interrupted or of  
right of easement.—The mere fact of user for any  
number of years will not be sufficient to confer a  
right, if the user be from time to time interrupted by  
the owner resuming, as occasion may require the  
exclusive use of his land. In such a case the user will  
be treated as permissive merely and not as the exer-  
cise of a right. AUNOY COOMAR CHUCKERBORTY  
v. MOLLAN MOBER NOWAZ 13 W. R., 448

6 ——— Wrongful inter-  
ruption.—Acquiescence.—Wrongful interruption  
does not destroy a right of user where a person  
immediately taken to assert the right; but if this is  
not done for a length of time, acquiescence may safely  
be presumed. HEERALALL KOOR v. PURMESHER  
KOOR 15 W. R., 401

**USER—concluded.**

7. ————— *Letting house to tenant.*—Where a right of user of a drain or passage is incidental to a house, that right is not affected by the owner of the house letting the house to a tenant.  
*AMJEDER BEGUM v. AHMED HOSSEIN*

[3 W. R., 314]

8. ————— *Long uses by tenants of a plot of their landlord's land as a threshing floor—Conditions or contract of tenancy—Presumption.*—On evidence that a tenant has for a great number of years used a particular piece of the zamindar's land along with other tenants as a threshing floor, it is competent to the Court to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy. *Udit Singh v. Kashi Ram, I. L. R., 14 All., 185*, distinguished.  
*DALBI v. BHAIJU* . . . I. L. R., 16 All., 181

9. ————— *License to use land of another, coupled with grant—Revocation of license—Right of licensee to damages.*—A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if it is revoked contrary to the terms of any express or implied contract. *Wood v. Leadbitter, 13 M. and W., 538*, applied; *PROSONNA COOMAR SINGHA v. RAM COOMAR GHOSH* . . . I. L. R., 16 Calc., 640

**USUFRUCTUARY MORTGAGE.**

*See DECREE—FORM OF DECREE—MORTGAGE* . . . I. L. R., 1 All., 524  
 [I. L. R., 11 Mad., 88]

*See CASES UNDER LEASE—ZUR-I-PESHGI LEASE.*

*See LIMITATION ACT, 1877, s. 19 (1859, s. 1, CL 15)—ACKNOWLEDGMENT OF OTHER RIGHTS* . . . 13 B. L. R., 177  
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*See CASES UNDER MORTGAGE—POSSESSION UNDER MORTGAGE.*

**USURY.**

*See CASES UNDER BENGAL REGULATION XV OF 1793.*

*See HINDU LAW—ALIENATION—ALIENATION BY FATHER.*  
 [I. L. R., 2 Calc., 213]

*See CASES UNDER HINDU LAW—USURY.*

*See CASES UNDER INTEREST—STIPULATIONS AMOUNTING OR NOT TO PENALTIES.*

*See CASES UNDER MAHOMEDAN LAW—USURY.*

**UTBUNDI TENURE.**

*See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—MODE OF ACQUISITION.*

• [20 W. R., 323  
 I. L. R., 17 Calc., 399]

**V****VACATION.**

————— *Closing of Court for—*

*See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE—TIME FOR APPEALING* . . . 1 B. L. R., O. C., 39  
 [12 W. R., 293  
 I. L. R., 2 Calc., 128, 272]

*See CASES UNDER LIMITATION ACT, 1877, s. 5 (1871, s. 5).*

————— *of High Court.*

*See CIVIL PROCEDURE CODE, s. 307.*  
 [I. L. R., 20 Bom., 745]

**VACCINATOR.**

*See PENAL CODE, s. 186.*  
 [I. L. R., 15 Mad., 93]

**VAKALATNAMA.**

*See CONTRACT ACT, s. 25.*  
 [I. L. R., 5 Bom., 258]

*See CASES UNDER PLEADER—APPOINTMENT AND APPEARANCE.*

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*See STAMP ACT, 1869, SCH. II, ART. 32.*  
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**VAKIL.**

*See PAUPER SUIT—SUITS 15 W. R., 198*

*See CASES UNDER PLEADER.*

*See PRISONER* . . . 6 Mad., 38

*See STAMP ACT, 1879, SCH. II, ART. 11.*  
 [I. L. R., 8 Mad., 14]

————— *Right of, to plead on Original Side of High Court.*

*See RULES OF HIGH COURT, MADRAS.*  
 [I. L. R., 1 Mad., 24]

**VAKIL AND CLIENT.**

*See ATTORNEY AND CLIENT.*  
 [11 B. L. R., 60 note]

*See CONTRACT ACT, s. 25.*  
 [3 Agra, 286  
 3 N. W., 25  
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 I. L. R., 5 Bom., 258]

**VALUATION OF APPEAL.**

*See CASES UNDER APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—VALUATION OF APPEAL.*

*See CASES UNDER PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL.*

*See CASES UNDER VALUATION OF SUIT—APPEALS.*

## VALUATION OF SUIT

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VALUATION OF IT

## 1 SUITS

1. — Question of valuation—Pro-  
cedure.—Whether or not a suit has been properly  
valued is a preliminary question which ought to be  
disposed of before the case goes to trial. JOTARA  
DASSER & MAHOMED MOHARTECK

[I. L. R. 8 Calc., 975 11 C. L. R., 399]

2. — Computation of value—  
Stamp duty—Value of subject matter for pur-  
pose of determining jurisdiction.—The valuation of  
a suit for the purposes of stamp duty and the valua-  
tion of the subject matter of the suit for the purpose  
of determining the jurisdiction of the Court in  
appeal are two different things. The value of the  
suit for the purposes of stamp duty is fixed by certain  
rules which determine an artificial value for those  
purposes. The value of the subject matter of a suit on  
appeal, on which depends the jurisdiction of the  
several grades of civil courts, is the actual value of  
the property in litigation. ATKIL CHUNDER DEY  
ROY & MOHIT MORTON DASS

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3. — Valuation for  
purposes of jurisdiction.—Questions of jurisdiction  
whether with reference to the nature of the suit or  
with reference to the pecuniary limits of the courts are  
matters to be governed by the statements contained in  
the pleadings in the cause. The valuation of the claim as  
preferred by the plaintiff and not as set up by the  
plea in defence should govern the action, not only  
for the purposes of the original Court but also for  
the purposes of appeal, and indeed throughout the  
litigation. JAG LAL & HAN NARAIN SINGH

[I. L. R., 10 All., 524]

## VALUATION OF SUIT—contd. and

## 1 SUITS—contd. and.

4. — Valuation for  
purposes of jurisdiction.—Court Fees Act.—The  
valuation of suits for the purpose of jurisdiction is  
perfectly distinct from their valuation for the fiscal  
purpose of Court fees. Therefore Court Fees Act, which  
are fiscal enactments, are not to be resorted to  
for construing enactments which fix the valuation  
of suits for the purpose of determining jurisdiction.  
DAYACHAND & HEMCHAND DHARAMCHAND

[I. L. R. 4 Bom. 515]

5. — Jurisdiction of  
Munsif—Mod. Regs. VI of 1816 & 11 and III of  
1833.—The valuation of the matters of litigation for  
the purpose of determining the jurisdiction of Munsifs  
is to be made in the mode prescribed by s. 11 Regu-  
lation VI of 1816, and Regulation III of 1833, and  
not in that prescribed in the Stamp Acts. THIAO  
RAJA MUDALI & RAMANUJA CHAKRY CHINNIAINI  
CHETTI & NANJAPPARANT JINJALA VENKATARA  
YADU & JINJALA RAMANMAH 6 Mad., 151

6. — Court Fees Act  
1870 & 12.—Class of suit in which particular is  
ranks.—S. 12 of the Court Fees Act which makes  
the decision of a Court in which a plaint or memo-  
randum of appeal is filed final on questions relating  
to valuation for the purpose of determining the  
amount of any fee chargeable does not affect a  
question as to the class of suits in which a particular  
suit ranks. ANNAMALAI CHETTI 10 Mad., 204

[I. L. R., 4 Mad., 204]

7. — Court Fees Act  
1870 & 12.—Non payment of sufficient Court fees—  
S. 12 of the Court Fees Act (VII of 1870) appli-  
es to the valuation of property for the purpose  
of calculating the Court-fee when there is no ques-  
tion as to the article of the schedule of the Act with  
reference to which the valuation is to be made and  
does not apply to a case in which it is contended that  
the property has been wrongly valued, but that the  
relief has been improperly estimated by the Court  
under a wrong article in the schedule of the Act.  
It does not contemplate a case in which the Court  
refuses to hear a suit on the ground that a sufficient  
Court-fee has not been paid. See *Goodhyia Pershad*  
*Singh v Gunga Pershad* I. L. R., 6 Calc., 249  
6 C. L. R. 56 OMKAR MIRZA & JONES

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8. — Jurisdiction—  
Market value of subject matter—Mode of computation—  
Court Fees Act (VII of 1870) ss. 6 and 12.—For  
the purpose of determining the question of jurisdic-  
tion, the valuation of a suit should be computed ac-  
cording to the market value of the subject-matter of  
the suit, and not by the special rules applicable to  
valuation laid down in Act VII of 1870. NANBOON  
SINGH & TOFANER SINGH

[12 B. L. R. 113 20 W. R., 33]

JEEBAY SINGH & INDEENJIT MAHOTA  
[12 B. L. R., 115 note 18 W. R., 109]  
CHUNDER NATH BHUTTACHANDER & BHAIKARTY  
CHAND 25 W. R., 39

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

KALU BIN BHIWARI v. VISHRAM MAWARI  
[I. L. R., 1 Bom., 543]

BAI MAHKOR v. BULAKHI CHAKU  
[I. L. R., 1 Bom., 538]

## 9. ———— Market value—

*Valuation for stamp purposes.*—Where a Court is satisfied that the market value of the subject of a suit or appeal presented to it is of such an amount as to bring the suit or appeal within its jurisdiction, it is bound to receive it. The Court will generally assume that the value of the property in suit is that arrived at by the computation for the purposes of ascertaining the stamp duty where the Stamp Act prescribes arbitrary principles of calculation; but where it is asserted and shown, to the satisfaction of the Court, that the market value is in excess of the amount computed for such purposes, the Court must take notice of the actual market value. DHUNNOO v. DAMODUR DASS . . . . . 2 N. W., 177

10. ———— Cases in which revenue cannot be calculated—Market value.—In cases where, for the purpose of the stamp on an appeal, it is impracticable to ascertain accurately what portion of permanent revenue has been assessed on the lands in dispute in a suit, the appellant should furnish to the Registrar a memorandum giving an estimate of the market value and the date on which it has been calculated. If the Registrar consider the estimate clearly insufficient, the Court will issue a commission to ascertain the proper market value. The provisions of sch. B of Act XXVI of 1867 considered. EX-PARTE MOONEE RANGAPPEN

[3 Mad., 352]

11. ———— Dispute as to proper valuation.—On a dispute arising as to the proper valuation of a suit, the Court may, on the application of either party, issue a commission and make an inquiry into the market value or the net profits of the property in dispute. The final decision as to the proper valuation is vested in the Court which hears the suit. UMA SANKAR ROY CHOWDREY v. MANSUR ALI KHAN

[5 B. L. R., Ap., 6: 13 W. R., 327]

See WAJID ALI KHAN v. LALA HANUMAN PRASAD  
[4 B. L. R., A. C., 139: 12 W. R., 484]

12. ———— Costs.—In estimating the value of a suit, the costs must not be included in the amount in dispute. NIRMADHAN DAS v. BISWAMBHAR DAS

[3 B. L. R., P. C., 27: 12 W. R., P. C., 29  
13 Moore's I. A., 85]

13. ———— Character of suit—Valuation altering with wording of plaint.—A suit should be valued according to its real character. Where a plaint is so worded as that, taken strictly, the valuation would be such that the Court in which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the Court of its jurisdiction. AJOODHIA LALL v. TUMANI LALL . . . . . 2 C. L. R., 134

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

14. ———— Court Fees Act (VII of 1870), s. 17, Applicability of—"Cumulative reliefs"—Alternative relief.—Where the plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. S. 17 of the Court Fees Act (VII of 1870) does not apply to such a case. That section is applicable only to a case of cumulative relief sought by the plaintiff. MOTIGARRI v. PRANJIVANDAS, I. L. R., 6 Bom., 502, followed. KASHINATH NARAYAN v. GOVINDA BIN PIRAJI . I. L. R., 15 Bom., 82

15. ———— Incorrect valuation—Appellate Court—Ground for dismissal of suit.—The valuation of a suit must be taken from the statement in the plaint, and if, after going into the evidence, it is found that a particular item is improperly claimed, the Court has means of punishing the plaintiff by saddling him with costs or in any other way; but the whole suit should not be dismissed simply because, in the opinion of the lower Appellate Court, it ought to have been valued within the limit of the jurisdiction of the Small Cause Court. MOHEE LALL v. KHETARAM MARWARY . . . . . 25 W. R., 76

16. ———— Designed exaggeration of valuation—Suits Valuation Act (VII of 1887), s. 11—Munsif, Jurisdiction of—Code of Civil Procedure (1889), s. 578—Plaint, Return of—Provincial Small Cause Courts Act (IX of 1887), s. 15, sub-s. 3.—A suit was brought in the Munsif's Court for money as well as for damages, valued at Rs. 1,004. The Munsif gave the plaintiff a decree for Rs. 900, but dismissed the claim for the balance, which was for damages. On appeal the Subordinate Judge was of opinion that the claim had been designedly exaggerated, and he therefore held that the suit was one cognizable by the Small Cause Court, and directed the plaint to be returned to the plaintiff for the purpose of presenting it to the proper Court. Held that, as the suit was tried on its merits by the first Court, and the overvaluation of the suit was not found by the Appellate Court to have prejudicially affected the disposal of the suit on its merits, the objection as to jurisdiction should not have been given effect to, and therefore the Court below was wrong in directing the plaint to be returned. MOHEE LALL v. KHETA RAM MARWARY, 25 W. R., 76, followed. NANDA KUMAR BANERJEE v. ISHAN CHANDRA BANERJEE, 1 B. L. R., Ap., 91; and BONOMALLY NAWN v. CAMPBELL, 10 B. L. R., 193, distinguished. HAMIDUNNISSA BIBI v. GOPAL CHANDRA MAZAKAR . I. L. R., 24 Cal., 661  
[1 C. W. N., 556]

17. ———— Under-valuation, Effect of—Suits Valuation Act (VII of 1887), s. 11—Suit for partition.—The plaintiffs instituted a suit for partition in the Munsif's Court and valued it at Rs. 350, being the value of their share. Defendant contended that the suit ought to have been valued at Rs. 3,000, being the value of the whole 16 annas, and therefore the Munsif had no jurisdiction. The Courts below overruled the objection, holding that, as the value of the share claimed was within the limit



## VALUATION OF SUIT—continued

## 1 SUITS—continued

of the Munsif a jurisdiction on the suit was brought in the proper Court a decision was then given in favour of the plaintiffs. *Held* that the disposal of the suit by appeal not having been prejudicially affected by the error by the under appeal on the defect of jurisdiction if any had been cured by a bill of the suit as valued on Act (VII of 1880). **DINESH CHANDER LOY v. SARANATHI DEBI**

[I C W N., 130]

## VALUATION OF SUIT—continued

## 1 SUITS—continued

of the Court Fees Act (VII of 1880), the plaintiff in a suit for accounts must state the amount at which he values the relief sought; but he is free to fix it as he thinks proper subject to the provisions of s. 11 which preclude the execution of the decree in case it exceeds such value until the execution fee has been paid. **GOVINDAS v. DATARHAI**

[I L R., 9 Bom., 23]

18. — *Valuation of suit—no limit on mortgage and for interest.* In a suit on a mortgage in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif and which was filed in the Court of a Subordinate Judge it appeared that there had been an adjudication by District Munsif in a previous suit affecting the rights of the parties in the same and that the present claim was largely comprised in interest thereon. *Held* that the claim framed in the present suit was not barred by the limitation of the jurisdiction of a District Munsif but that the claim had been unwarrantably exaggerated with a view to bring the suit in a superior Court, and so was liable to the provisions of the Code and he thereupon returned the plaintiff to be presented in the proper Court. *Held* that the procedure adopted was wrong, and that the whole suit should have been tried. **KOTI PRASAD v. MAYJATA**

[I L R., 21 Muz., 271]

19. — *Valuation of amended complaint—Valuation as estimated at date of filing and at date of amendment.* The proper valuation in the case of an amended complaint is that ascertained at the date of the amendment and not at the date of the original filing of the complaint. **MOKO VISHWANATH v. GANESH VITHAL**

10 Bom., 444

20. — *Valuation of plaintiff presented again after return of plaintiff—Return of plaintiff for want of jurisdiction—second presentation under Court Fees Act 1880 Act XXI of 1867.* Plaintiff presented under. Where a plaintiff in a suit was originally presented when Act XXI of 1867 was in force, in the Court of the Munsif and being above the amount for which that Court had jurisdiction was returned for presentation to the Subordinate Judge and when presented there it was admitted and heard and afterwards it was found that under Act VII of 1880 the Court Fees Act which was then in force the lower standard of valuation necessary would have made it cognizable by the Munsif. *Held* that by analogy to the cases which decide that the date of a suit for the purposes of limitation is the date when the plaintiff was originally presented the suit must be assumed to have been brought when the plaintiff was filed in the Munsif's Court, and therefore was properly valued under Act XXI of 1867. **KHULAT CHANDER GEORGE v. NAGESHCHANDRAN BIKER**

18 W R., 47

21. — *Account, Suit for—Court Fees Act, 1870 s. 7, cl. (1) and s. 11—By s. 7, cl. (f),*

22. — *Subordinate Judge's power to make valuation—Court Fees Act (VII of 1870) s. 7, cl. (f)—Civil Procedure Code (Act XIV of 1852) s. 64 (a) and (b).* The plaintiffs brought a suit for an account, and approximately valued their claim at Rs. 16,151-0. The Subordinate Judge was of opinion that the claim was for recovery of money and should have been valued at Rs. 1000. He therefore called on the plaintiffs to make up the stamp to that required on such valuation and the plaintiffs refusing, he dismissed their suit under s. 64 (b) of the Civil Procedure Code (Act XIV of 1852). *Held* that in any case the Subordinate Judge was wrong. If the suit was really one for an account, the plaintiffs were entitled to value the relief they sought at approximately as they had done, if it were not one for an account but for recovery of money still the Subordinate Judge had no power himself to value the relief sought, but should have called on the plaintiffs to value the relief they sought, and then if he had thought such relief was undervalued he could have applied s. 64 (a) of the Code of Civil Procedure and rejected the suit. **BALVANTRAY v. BHIMASHANKAR**

[I L R., 13 Bom., 517]

23. — *Suit for account and for balance that may be found due—Appellate Act XIV of 1869 ss. 8 and 26.* The plaintiffs sued for an account of all the business done by the defendants as their commission agents from 1854 to 1867 and prayed that whatever was found due might be awarded with interest. The plaintiffs valued the relief sought approximately at Rs. 1510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a first class Subordinate Judge, who rejected the plaintiff's claim. Against this decision the plaintiffs preferred an appeal to the High Court. *Held* that as the approximate amount of the claim was stated in the plaint to be Rs. 1510, that must be taken to be the value of the subject matter of the suit for purposes of jurisdiction. The appeal therefore, lay under ss. 8 and 26 of Act XIV of 1869 not to the High Court but to the District Court. Under s. 50 of the Code of Civil Procedure (Act XIV of 1852) if a plaintiff seeks the recovery of money the plaintiff must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts the plaintiff need only state approximately the amount sued for. As in the former instance the precise amount so in the latter the approximate amount, stated in the plaint must be taken to be the amount of value of the subject matter of the suit.

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

for purposes of jurisdiction. **KHUSHALCHAND MULCHAND v. NAGINDAS MOTICHAND**

[I. L. R., 12 Bom., 675]

24. ——— Adoption, Suit to set aside—*Suit by reversioner—Jurisdiction.*—For the purpose of determining the jurisdiction over a suit by a reversioner to set aside an adoption, the loss which would accrue to the adopted person, should the adoption be declared invalid, is the measure of the value of the subject-matter of the suit. **KESHAVA SANABHAGA v. LAKSHMINARAYAN**

[I. L. R., 6 Mad., 182]

25. ——— *Court Fees Act, s. 7—Suits Valuation Act (VII of 1857), ss. 3, 10.*—The value, for the purposes of jurisdiction, of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his claim by the plaintiff. **Keshava Sanabhaga v. Lakshmi Narayana, I. L. R., 6 Mad., 182**, dissented from. **SHEO DENDI RAM v. TULSHI RAM**

[I. L. R., 15 All., 378]

26. ——— Annuity, Suit for declaration of right to—*Act XXI of 1867—Stamp Act, 1862, sch. A, cl. 2.*—In a suit for a declaration of right to an annuity (varshasan) it was held that the stamp for the petition of special appeal should be regulated by the market value of the annuity, and that *prima facie* ten times the amount of the annuity might be assumed to be its market value, as enacted for analogous agreements by s. 2, sch. A, Act X of 1862. **NARSINYACHARYA v. SVAMI RAYA CHARYA**

[5 Bom., A. C., 55]

27. ——— Attachment, Suit to set aside—*Suit by trustees' deed given by insolvent for benefit of creditors.*—The valuation for stamp duty of a suit brought by the trustees of an assignment by an insolvent trader for the benefit of his creditors to set aside an attachment by an execution-creditor should be calculated on the value of the lien claimed by the judgment-creditor. **STEPHENSON v. BAUMGARTNER**

3 Agra, 104

28. ——— *Suit under Civil Procedure Code, 1882, s. 283—Stamp—Possession—Court Fees Act, VII of 1870, sch. II, art. 17, cl. 1.*—When a party prefers a claim or makes any objection to the attachment of any property in execution of a decree, but fails to establish it, and brings a suit under s. 283 of the Code of Civil Procedure (Act XIV of 1882) to establish his right to the property attached, his plaint is to be treated as falling under art. 17, cl. 1, of sch. II of the Court Fees Act, VII of 1870, and is chargeable with only a ten-rupee stamp, notwithstanding that the plaintiff may pray in such a suit to be awarded possession. **Purati v. Kisan Sing, Judgments for 1881, p. 121**, followed. **Gunpatgir Guru Bhologir v. Gunpatgir, I. L. R., 3 Bom., 230**, distinguished. **DIONDO SAKHARAM v. GOVIND BABAJI**

I. L. R., 9 Bom., 20

29. ——— Attachment; Suit to set aside order removing—*Court Fees Act, VII of*

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

1870, ss. 6 and 12, and sch. II, art. 17, cl. 1—*Valuation by subordinate Court—Suit to re-establish judgment-debtor's right to property on removal of attachment.*—Where, on the removal of an attachment at the instance of a third party, the judgment-creditor brought a suit to establish the right of his judgment-debtor to the property from which the attachment had been removed, and to get the summary order to remove the attachment set aside,—*Held* that the proper stamp on a plaint of that kind was Rs 10 under s. 6 and sch. II, art. 17, of the Court Fees Act, VII of 1870. **VITAL KRISHNA v. BALKRISHNA JANARDAN**

I. L. R., 10 Bom., 610

30. ——— Award, Suit to carry out.—A suit to carry out an arbitration award need not be valued. **KNODA BUKSH v. MOWLA BUKSH**

[14 W. R., 255]

31. ——— Award, Application to file—*Civil Procedure Code, 1882, s. 525.*—The proper Court-fee upon an application to file an award under s. 525 is the Court-fee prescribed for applications, and not the Court-fee upon a plaint. **BIJADHUR BHUGUT v. MONOHUR BHUGUT**

I. L. R., 10 Cal., 11

**S. C. PALUT BHAGUT v. MONOHUR BHAGUT**

[13 C. L. R., 171]

32. ——— Charge on property, Suit to establish—*Madras Civil Courts Act, 1873—Subject-matter of suit.*—For the purposes of jurisdiction (Madras Civil Courts Act, 1873) the subject-matter of a suit to establish the validity of a charge upon property is, when the property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property. **KRISHNAMA CHARYAR v. SRINIVASA AYYANGAR**

I. L. R., 4 Mad., 339

33. ——— Damages, Suit for.—In determining the jurisdiction of the Court in a suit for damages, the amount claimed, and not that eventually found due, must be taken at the valuation. **JOY DOORGA DASSEE v. MANICK CHAND BAROO**

[16 W. R., 248]

34. ——— Declaratory decree, Suit for—*Suit to establish right to attached property.*—*Held* that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. *Second Appeal No. 320 of 1876, decided the 26th May 1876*, followed. **GULZARI LAL v. JADAUN RAI**

[I. L. R., 2 All., 799]

35. ——— *Suit for declaration that property is liable to sale in execution of decree—Jurisdiction.*—In a suit to have it declared that certain property valued at Rs 400 was liable to sale in execution of the plaintiff's decree for Rs 600, *Held* that in this case the value of the property determined the jurisdiction, that it was immaterial

## VALUATION OF SUIT—cont. used

## 1 SUITS—cont. used

that the amount of the decree was higher than the limit of the Munsif's jurisdiction and that the case was fit for appeal to the Munsif. *Gulzar Lal v Jadun Das* 11 L. R. 241 52 distinguished. *Durga Prasad v Baika Khar*

[L. R., 9 All., 140]

38 — — — — — *Bengal Civil Court Act (11 of 1851) s. 20*—Value of the subject-matter in dispute—*Civil Procedure Code (Act XII of 1852) s. 263* Attached property does not establish right to—in suits brought under s. 83 of the Civil Procedure Code to test the question whether a property which has been attached in execution liable to pay the claim of the creditor the amount which is in dispute and which the creditor would receive if successful is the amount due to him and not the value of the property attached, unless he has no other property to be attached. *Janki Lal v Jadun Das* 11 L. R. 241 68 *Gulzar Lal v Jadun Das* 11 L. R. 241 52 *Har Lal v Chandra Prasad* 11 L. R. 434 39 and *Dowdchand Venchand v Janki Lal* 11 L. R. 434 39 *Bom. J. C. v. M. D. Prasad* 11 L. R. 16 Calo., 104

37 — — — — — *Suit by claimant to attach defendant's property—Court Fees Act (VII of 1850) s. 1* Procedure Code (1852) ss. 278 and 283.—Where a claimant whose objection under s. 279 of the Code of Civil Procedure has been dismissed, brings suit and makes the judgment-debtor who was trying to execute the decree of the court to the extent of a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only one declaration and for such purposes and not for a declaration that the plaintiff's and not the defendant's title to the property is the plaintiff's and not the defendant's. But where the person objecting under s. 279 of the Code brings his suit and makes a declaration as to the extent of the attachment proceeding, but also the judgment-debtor in those proceedings parts with the suit, and asks for a declaration of the plaintiff's title to the property and a declaration as to the judgment-debtor and also asks for a declaration in denial of the judgment-debtor's right to bring that property to sale in execution of the judgment-debtor's decree, there are two substantial declarations asked for. *Moti Chandra v Kanchhila*

[L. R., 18 All., 308]

38 — — — — — *Bengal Civil Court Act (XII of 1851) ss. 19 and 21*—*Suit by claimant for property under the Civil Procedure Code s. 263*—When a suit is under s. 263 of Act XIV of 1852 the claimant objector makes the judgment-debtor or his representative a party as defendant to the suit, the property attached

## VALUATION OF SUIT—cont. used.

## 1 SUITS—continued

must be regarded as the subject-matter of the suit and the value of the suit is then the market value of ss. 19 and 21 of Act XII of 1851 and not the value of the property attached, which is sought to be realized by the sale of property in execution of the decree. *Gulzar Lal v Jadun Das* 11 L. R. 241 52 *Pargana Prasad v Lakshmi Khar* 11 L. R. 434 140; *Krishna Chandra v Krishna Chandra* 11 L. R. 434 140 *Mad. 339* and *Mad. 339* *Rajkoti Chandra Roy* 11 L. R. 15 Calo. 104, distinguished. *Maharaj Singh v Purnima Lal* 11 L. R. 13 All., 329 and *Madho Das v Bhoji Lal* 11 L. R. 16 All., 266 referred to. *Dwarka Das v Hanuman Prasad* 11 L. R., 17 All., 69

39 — — — — — *Court Fees Act, s. 12 and sch. II art. 17 cl. 3*—*Cases not subject to appeal—Civil Procedure Code* 1852, s. 246—s. 12 of the Court Fees Act provides that appeals on questions of law, to valuation for the purpose of determining the amount of a fee but does not prevent a Court of appeal from determining whether or not consequential relief is sought in a suit, so that it may determine under what cases of cases the suit falls for the purposes of the Court Fees Act. As by a person against whom an order has been made under s. 246 of Act VIII of 1852 disallowing his claim to the attached property need not be valued according to the value of the property but can be brought on a stamp of Rs. 10 under Act VII of 1852, sch. II art. 17 (iii). *Churnia v Ram Dhan*

[L. R., 1 All., 360]

40 — — — — — *Suit to declare invalid proceedings and for Damages* 11 L. R. 111 *offer payment on only private arrangement*—An application under a private petition used to say subsequent partition proceedings brought under regulation XIX of 1814 and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the revenue authorities. Held that such a suit should be considered to be one for a declaratory decree or for something, in the nature of an injunction, and that therefore the plaintiff should not be stamped according to the value of the entire estate. *Joykanti Roy v Lal Bahadur Singh*

[L. R., 8 Calo., 128 10 C. L. R., 148]

41. — — — — — *Suit for declaration of title to paid offices—Withdrawal of suit from some of the offices—Office at which suit was made the right to the others*—In a suit to declare title to four paid offices in a temple, the plaintiff asked that the names with regard to three of them should not be tried, but on cross examination asserted right to them. It was found that the fourth office carried with it the right to the other three. Held that the plaintiff was not bound to have it adjudged their claim on the three offices for the purposes of the suit, but that, even if they had done so, the value of all

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

the four offices must be taken for the purposes of jurisdiction. *SUNDARA v. SUBBA*

[I. L. R., 10 Mad., 371]

42. — *Suit to obtain a declaratory decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of 1870 (Court Fees Act), sch. II, art. 17 (i) and (iii).—Held that the Court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (a) for a declaration of right to certain property, and (b) that the said property might be released from attachment in execution of a decree was R10 in respect of each of the reliefs prayed. *DILDAR FATIMA v. NARAIN DAS* [I. L. R., 11 All., 365]*

43. — *Pecuniary valuation of suit—Court Fees Act, s. 12, sch. II, art. 17 (iii).—A suit for two declarations filed in a subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was res judicata by reason of decrees passed in District Munsifs' Courts. No objection was taken in the subordinate Court to the valuation of the suit. Held that the plea of res judicata failed. Per *MUTTUSAMI AYYAR, J.*—For the purposes of jurisdiction, the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. *GANAPATI v. CHATHU* . I. L. R., 12 Mad., 223*

44. — *Madras Civil Courts Act (Mad. Act III of 1873), s. 12—Suit for declaration of membership of a tarwad—Valuation for the purposes of jurisdiction.—The plaintiff, alleging that he was carman of the defendant's tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property exceeded R26,000 in value, but that the proportionate share of each member, computed as on an equal division, was less than R900. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsif and rejected the plaint. Held that the value of the subject-matter of the suit was the value of the whole tarwad property, and not the value of what the plaintiff's share would be on partition; the order therefore was wrong and should be set aside. *Ganapati v. Chathu, I. L. R., 12 Mad., 223*, followed.*

*IBRAYAN KUNHI v. KOMAMUTTI KOYA*

[I. L. R., 15 Mad., 501]

45. — *Bengal Tenancy Act, s. 149—Suit by third party claiming rent paid into Court in rent-suit, Nature of—Title-suit—Institution-stamp.—A suit by a third person under cl. (3) of s. 149 of the Bengal Tenancy Act is not a title-suit, and need not be stamped as such. Per *TOTTENHAM, J.*—Such suit is in the nature of a suit for an injunction under the Specific Relief Act or*

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

else a declaratory suit. *JAGADAMBA DEVI v. PROTAP GHOSE* . I. L. R., 14 Calc., 537

46. — *Suit to establish right by reversal of deeds.—When a plaintiff only sues for declaration of his title to certain lands on reversal of the kobalas said to have been illegally executed by his father, he need not be compelled to value the case at the total of the consideration mentioned in those deeds. *SHEO GHOLAM SINGH v. BEJOYRAM PROTAP SINGH* . W. R., 1864, 317*

47. — *Plaint insufficiently stamped—Court Fees Act (VII of 1870), s. 12.—The law allows a plaintiff in some cases to rectify a mistake as to stamp duty, but this privilege is subject to qualification, and does not exist where the relief to be granted is altogether distinct from that originally sought. In such a case, the plaintiff should not be allowed to put an additional stamp on his plaint. Where a plaintiff sued on a stamp of R10 for a declaration of his title to land worth R19,000, in the possession of the defendant, it was held that the suit could not be maintained, and that the plaintiff was not entitled to put an additional stamp on the plaint and convert his suit into one for possession. *CHOKALINGAPESHANA NAICKER v. ACHYAR* . I. L. R., 1 Mad., 40*

48. — *Court Fees Act (VII of 1870), s. 4, and sch. II, art. 17, cls. 3 and 6—Jurisdiction—Bombay Civil Courts Act (XIV of 1869), s. 21.—A Subordinate Judge of the 2nd class has no jurisdiction to entertain a suit for the declaration of the plaintiff's title where the property in respect of which the declaration is sought exceeds R5,000 in value. The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim, upon which the jurisdiction of a Court depends. Whether a suit be merely to obtain a decree, declaratory of the plaintiff's title to, or whether it be to establish his title, coupled with a prayer for possession of, the rights of a deceased person, the inheritance is the object in dispute. The actual value of the estate to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter. *BAI MAHKOR v. BULAKHI CHAKRE**

[I. L. R., 1 Bom., 538]

49. — *Court Fees Act (VII of 1870), s. 17—Suit by reversioners to declare various alienations by a Hindu widow to be invalid against them.—When reversioners sue to have declared invalid as against them alienations made by a Hindu widow, a Court-fee of R10 must be paid in respect of each of the alienations in question. *DAIVACHILAYA PILLAI v. PONNATHAL**

[I. L. R., 18 Mad., 459]

50. — *Court Fees Act (VII of 1870), s. 7, cl. 4 (c), sch. II, art. 17, cl. (iii)—Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Decree for declaration without consequential relief.*

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

payment of Rs. 6,000, together with interest thereon at the rate of 4 per cent. per mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of Rs. 6,000, together with interest thereon at the rate of 1½ per cent. per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court Rs. 6,000, together with interest at the rate of 1½ per cent. per mensem. *Held* that the value of the subject-matter in dispute was the difference between Rs. 6,000 and Rs. 600.00 or thereabouts, and therefore an appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him. **KALI CHARAN RAI v. AJUDHIA RAI**. I. L. R., 2 All., 148

59. ———— *Deed prejudicing title to immovable property.*—In a suit to annul a sale-deed which prejudices the title of the plaintiffs to immovable property, a stamp calculated on the consideration-money mentioned in the sale-deed is sufficient. **THAKOOR PATIL v. RAM SOOMRAN LAL**. 3 N. W., 433

60. ———— *Suit to set aside sale-deed as being forged.*—A suit to set aside a false sale-deed was held to be sufficiently valued at the sum mentioned in that sale-deed. **THAKOOR PATIL v. RAMSOOMRAN LAL**. 1 N. W., 17; Ed. 1873, 16

61. ———— *Court Fees Act (VII of 1870), ss. 7, 12—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional Court-fees.*—In a suit in a subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that Court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment; and the Subordinate Judge dismissed the suit. *Held* that the order was erroneous, since the plaintiffs would not be gainers to the extent of the value of the property if they obtained a decree, the plaint should not be valued according to the value of the whole of the tarwad property; (2) that the High Court was not precluded by the Court Fees Act, s. 12, from revising it, and reversing the order as to valuation of the suit. **KANARAN v. KOMAPPAN** [I. L. R., 14 Mad., 169]

62. ———— *Court Fees Act, sch. I, cl. 1—Suit for cancellation of an agreement to sell—Ad valorem fee.*—The plaintiff had executed an agreement to sell certain property in discharge of mortgages executed on his behalf during his minority. He now brought a suit alleging that the agreement had been extorted from him, and praying for a declaration that the agreement was not binding on him, and for any other relief "which the Court considers to be reasonable." *Held* that the plaintiff was bound to pay Court-fees upon the value of his interest in the document sought to be invalidated. **PARATHAYI v. SANKUMANI**

[I. L. R., 15 Mad., 294]

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

63. ———— *Suit to cancel document on ground of fraud.*—The plaintiff executed a document whereby he created a charge of Rs. 1,500 upon certain immovable property. In a suit to cancel the document upon the ground of fraud, *Held* that the plaintiff valued his relief at Rs. 1,500, and that the District Munsif had no jurisdiction to try the suit. **NARAINA PUTTER v. AYA PUTTER**. 7 Mad., 372

64. ———— *Suit for possession of property alienated—Price stated in sale-deed.*—In a suit for possession of a share of an undivided estate and to set aside a kobala by which the estate had been illegally alienated, the plaintiff is not bound to value his claim according to the price stated in the kobala. **AUGUPERA CHOWDHRY v. MEAH BIDER**. 10 W. R., 207

65. ———— *Deed, Suit to enforce registration of—Court Fees Act (VII of 1870), s. 7, cl. 5—Madras Civil Courts Act (Mad. Act III of 1873), ss. 12, 14—Suit to enforce registration—Jurisdiction of Munsif.*—Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The latter instrument was found to have been executed in supersession of the former, and the District Munsif passed a decree directing its registration alone. *Held* that the documents standing in the relation to each other of operative and superseded document, the valuation of the suit for the purposes of jurisdiction was the value of the interest created by the operative document; and that the District Munsif had jurisdiction to entertain the suit. **RAMAKRISHNANMA v. BHAGANMA**

[I. L. R., 13 Mad., 56]

66. ———— *Ejectment, Suit for—Market value of tenant-right*—Where a landlord claims to eject a tenant, he claims to recover the tenant-rights in the holding, and the stamp duty chargeable on the plaint should be determined with reference to the market value of that right only. **AJODHYA CHOWDHRY v. DABEE SINGH**. 3 Agra, Rev., 5

67. ———— *Suit to contest claim of occupancy raiyat—Court Fees Act, 1870, s. 7, cl. 11, and sch. II, cl. 5.*—In a suit to eject a defendant as being a tenant at will, the Court-fee upon the plaint or memorandum of appeal is 8 annas under sch. II, cl. 5, of Act VII of 1870. Cl. 11 (d) of s. 7 of that Act applies only to suits brought by a tenant to dispute the validity of his landlord's notice to quit. **NURJAHAN v. MURBAN MUNDUL**

[11 C. L. R., 91]

68. ———— *Court Fees Act (VII of 1870), s. 7, para. 5—Suits Valuation Act (VII of 1887), s. 8—Jurisdiction—Suit to eject a tenant at fixed rates.*—A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of para. 5, s. 7 of the Court Fees Act, 1870, and the valuation of such suit for the purposes

## VALUATION OF SUIT—continued

## 1 SUITS—cont. and

of Court fees and of jurisdiction is the value of the subject matter of the suit that is to say of the tenant's right in the land itself not of merely one year's rent. **RAM RAJ TEWARI v. GIRDHARAN BHAGAT** I. L. R., 15 AIL, 63

69

*Suit to have a lease to set aside and buildings erected by lessees demolished—Suit for possession of land and demolition of buildings erected thereon—Court Fees Act—Bengal Civil Courts Act 20-22—Certain co-sharers of a village sued to have a lease of certain land the joint undivided property of the co-sharers which the other co-sharers had granted, set aside and to have the buildings erected on such land by the lessors demolished on the ground that such lease had been granted without their consent. They alleged the relief sought at Rs. 50. The value of the buildings of which they sought demolition was Rs. 300. Based on the value of the possession of certain land and to have the buildings demolished thereon by the defendants demolished. Held with reference to the above mentioned suit that the amount of their value for the purpose of the Court Fees Act, 1870 or of the Bengal Civil Courts Act 1871 the value of the buildings which might have to be demolished should not be taken to account. **JOGAL KISHOR v. TALU SINGH, BIKDESHRI CHAUDHRY v. NANDU***

[I. L. R., 4 AIL, 320]

70

*Emoluments attached to office—Suit for Court Fees Act 1870 s. 7 cl. 2—Claims for future emoluments—Jurisdiction—Madras Civil Courts Act 1873 s. 12—Portion of claim struck out and plaint returned for presentation to refer or Court—In a suit filed in the Court of a Subordinate Judge the plaintiff prayed for a decree for the payment annually of the emoluments attached to a certain office or their value at a rate stated in the plaint. This portion of the claim was allowed under cl. 2 of s. 7 of the Court Fees Act at the time the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Munsif. The Subordinate Judge held that the portion of the claim was not actionable inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under cl. 2 of s. 7 of the Court Fees Act, not being a fixed sum payable periodically and therefore he held that the suit was improperly valued that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court. Held that this order was right. **KRISHNAN v. REV. VARMA***

[I. L. R. 8 Mad. 384]

71

*Interest—Court Fees Act (VII of 1870) s. 7—Claim for interest from institution of suit until payment—Future means profits—No additional stamp is required on account of the claim for interest from institution of the suit until payment. It stands on the same footing as future means profits, which do not fall under s. 7 of*

## VALUATION OF SUIT—continued

## 1 SUITS—cont. and

the Court Fees Act (VII of 1870) **VITHAL HARI ATHAVLE v. GOVIND VASUDEO THOSAR**

[I. L. R., 17 Bom., 41]

72. ——— Instalment-bond, Suit on.

—The stamp on a plaint on an instalment bond should be estimated not on the amount of the whole bond, but on the amount claimed in the suit. **SETTO BHAMA DOSREA v. JAMES REDDY KHAN**

[4 W. R., S. C. C. Ref., 13]

73. ——— Khoti estate, Suit for recovery of—Act XXVI of 1867 s. 6 cl. 11—

Amount of assessment—Held that a khoti estate is an estate paying revenue to Government upon which an assessment is temporarily settled, and that a suit for its recovery should be assessed at eight times the annual assessment under Act XXVI of 1867 s. 6 cl. 11. See (a) Sp. Rule I for the Bombay Presidency. **EX PARTE VITHAL alias GOPAL GOWDH BIVALKAR** 4 Bom., A. C., 148

74. ——— Land, Suit for—Court Fees Act (VII of 1870) s. 7 art. 5 proviso—Stamp—

Construction and applicability of the proviso—Valuation of suits for land in a talukdhari village—Talukdhari jumma—Remission—Per WIST and NAXABHAI JJ.—The proviso to art. 5 of s. 7 of the Court Fees Act (VII of 1870) was clearly intended to provide a standard of valuation in the Bombay Presidency not only for the comparatively rare cases of land forming part but not a definite share of an estate paying revenue to Government but for all cases of suits for land. The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the appraisement made in order to show the proper amount of the land tax may be regarded as a remission. In the case of a talukdhari village, the proprietor of which had, under a settlement with Government for a period of twenty-two years, agreed to pay a fixed annual jumma, or lump assessment instead of the full survey assessment for the whole village—Held by a majority of the Full Bench that the difference in amount between the jumma and the full survey assessment was a remission, and therefore a suit for possession of lands in this village was to be valued according to cl. (3) of the proviso to art. 5 of s. 7 of the Court Fees Act (VII of 1870). **PER BIRWOOD J.**—The remission contemplated by cl. (3) of the proviso "is an express remission and not a mere difference in amount between the actual assessment payable by a talukdhari and the survey assessment. The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency; the first clause being applicable to lands settled for a period not exceeding thirty years; the second to lands settled for a longer period or permanently; and the third to unam lands on which the whole or a part of the survey assessment has been expressly remitted. The talukdhars are not unam lands. They are landholders liable to pay a land tax, but not under a survey settlement, such as is applicable

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

to lands for which provision seems to have been specially made in the proviso to art. 5 of s. 7 of the Court Fees Act. No part of the proviso therefore applies to a suit for the possession of lands in a talukhdari village. Such a suit should be valued according to cl. (d) of art. 5 of s. 7 of the Court Fees Act. *ALA CHELA v. OGHADHAI THAKERSI*

[I. L. R., 11 Bom., 541]

BAYAJI MOHANJI v. PENJADHAI HANUDHAI

[I. L. R., 11 Bom., 550 note]

75. ———— *Court Fees Act (VII of 1870), s. 7, cl. 5 (c), (c)*—*Paramba in Malabar, Valuation of suit for—Suit for garden land or land paying no revenue.*—On its appearing that a paramba in Malabar is not subject to land-tax, but that a tax is levied on trees of certain kinds which may grow on it,—*Held* that a paramba must be regarded for the purposes of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case. *AVDATHODAN MOIDIN v. PULAMBATH MAMALLY*

[I. L. R., 12 Mad., 301]

76. ———— *Manager, Suit to remove—Court Fees Act, 1870, s. 7—Suit to eject trustee—Jurisdiction—Specific Relief Act, s. 42.*—By an agreement between S and M, members of the same Hindu family, it was arranged that certain immovable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M should render accounts to S and observe certain other conditions. S sued M in the Court of the District Munsif, and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property. M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by s. 12 of the Madras Civil Courts Act, 1873. *Held* that S was not entitled to sue for the removal of M without praying for his ejection from the property, and that, as the property exceeded in value Rs. 2,500, the District Munsif had no jurisdiction. *SONACHALA v. MANIKA*

[I. L. R., 8 Mad., 516]

77. ———— *Karnavan of Malabar tarwad—Madras Civil Courts Act, 1873, s. 13.*—For the purpose of jurisdiction, a suit, to remove the karnavan of a Malabar tarwad is not a suit for the recovery of the tarwad properties managed by the karnavan and to be valued as such, but a suit which asks for a relief that is incapable of valuation. *NABANJOHI CHIRAKAL KUNHI RAMAN v. NABANJOHI CHIRAKAL PUTTALATHU KUNHUNNI NAMBIAR*

[I. L. R., 4 Mad., 314]

78. ———— *Suit for removal of karnavan—Court Fees Act, 1870, sch. II, art. 17, cl. 6.*—A suit for the removal of a karnavan of a Malabar tarwad on the ground of misfeasance is incapable of valuation and falls under s. 6, art. 17, sch. II of the Court Fees Act, 1870. *GOVINDAN NAMBIAR v. KRISHNAN NAMBIAR*

[I. L. R., 4 Mad., 146]

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

79. ———— *Act XX of 1863—Suit to remove managers of endowment from office—Court Fees Act, 1870, sch. II, art. 17.*—In a suit under Act XX of 1863 to remove the managers of an endowment from office, the subject-matter was held to be one which did not admit of valuation, and the Court-fee payable on its institution was the fixed fee of Rs. 10. *VEERASAMI PILLAY v. CHOKAPPA MUDALIAR*

See SRINIVASA v. VENKATA

[I. L. R., 11 Mad., 148]

80. ———— *Madras Civil Courts Act, s. 13—Court Fees Act, sch. II, art. 17, s. 6—Suit to remove a karnavan—Valuation for jurisdiction.*—Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. 6, art. 17 of sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bona fide* by the plaintiff, the Court should adopt it. *KRISHNA v. RAMAN*

I. L. R., 11 Mad., 266

81. ———— *Suit to remove a karnavan for mismanagement as de facto karnavan—Madras Civil Courts Act (III of 1873), s. 13.*—In a suit brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property, to the extent of more than Rs. 500, brought in the Court of a District Munsif,—*Held* that for the purpose of jurisdiction the suit was not one for the recovery of tarwad properties, nor to be valued as such, but it was a suit for relief that was incapable of valuation, and therefore was within the jurisdiction of the District Munsif. *KUNHAN v. SANKARA*

[I. L. R., 14 Mad., 78]

82. ———— *Mesne profits, Suit for—Denial of plaintiff's title.*—In a suit for wasilat, the stamp on the plaint will be sufficient if it cover the amount claimed for wasilat, notwithstanding the defendant may deny the title of the plaintiff to the land. *KADIR BUKSH v. WISE*

[Marsh., 185: 1 Ind. Jur., O. S., 103  
1 Hay, 370]

83. ———— *Suit for possession and mesne profits.*—Where a suit for mesne profits is united with one for possession, no separate stamp-fee is necessary in respect of mesne profits. *SYEDUN v. ALLAH AHMED*

W. R., 1864, 327

84. ———— *Mortgage—Court Fees Act (VII of 1870), s. 7, cl. 19—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage debt by sale of mortgaged and other property—Suit for money.*—A suit instituted by the mortgagee against the heir of the original mortgagor, to have the mortgage-debt paid by sale not exclusively of the mortgaged property, but also of all the other property in the hands of such heir liable for the debts of the original mortgagor, is virtually

## VALUATION OF SUIT—contd

## 1 SUITS—continued

a suit for mortgage a land should be valued not at the principal debt but at the true amount including interest. *HASHIMATH BALLAL v. GANPATI A. R. TESHVA. JOSH* I. L. R. 18 Bom., 688

85 ———— *Court Fees Act (VII of 1870) s. 7 cl. 5 and 9. Suit against mortgagor for recovery of mortgaged property*—CL. 5 of the Court Fees Act, applies not only to suits for redemption of mortgaged properties but to all suits against the mortgagor for the recovery of the mortgaged property and whatever may be the actual amount due to the mortgagor the court fee will always be upon the amount appearing in the bond. *HORAMAY NISCH v. NORMAN COCKELL* I. L. R. 8 W. N., 670

89 ———— *Partition, Suit for Madras Civil Courts Act s. 13—Jurisdiction—Subject-matter of suit*—In a suit for partition the value of the property for which the plaintiff claims a share and not the value of the share claimed determines the jurisdiction of the Court under s. 13 of the Madras Civil Courts Act, 1857. *VEDIVATHA v. SUBRAMANYA* I. L. R., 8 Mad., 235

87 ———— *Suit for partition of share of land*—In a suit for ascertainment, partition and delivery to the plaintiff of a share of certain land, the suit should be valued at the amount of the value of the whole estate. *Ludlow v. Subramanya* I. L. R. 8 W. N., 23, followed. *NAGAMMA v. SUBRA* I. L. R., 11 Mad., 197

88. ———— *Court Fees Act (VII of 1870) Suit for partition and for possession of share*—The stamp on a suit for partition and possession of the plaintiff's share of joint family property must be an ad valorem one on the value of the share. *BALVANT GANESH v. NANA CHINTAMON* [I. L. R., 18 Bom., 209]

89 ———— *Suit for partition of family property—Valuation for purposes of jurisdiction—Court Fees Act (VII of 1870) s. 7 cl. (iv) (b)—Suits Valued on Act VII of 1870*—In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the suit for the purposes of jurisdiction is the amount at which the plaintiff values his share. *VELU GOUDAN v. KUMARAVELU GOUDAN* [I. L. R., 20 Mad., 239]

90 ———— *Suits Valued on Act (VII of 1857) s. 8—Jurisdiction of Subordinate Judge—Valuation of a suit for partition*—In a suit for partition of certain property the value of the whole property sought to be divided was over Rs. 5000. Plaintiff valued his share at Rs. 200, and paid Court fees on that amount. The suit was filed in the Court of a Subordinate Judge of the first class. Held that the value of the subject-matter of the suit could not be held to be more than Rs. 200 so that the suit ought to have been filed in the Court of the second class Subordinate Judge. *MOTISHAI v. HARIDAS* I. L. R., 22 Bom., 315

## VALUATION OF SUIT—continued

## 1 SUITS—continued

91. ———— *Hearing for Calculation of—Market value of property*—The ordinary rule for assessing the value, for assessment to the market value of the property in suit is not applicable to a suit for partition and the Court in each case ought to fix the amount of such fee. Generally speaking, the value of the suit is the difference between the value after partition of the plaintiff's share which he requires to be partitioned and the value of the same share not partitioned. *KHATRE CHANDER MITTER v. ANNAATH NATH DES* [13 C. L. R., 253]

92. ———— *Suits for division of lands according to established custom*—A co-owner of a village land has to have them divided among the villagers according to a custom (last used in 1835) that at the expiration of every twelve years the lands should be redistributed by lot among the co-owners, and to have two of the shares divided into as many as one of such co-owners. In 1861 another co-owner filed in a suit to which came only of the present defendants were parties, a claim to receive for the periodical allotment of the lands; and in 1853 such decree which clearly recognised the existence and validity of the custom, was affirmed on appeal. Held that the plaintiff need not pay an instalment on fees on the aggregate amount of the value of all the shares in the village, and that the stamp on the plaint need only be proportioned to the value of the property actually sued for. *VEKATKAR V. NAYAKHAN v. SUBBA LAL SANKARA SUBBAYYAR v. SUBBA RAU* 2 Mad., 1

93 ———— *Jurisdiction—Subject-matter of suit—Act XIV of 1869 s. 2a*—What *procedura* determines the jurisdiction of a Court is the claim, or subject-matter of the claim as estimated by the plaintiff and the determination having given the jurisdiction the jurisdiction itself contains whatever the extent of the suit. And this is notwithstanding a bona fide error in the estimate made by the plaintiff but plaintiff can not oust the Court of its jurisdiction by making unwarrantable additions to the claim which cannot be sustained, and which there is no reasonable ground for expecting to sustain. The subject-matter of a claim within the meaning of s. 2a of Act XIV of 1869 is the specific thing sought by the plaintiff. In a partition suit, where the plaintiff seeks for a division and separate possession of his share in joint property it is the share so claimed which is the subject-matter of the claim, and not the whole of the joint property which is sought to be divided. *LAKEH MAN BHATKAR v. BABAJI BHATKAR* [I. L. R. 8 Bom., 31]

94. ———— *Bengal W. Provinces and Assam Civil Courts Act (XII of 1867) s. 21—Court Fees Act (VII of 1870) s. 7 cl. 4—Suits Valued on Act (VII of 1870), ss. 7 & 8 and 11—Jurisdiction, Valuation for purposes of—*For purposes of jurisdiction, the words "value of the original suit" in s. 11 of Act XII of 1867 are, in partition suits to be taken to mean the



# VALUATION OF SUIT—continued.

## 1. SUITS—continued.

value of the property in suit, and this is the valuation by which the Courts should be guided in such suits. *Kirty Churn Mitter v. Ananth Nath Deb, I. L. R., 8 Calc., 757*, followed. The Court Fees Act (VII of 1870), s. 7, cl. 4, does not contemplate that a plaintiff should assign an arbitrary value to the subject-matter of the suit, and the provisions of the Suits Valuation Act (VII of 1887), ss. 7, 8, and 11, indicate that this was not the intention of the Legislature. *BORDYA NATH ADYA v. MAKHAN LAL ADYA*. I. L. R., 17 Calc., 680

### Stamp in partition

85.—The plaintiff brought a suit to have 99 items of property partitioned. The plaintiff bore a Court-fee stamp of Rs. 10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the second defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title to and possession of, properties in which the plaintiff had no interest. An issue was raised on this point, and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal,—*Held* by *PETHERAM, C.J.*, and *NORRIS, J.*, that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes for the stamp, the cause of action which is stated in the plaint, and that only, must be looked at. *MOHENDRO CHANDRA GANGULI v. ASHUTOSH GANGULI*. [I. L. R., 20 Calc., 762]

### “Subject-matter

in dispute”—Jurisdiction of Munsif—Claim for partition of share less than Rs. 1,000 in family property exceeding Rs. 1,000.—In a suit instituted in the Court of a Munsif by a member of a Mahomedan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000, and the value of the whole family property exceeded Rs. 1,000. *Held* that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871), was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vyadinatha v. Subramanya, I. L. R., 8 Mad., 235*; *Kirty Churn Mitter v. Ananth Nath Deb, I. L. R., 8 Calc., 757*; *Khoorshed Hossein v. Nubbee Fatima, I. L. R., 3 Calc., 551*; and *Ram Chandra Narayan v. Narayan Mahadev, I. L. R., 11 Bom., 216*, distinguished. *HIKMAT ALI v. WALI-UN-NISSA*. I. L. R., 12 All., 506

### Value of share on

97.—Subject-matter of suit—Munsif, Jurisdiction of.—Plaintiff sued in the District Court for partition of a one seventh share purchased by him in an undivided aghraharam, of which the total value was about Rs. 10,400, and obtained a decree. *Held* that the subject-matter of the suit was the

# VALUATION OF SUIT—continued.

## 1. SUITS—continued.

share sued for and not the total value of the aghraharam, and therefore the suit should have been filed in the District Munsif's Court. *Vyadinatha v. Subramanya, I. L. R., 8 Mad., 235*, distinguished. *RAMAYYA v. SUBBRAYUDU*. I. L. R., 13 Mad., 25

98.

*Madras Civil Courts Act (Mad. Act III of 1873), s. 12—Valuation of relief—Suits Valuation Act (VII of 1887), s. 11—Suit by a purchaser at a sale in execution of decree for partition—Jurisdiction of Munsif and Subordinate Judge.*—The purchaser at a Court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Judge's Court against his vendor and certain persons, who were in possession of, and claimed to be entitled by right of purchase to, the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants. *Held* (1) that the value of the share sought to be recovered, and not the entire value of the property, should be taken to be the value of the suit for the purpose of determining jurisdiction, and that the suit was within the pecuniary limits of the jurisdiction of a District Munsif; (2) that since the disposal of the suit had not been prejudicially affected, the suits Valuation Act, s. 11, was applicable, and the decree of the Subordinate Judge should be confirmed. *Quare*—Whether the Subordinate Judge has not concurrent jurisdiction with a District Munsif in suits less than Rs. 500 in value. *Krishnasami v. Kanakasabai, I. L. R., 14 Mad., 133*. *NARAYANAN v. NARAYANAN*. I. L. R., 15 Mad., 69

99.

*Suits Valuation Act—Act VII of 1887, s. 8—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of memorandum of appeal.*—The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed, and it was ordered that the plaint be returned for presentation to the proper Court. On second appeal to the High Court,—*Held* that plaintiff's remedy was not by way of a second appeal, but he should have proceeded under Civil Procedure Code, s. 588. The petition of appeal having been allowed to be amended in accordance with this ruling,—*Held* that the Court of the Munsif had jurisdiction to entertain the suit. *CHINNASAMI PILLAI v. KARUPPA UDAYAN*. I. L. R., 21 Mad., 234

100.

*Partnerships—Suit for share of profits of partnerships after winding up and adjustment of accounts—Contract Act, s. 265—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation*



## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

property itself, determines the question of jurisdiction under s. 20, Act VI of 1871. *NAUN SINGH v. RASH BEHARY SINGH* I. L. R., 13 Cal., 255

111. — *Court Fees Act (VII of 1870), ss. 5 and 7, cls. (5) and (6)*—*Suit for pre-emption of separate plots of land not being a fractional share of a revenue-paying unit.*—*Held* that in a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue-paying area and were not themselves separately assessed to revenue, the Court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5

[I. L. R., 16 All., 493]

112. — *Redemption, Suit for—Value for purpose of jurisdiction.*—The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a *pro forma* defendant. *Held* that the value of the subject-matter of the suit was not the market value of the land, but the amount of the mortgage money. *KUBAIR SINGH v. ATMA RAM*

[I. L. R., 5 All., 332]

113. — *Madras Civil Courts Act, 1873, ss. 12 and 14—Value of improvements.*—*Per curiam* (TURNER, C.J., and MUTTUSAMI AYYAR, J., dissenting)—Where an instrument of mortgage does not expressly secure the amount to be allowed for improvements on redemption of the mortgage, the value of the improvements is not to be calculated in ascertaining the “value of the subject-matter of the suit” for the purposes of jurisdiction under s. 12 of the Madras Civil Courts Act. *Per* TURNER, C.J. (MUTTUSAMI AYYAR, J., concurring).—By the custom of Malabar, a condition is attached to all kanom demises that the mortgagor shall pay the value of improvements made by the mortgagee during the term of the demise before he can redeem, and the repayment of the sums spent in improvements is thus secured by the mortgage in the same manner as the repayment of the principal advanced, and must be calculated in determining the value of the subject-matter of the suit for the purpose of jurisdiction. *ZAMORIN OF CALICUT v. NARAYANA*

I. L. R., 5 Mad., 284

ANONYMOUS I. L. R., 5 Mad., 287 note

114. — *Jurisdiction of Munsif.*—The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right *qua* such share was under Rs. 1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding Rs. 1,000 was due, had been tacked to the mortgage, and that, until such sum had been

## VALUATION OF SUIT—continued.

## 1. SUITS—continued.

satisfied, the plaintiff could not recover possession of his share. *Held* on the question whether the Munsif had jurisdiction that the value of the subject-matter of the suit was the value of the mortgagee's right *qua* the plaintiff's share; and as the value of such right did not exceed Rs. 1,000 even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognizable in the Munsif's Court. The principle laid down in *Gobind Singh v. Kallu*, I. L. R., 2 All., 778, followed. *BAHADUR c. NAWAB JAN* I. L. R., 3 All., 822

115. — *Joint mortgage—Jurisdiction—Court-fee—Valuation of suit—“Subject-matter in dispute”*—*Act VII of 1870, s. 7, art. (ix)—Act VI of 1871, s. 20—Statute, Construction of.*—A deed of mortgage was executed by P, T, and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of P and T, the other mortgagors. *Held* by the Full Bench with reference to s. 7, art. (ix), of the Court Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo v. Nageekar*, I. L. R., 6 Bom., 32d, referred to. *Held* also, with reference to the terms of s. 2 of the Bengal Civil Courts Act (VI of 1871), that the “subject-matter in dispute” in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. *Per* MAHMOOD, J.—It is a rule of construction that, while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction. *AMAYAT BEGAM v. BHAJAN LAL* I. L. R., 8 All., 498

116. — *Usufructuary mortgage—Overvaluation of suit, Effect of Jurisdiction.*—The mere fact that a suit has been overvalued does not deprive the Court in which it is brought of jurisdiction, if the overvaluation was *bond fide* and had not the effect of altering the appellate jurisdiction, that is to say, did not cause the appeal from the judgment of the Court of first instance to lie to a different Court from that to which it would

## VALUATION OF SUIT—continued

## 1 SUITS—continued

have lain had the suit been instituted in a Court having a more limited jurisdiction. **RAJENDRO LALL GOSWAMI v. SHAMA CHURN LAHORI**

[I. L. R., 5 Cal., 188  
4 C. L. R., 417]

117

*Suit to redeem mortgaged land paying revenue to Government*—The stamp duty payable under Sch. B of Act X of 1862, on a suit to redeem mortgaged land paying revenue to Government shall be calculated on the sum for which the land is mortgaged and not on the market value of such land. **NARAYAN SUNDARI NAIR v. BALAJI VITHAL**

5 Bom., A. C., 153

118.

*Suit by tenant holder against jennu and holders of prior known in possession*—A suit brought by a tenant holder against the jennu and the holders of a prior known in possession to recover possession of the lands, may be properly treated, for the purpose of jurisdiction as a suit for land although it results in a decree for redemption on and for good as a redemption suit, would be cognizable by a Court of subordinate jurisdiction. **MARAKAN v. PARAMESWARAN**

[I. L. R., 6 Mad., 140]

119

*Court Fees Act (VII of 1870)—Dekkan Agriculturists' Relief Act (XVII of 1879) Ch II*—The valuation of a suit for redemption for purposes of jurisdiction is the amount remaining due on the mortgage or claimed on it by the mortgagee. It is that amount and the right connected with it which is the usual subject of contention in a mortgage-suit. *Per BIRWOOD J.*—The rules laid down in the Court Fees Act (VII of 1870) are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction. **REYNOLD HUEM CHAND v. BALVANT NARAYAN**

[I. L. R., 11 Bom., 501]

120.

*Dekkan Agriculturists' Relief Act (XVII of 1879) Ch II, s. 9—Appeal—Jurisdiction*—In a redemption suit the valuation of the subject-matter does not depend on the value of the mortgaged property. Where the mortgage itself is denied and the mortgagee does not say what he claims in respect of the mortgage-debt, the amount found to be remaining due on the mortgage if any amount was due at the date of the suit would represent the true valuation of the subject-matter of the suit. **REPKAND KAKKACHAND v. BALVANT NARAYAN** I. L. R., 11 Bom., 591 followed. The plaintiffs, who were agriculturists, sued to redeem certain lands alleging that they had been mortgaged to the defendants' father for Rs. 50, and that the debt had been satisfied out of the rent and profits of the mortgaged property. The defendants denied the alleged mortgage. The Subordinate Judge found that the mortgage was proved, and the mortgage-debt had been more than paid off out of the profits of the property in dispute. He therefore passed a decree awarding possession to the plaintiffs. Against the decree the defendant appealed. The District Court found that the mortgage was not established

## VALUATION OF SUIT—continued

## 1 SUITS—continued

and reversed the decree of the Subordinate Judge. Held on second appeal that no appeal lay to the District Court from the decision of the Subordinate Judge. As the Subordinate Judge found that no sum remained due on the mortgage, and as the original advance was alleged to have been Rs. 50, the suit was governed by the provisions of Ch. II of the Dekkan Agriculturists' Relief Act (XVII of 1879). **AMRITA DEVI BAPUJI v. NARAYAN GOPALJI**

[I. L. R., 13 Bom., 489]

121.

*Suit on mortgage—Suit for redemption of mortgage—Value of subject-matter of suit*—In a suit upon a mortgage where the sum due upon the mortgage is unknown, what determines the value of the subject-matter of the suit is the amount of the mortgage, the rights connected with which are the subject of contention. **RAM CHANDRA BABA v. ATHER v. JAGANNATH ARAI**

[I. L. R., 14 Bom., 19]

122.

*Court Fees Act (VII of 1870), s. 7—Suit for redemption of mortgage*—In a suit for redemption of a known mortgage the institution fee must be computed on the known debt as it originally stood. **REYNOLD HUEM CHAND v. BALVANT NARAYAN**

I. L. R., 14 Mad., 480

123

*Court Fees Act (VII of 1870), ss. 7 (12) and 17—Redemption suit against mortgagee in possession—Arrears of rent considered for, to be deducted from the mortgage amount*—In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for and the plaintiff asks for an account in taking which the arrears of rent should be deducted from the mortgage amount, Held that the court-fee should be computed according to the principal sum expressed to be secured by the mortgage. **RACHARAY PATTAR v. APPU PATTAR**

[I. L. R., 19 Mad., 16]

124.

*Suit to redeem mortgage and for rent—Madras Civil Courts Act (Mad. Act III of 1858), s. 14*—The karnavan of a Malabar taluk, having the jennu title to certain land and holding the uruma right in a certain police division to which other land belonged demised lands of both description on karnam to the defendants' taluk, and subsequently executed to the plaintiff a melknam of the first-mentioned land and purporting to sell to him the jennu title to the last mentioned land in a suit brought by the plaintiff to redeem the karnam and to recover arrears of rent, Held that for the purposes of determining the jurisdiction of the Court of appeal, the value of the subject-matter of the suit was the aggregate value of the two heads of relief. **KONNA PATTAR v. KANNA KARA**

I. L. R., 18 Mad., 338

125

*Restitution of conjugal rights, Suit for—Burma Courts Act 1870, s. 43—Appeal*—The proviso in s. 43 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an

## VALUATION OF SUIT—continued.

### 1. SUITS—concluded.

amount or value capable of being estimated in money, and that that amount or value must fall within certain specified limits. A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon. *GOLAM RAHAMAN v. FATIMA BIBI*

[I. L. R., 13 Cal., 232]

126. A suit for restitution of conjugal rights is not one to which any special money value can be attached for the purposes of jurisdiction. *Golam Rahman v. Fatima Bibi*, I. L. R., 13 Cal., 232, followed. *MOWLA NEWAZ v. SAJJIDUNNISSA BIBI* . I. L. R., 13 Cal., 378

127. Sale, Suit to set aside—*Sale in execution of decree—Value of property sold.*—In a suit to set aside an auction sale, the plaint must be stamped as if the suit were for the recovery of the property. *DEARU CHOWDHURY v. ISHAN CHUNDER DAS* . 9 C. L. R., 231

128. Share of land, Suit for—*Suit relating to land—Rental of share.*—In valuing a suit relating to a share of land, the rental of the share is to be the criterion of the stamp. *RAM BUKSH THAKOOR v. AJOODHYA LAL*

[2 W. R., Mis., 45]

129. Waste lands, Suit for—*Act XXXIII of 1863 (Waste Lands)*, s. 5, *Suit under.*—In a suit under s. 5, Act XXXIII of 1863, by a claimant to waste land proposed to be sold or otherwise dealt with on account of Government, or by an objection to the sale or other disposition of such land, the plaint must be on a stamp of Rs. 100. *GREENSH CHUNDER ROY v. COLLECTOR OF SYLHET*

[7 W. R., 349]

### 2. APPEALS.

130. Question of valuation—*Appellate Court, Power of—Act XXVI of 1867.*—An Appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the valuation of the property in suit. *MAFIZUDDIN v. KARIMUNNISSA BIBI*

[6 B. L. R., Ap., 11: 14 W. R., 381]

*ISHAN CHANDRA MOOKERJEE v. LOKENATH ROY*

[6 B. L. R., Ap., 12: 14 W. R., 451]

131. Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), s. 21, cl. (a)—“Value of the original suit”—“Amount or value of the subject-matter of the suit”—*District Judge, Jurisdiction of—General Clauses Act (I of 1887)*, s. 3, cl. 13.—For the purpose of determining the proper Appellate Court in a civil suit, what is to be looked to is the value of the original suit, that is to say, the “amount or value of the subject-matter of the suit.” Such “amount or value of the subject-matter of the suit” must be taken to be the value assigned by the plaintiff in his plaint, and not the value as found by the Court, unless it appear that, either purposely or through gross negligence, the true

## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

value of the suit had been altogether misrepresented in the plaint. *MAHABIR SINGH v. BEHARI LAL*

[I. L. R., 13 All., 320]

132. Ground of appeal—*Going to the whole of the respondents’ decree.*—Where one of several appellants takes a ground of appeal which goes to the root of the respondent’s case and which, if successful, would deprive the respondent of his decree as a whole, and not merely of his interest in it quoad the particular appellant, the Appellate Court is justified in refusing to hear such appellant on such ground as aforesaid unless he pays a Court-fee sufficient to cover the whole relief obtainable on such ground of appeal. *BUJHAWAN RAI v. MAKUND LAL* . I. L. R., 15 All., 112

133. Suit of the nature cognizable in Courts of small Causes.—For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. *NAZAR HUSAIN v. KESRI MAL* . I. L. R., 13 All., 581

134. Jurisdiction of District Judge—*Valuation put by plaintiff in his plaint—Amount awarded by decree—Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887).*—The pecuniary jurisdiction of a Civil Court on its appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff. There is nothing in Act XII of 1887 to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit. *Mahabir Singh v. Behari Lal*, I. L. R., 13 All., 320, referred to. *MADHO DAS v. RAMJI PATAK* . I. L. R., 16 All., 286

135. Jurisdiction—*Appellate Court.*—Where it appears on appeal that the suit has not been rightly valued, and if rightly valued the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below. *SHEO GOBIND RAUT v. ANHAR NARAIN SINGH* . 5 B. L. R., Ap., 17

136. Undervaluation—*Ground for dismissing appeal—Insufficient stamp.*—Where an appeal was brought on an insufficient stamp, the appeal was dismissed without prejudice to the appellant bringing a fresh appeal within twenty days on a full stamp. *WALI ALAM v. NASIRAN*

[3 B. L. R., Ap., 104]

*S. C. WOLEE ALUM v. MISRUN* . 12 W. R., 50

137. Ground for dismissing appeal.—When a suit has been admitted upon a certain stamp, tried, and decreed for the

## VALUATION OF SUIT—continued

## 2. APPEALS—continued.

plaintiff's declaration' is no ground for dismissing the defendant's appeal. **RAMCHANDER KHAN v. RAMKISHORE KOWAR** 5 B. L. R., Ap., 30

138. — *Insufficiently stamped appeal*—Deputy Registrar Power of Civil Procedure Code, 1859 s. 31—The Deputy Registrar has no authority to make an order returning a petition of appeal when the stamp fee paid upon is insufficient. The right course for that officer if he requires as to stamps are not complied with, is to lay the matter before the Court. But if the appellant is ready to pay what is required, then whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time. **AMSTER ALL v. HALL CHAND BOSS** 24 W. R., 258

139. — *Overvaluation—Refused of stamp duty*—Where excess stamps had been filed in consequence of an overvaluation of the appeal, the surplussage was ordered to be refunded. **IN THE MATTER OF GRANT** 14 W. R., 47

140. — *Law applicable to valuation*—Law in force at presentation of appeal—The valuation of an appeal must be according to the Act in force at the time of its presentation, and the original valuation is a law which at the period of appeal can have no influence in the decision. **AYOBYNATH** 5 Mad., Ap., 44

**BHAGYATHY KOOER v. BHAGYATHY KOOER** 15 W. R., 272

141. — *Card Procedure Code*—s. 229—Change of law between date of original suit and date of decree, Effect of on jurisdiction—The subject-matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal, and not of the suit which has led to it. For the purpose of jurisdiction, a case under s. 229 of Act VIII of 1859 is a fresh suit, and not a continuation of the suit in which the claim is made, and that where by reason of a change in the law as to the mode of valuation, suits for the purpose of jurisdiction between the case of the original suit and the claim, the Court that deals with the original suit ceases to have jurisdiction, or the subject-matter of the claim, the Court cannot try the claim. **MUTHUMAL v. CHEN NAYAGU SINGH** 1 B. L. R., 4 Mad., 220

142. — *Bengal Civil Courts Act (Beng. Act VI of 1871), s. 22—Subject-matter in dispute—Jurisdiction of the High Court*—The appeal from the decree or order of a subordinate Judge or Munsif where the amount or value of the subject-matter in dispute in a suit exceeds Rs. 500, lies to the High Court, although the amount or value of the subject-matter in dispute in appeal is less than Rs. 500. **IN THE MATTER OF THE APPEAL OF DUTTA CHAND** 9 B. L. R., 180

**C. DOOLY CHETTY v. NIRMAL SINGH, SURESHWAR SINGH v. SURESHWAR SINGH, SURESHWAR SINGH v. SURESHWAR SINGH** 18 W. R., 281

## VALUATION OF SUIT—continued

## 2. APPEALS—continued.

So also held, under s. 18, Act XVI of 1858 by the majority of the Court (**PARSONS J.**, dissenting) of the North-Western Provinces in **MAROKED HOSSEIN KHAN v. SHIB DUTTA** 5 N. W., 108 Agta. F. B., Ed. 1874, 279

**MAROKED HOSSEIN v. NAZIR KHAN** 1 N. W., 117 Ed. 1873, 203

**CHANDER BHAN SINGH v. JAIRAM GATE** 5 N. W., 170

**See DAKHATI DASI v. MOHAMMAD DOST** 9 B. L. R., 183 note

143. — *Appeal where one suit has been split up into several*—Where a suit for Rs. 12,777 was brought against defendants whose interests were not identical, and the Judge ordered separate trials of the different causes, as provided in s. 8, Act VIII of 1859, an appeal by the defendants from the decision in one of the suits valued at Rs. 145 was held not to lie to the High Court. **LAM COOMAR DOST v. HEDDOO MOHAMMAD DASS** 15 W. R., 31

144. — *Interest on amount of appeal*—Where an appeal was made from an order in execution of the decree in a suit in which both the amount sued for and the amount of the decree were below Rs. 500, but by reason of interest the appeal was valued at more than that sum, the case was held to come within the principle of *in re Dutt Chaud.* **RAJ PRANTH V. SINGH BHAU DOST v. MAHENDRA DASI** 9 B. L. R., 187 note, 316

145. — *Sub-judice in dispute—Jurisdiction of High Court*—The effect of decree—Act XIII of 1861—An appeal from an order of a subordinate Judge in execution of a decree lies to the District Judge, not to the High Court, where the amount of the suit is under Rs. 500, although the amount to be recovered in execution has, by the addition of interest since decree, grown to a sum Rs. 500. **LUTTAJI KOOER v. RAM DASS** 10 B. L. R., 220, 19 W. R.,

146. — *Execution of decree*—When the High Court called up an appeal to the Zilla Judge, and tried it as a regular appeal and passed a decree thereon—Held that this did not entitle the parties to prefer an appeal to the High Court in the proceedings in execution of that decree such appeal would lie to the Zilla Judge. **MOGGA SARKY v. BYRATH LAL** 10 B. L. R., 231 note 15 W. R.,

147. — *Sum over Rs. 500—Appeal heard by Judge*—The High Court refused a case to the Zilla Judge. The case having been second decree of

## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

Court of the District Judge, who declared that it was not cognizable by him, as the value of the property in dispute exceeded Rs.5,000. A regular appeal was preferred to the High Court. *Held* that the entire proceedings subsequent to the first decree of the Subordinate Judge were *ultra vires* and could not be recognized, and that the appeal would not lie. **THAKOOR PERSHAD SINGH v. MAHADEO SINGH**

[5 N. W., 210]

**148.** ——— **Computation of value—Valuation of appeal for jurisdiction—Mad. Act III of 1873 (Madras Civil Courts Act).**—According to s. 18 of Act III of 1873 (the Madras Civil Courts Act), it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. *Held*, therefore, where the amount of the original suit was more than Rs.5,000, and an appeal was preferred to the District Court, but the amount in dispute in the appeal did not exceed Rs.5,000, that the District Court had no jurisdiction to hear the appeal. **MUTHUSAMI PILLAI v. MUTHU CHIDAMBARA CHETTI**

[7 Mad., 356]

**149.** ——— **Appeals in measurement cases—Miscellaneous petitions.**—Petitions of appeal in cases to obtain an order for measurement may be written on the stamp used for miscellaneous petitions. **SMITH v. NUNDUN LAL**

[6 W. R., Act X, 13]

**150.** ——— **Right to measure valued at specified amount.**—Where a zamindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation, and not upon a stamp used for miscellaneous petitions. **OOMA CHURN BISWAS v. SHIBNATH BAGCHIE**

[3 W. R., 14]

**151.** ——— **Appeal from order declaring party to have no locus standi—Miscellaneous appeal—Petition.**—An appeal from an order of the lower Appellate Court, declaring that a party who claimed to be in possession of property taken in execution of a decree to which he was no party, and with which he had no concern, had no *locus standi* in the execution case, is in the nature of a miscellaneous appeal, and should be on a stamp for an ordinary petition. **MOHESH CHUNDER BANERJEE v. CHUNDER MONER DABEE**

[9 W. R., 139]

**152.** ——— **Appeal from order rejecting application to set aside ex-parte decision—Summary appeal.**—The stamp required for a petition of appeal from an order rejecting an application to set aside an *ex-parte* decision under s. 119, Act VIII of 1869, was a two-rupee stamp. Such an appeal was treated as a summary and not a regular appeal. **PARBUTTY v. GREDHAREE LALL**

[4 W. R., Mis., 15]

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## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

is also of the nature of a miscellaneous appeal, and is to be valued and stamped as such. **KOSSELLA KOER v. BEHAREE PATUCK**

[12 W. R., 70]

**154.** ——— **Appeal by mortgagee on question of lien.**—Where the appeal by the mortgagee was not with reference to the property, but to a mortgage lien,—*Held* that the valuation for the purpose of stamp in such appeals should be with reference to the value of the lien for the mortgage-debt of incumbrance, and not with reference to the value of the mortgaged property. **MAHOMED SHEERUN KHAN v. MISSER KOONDUN LALL. BHEKA v. NUND KISHORE**

[Agra, F. B., 158; Ed. 1874, 119]

**155.** ——— **Appeal in suit for profits in respect of several years—Court-fees—Distinct causes of action—Distinct subjects—Act VII of 1870 (Court Fees Act), s. 17—Civil Procedure Code, ss. 43, 44.**—In an appeal in a suit for recovery of profits under s. 93 (h) of the N. W. P. Rent Act in respect of several years, the proper Court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year. **MUHAMMAD MALICK KHAN v. NURHAI BIBI**

[I. L. R., 7 All., 761]

**156.** ——— **Appeal from rejection of claim by forest settlement officer—Madras Forest Act (I of 1882), s. 10—Appeal to the District Court—Court Fees Act, sch. II, art. 11 (a); art. 17, cl. (vi).**—An appeal to the District Court from the rejection of a claim by a forest settlement officer under cl. 2 of s. 10 of the Madras Forest Act, 1882, falls under art. 17, cl. (vi), and not under art. 11 (a) of sch. II of the Court Fees Act, 1870. **KAMARAJA v. SECRETARY OF STATE FOR INDIA**

[I. L. R., 8 Mad., 22]

**157.** ——— **Appeal from order disallowing an application to file an agreement to refer to arbitration—Court-fee, Mode of calculation of.**—*Per* OLDFIELD, J.—The Court-fee payable on a memorandum of appeal from an order under s. 523 of the Civil Procedure Code, disallowing an application to file an agreement to refer to arbitration, is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal. **DATA NAND v. BAKHTAWAR SINGH**

[I. L. R., 5 All., 333]

**158.** ——— **Appeal against award under Land Acquisition Act—Court Fees Act (VII of 1870), ss. 5 and 8.** An appeal against an award made by the District Judge under Land Acquisition Act (I of 1894) was filed in the High Court; the appeal memorandum bearing a Court-fee stamp of Rs.10 only was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient. *Held* that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, s. 8, and that there having been no decision by the taxing

## VALUATION OF SUIT—contd

## 2 APPEALS—contd

officer under a 5 was open to the respondent to raise the objection on appeal at the bar: **HARTY CHET DEPUTY COLLECTOR LELLARY**

[I. L. R., 21 Mad., 289]

158. — Appeal from order of Judge under Land Acquisition Act (I of 1894) on reference by Collector as to disposal of compensation awarded *Court Fees Act (VII of 1900)*. In an appeal to the High Court from the order of the District Judge made upon a reference by the Collector under ss. 18 and 19 of the Land Acquisition Act 1894, as to the disposal of compensation awarded for land taken up by Government under the Act, the memorandum of appeal must be stamped as an appeal from an original decree: **SHEO RATTAY RAI v. MOHNI I. L. R. 21 All 354**

160. — Appeal from order disposing of dispute under Civil Procedure Code s. 322B—*Disputes as to judgment delicti* *labeled to the law* *are of appeal* *Court Fees Act VII of 1900 s. 11*. An appeal from the decision of a District Judge under s. 322B of the Civil Procedure Code falls directly within the exception of art. 1 sch. II of the Court Fees Act (VII of 1900) and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad rem* stamp: **Prasanna Ayngar v. Prasanna Nagakar I. L. R., 4 Mad. 420** dismissed from **AHMAD KHAN v. MADHO DAS**

[I. L. R., 7 All., 565]

161. — Appeal in partition suit—*Court Fees Act s. 11 art. 17 cl. 6* *Stamp on memorandum of appeal in partition suit*—The stamp fee payable on appeals to the High Court in suits asking for partition, the separation of a share and for the possession of that share after separation is that leviable under art. VI cl. 1 sch. II of the Court Fees Act. For the purpose of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp fee should be governed by a different principle: **KIRTI CHAND MITTAR v. ATWATH NATH DAS**

[I. L. R. 8 Calo. 57 11 C. L. R., 85]

See **BADYANATH ADYA** **MAHESH JAL ADYA**

[I. L. R. 17 Calo., 880]

162. — Appeal from decree for possession disallowing perpetual character of leases—A suit for possession of certain lands having been decreed on the ground of plaintiff's right of occupancy but the perpetual nature character of the lease under which the claim had been made having been disallowed an appeal was preferred to have it declared that the leases were perpetual. *It is* that, as the value of the claim would be the difference in the value of the land as held under a perpetual tenure as a fixed rent, or an ordinary tenure at a fluctuating rent, and at this might be an extremely difficult calculation, the stamp fee upon the appeal would be properly fixed according to the valuation put by the appellant upon the subject-matter of his claim: **ABDUL KAM MUMTAZ v. WELLS**

24 W. R., 454

## VALUATION OF SUIT—contd

## 2 APPEALS—contd

163. — Appeal from decree in suit for possession and mesne profits—*Mesne profits to be determined as execution of decree*—*Almost on of appeal against decree*—In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of title suit. The defendant appealed against the decree on the ground that he should not have been directed to pay the mesne profits or costs. In the valuation of the appeal for the purposes of the Court Fees Act, nothing was included on account of the mesne profits. *Held* that no stamp duty was payable in respect of the mesne profits suit, but to the extent of the suit. **MAHARAJA v. JASU KIRAMATTA**

I. L. R. 21 Mad., 371

See **RAMAKRISHNA BHARAJI BHIMARAJ**

[I. L. R., 15 Bom., 418]

164. — Appeal under cl. 10 of Letters Patent High Court, N.W.P. from an order of remand under s. 562 of the Code of Civil Procedure—*Court Fees Act (VII of 1870) s. 11 art. 11*—*Held* that in an appeal under s. 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under s. 543 of the Code of Civil Procedure the proper Court-fee is Rs. 2. **BALU RAI v. MAHABIR RAI**

I. L. R. 21 All., 178

165. — Appeal under Agency Rules No. 22, under Act XXIV of 1838—*Court Fees Act (VII of 1870)*—An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1838 against the decision of the Governor's Agent at Nagapattinam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act. **REFERENCE UNDER COURT FEES ACT s. 5**

[I. L. R., 22 Mad., 163]

166. — Appeal in suit to enforce a right of pre-emption—*Appeal by purchaser*—*Court fee—Act VII of 1870 (Court Fees Act) s. 7 (s) and (vi)*—Where in a suit to enforce a right of pre-emption a decree was passed against the vendee-defendants, and they appealed from the same on the grounds that they were entitled to receive from the plaintiff-purchasers a sum larger than that found by the Court of first instance to have been the purchase-money and also that the plaintiff had stopped themselves from asserting the right by refusing to purchase—*Held* that the nature of the suit was not changed in appeal and that, on the contrary the subject-matter of the dispute between the parties was the right of pre-emption the value of which, for the purposes of Court fee, was to be determined in manner directed by s. cl. (c) of the Court Fees Act, VII of 1870. **Ram Lakhan Rao v. Bandan Rao** distinguished. Where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established, as the case may be, no



# VALUATION OF SUIT—continued.

## 2. APPEALS—continued.

matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in art. (vi) of s. 7 of the Act. Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other. **HAFIZ AHMAD v. SOBHA RAM**

[I. L. R., 6 All., 488]

167. — Appeal in suit for redemption—*Court Fees Act (VII of 1870), s. 7, cl. 9—Madras Civil Courts Act (Mad. Act III of 1873), s. 13—Suits Valuation Act (VII of 1887), s. 11—District Judge, Jurisdiction of.*—In a suit in the Court of a Subordinate Judge to redeem certain land on payment of R1,625, being a quarter of a debt for which it had been mortgaged together with other land, a decree was passed for redemption of part of the land, but the Court held that the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court paying *ad valorem* Court-fees computed on the value of the land exonerated only. *Held* (1) that the *ad valorem* Court-fees should be computed on one-fourth of the mortgage-debt; (2) that the appeal lay to the District Court, and since Act VII of 1887, s. 11, did not apply to the case, the petition of appeal should be returned for presentation in that Court. **VASUDEVA v. MADHAVA**. I. L. R., 16 Mad., 326

168. — *Court Fees Act (VII of 1870), s. 17—Claim by mortgagor for rent in same suit—Court-fee on appeal.*—A suit to redeem a mortgage for R3,500 and to recover a certain sum on account of rent was dismissed so far as the prayer for redemption was concerned, and also part of the claim for rent was disallowed. It did not appear that the arrears of rent were intended to be set off against the mortgage-debt. The plaintiff appealed. *Held* that the Court-fee should be computed on the principal amount of the mortgage-debt and on the claim which had been disallowed on account of rent. **RAMA VARMA RAJAH v. KADAR**. I. L. R., 16 Mad., 415

169. — Appeal in suit for redemption of usufructuary mortgage—*Bengal Civil Courts Act (VI of 1871), s. 22.*—The plaintiffs sued for the possession of certain immovable property, alleging that they had mortgaged such property to the defendants, and that the mortgage-debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below R5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit, it was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute,"

# VALUATION OF SUIT—continued.

## 2. APPEALS—continued.

within the meaning of s. 22 of Act VI of 1871 was the mortgage and the mortgagees' rights under it, and that, the value of this being only R2,000, the appeal should have been preferred to the District Court. Second Appeal No 1039 of 1877 dissented from. **GOBIND SINGH v. KALLU** I. L. R., 2 All., 778

170. — Appeal from decree making property liable for mortgage-debt—*Court Fees Act (VII of 1870), s. 6, sch. II, art. 17.*—In a suit on a mortgage-bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of R10 only. *Held* that the proper stamp to be paid was not R10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property. **VENKAPPA v. NARASINHA** I. L. R., 10 Mad., 187

171. — Appeal from decree for ejectment and mesne profits—*Court Fees Act (VII of 1870), s. 7—Court-fee on memorandum of appeal.*—A memorandum of appeal from a decree directing ejectment and awarding mesne profits is chargeable with Court-fees calculated both on the land and on the mesne profits. **BRAHMAIA v. LAKSHMINARASINHAM** [I. L. R., 16 Mad., 310]

172. — Appeal in suit for ejectment—*Claim by tenants for improvements of greater value than plaintiff valuation—Appeal by tenants for improvements—Court-fees payable on such appeal.*—In a suit for ejectment, in which the plaintiff land was valued at R50 and court-fee paid on that valuation, the tenants claimed R500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court-fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court-fee,—*Held* that, as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land. **REFERENCE UNDER COURT FEES ACT, s. 5** I. L. R., 23 Mad., 84

173. — Appeal, Memorandum of, under Bengal Tenancy Act (VIII of 1885), s. 108, cl. 3—*Court Fees Act (VII of 1870), sch. II, art. 17, cl. 6.*—The Court-fee payable on a memorandum of appeal presented to the High Court under s. 108, cl. 3 of the Bengal Tenancy Act of 1885 is that prescribed by art. 17, cl. 6, of sch. II of the Court Fees Act. **PETU GHORAI v. RAM KHELAWAN LAL KHURUT** I. L. R., 18 Calc., 667

174. — Court-fees stamp on memorandum of second appeal to High Court from decision of District Court on appeal

## VALUATION OF SUIT—contd next

## 2 APPEALS—continued

from Talukhdari Settlement officer—*Court Fees Act (VII of 1870), sch II art 1 and sch I, art 1*—Application for execution of decree for partition—*Gujarat talukhdars Act (Bom. Act VI of 1888)*. A second appeal from an order rejecting an application for execution of a partition-decree under the Gujarat Talukhdars Act (Lomistay Act VI of 1888) is not within the contemplation of art. 1, sch. I but is an application falling under art. 1 of s. h. II of the Court Fees Act. (VII of 1870). The Court-fee stamp of Rs 2 should therefore be affixed to the memorandum of appeal. **JAMNABAI DEVABHAI v GOYABHAI HIRABHAI** I. L. R., 16 Bom., 408

175 — Appeal from decree payable by instalments. *Court Fees Act (VII of 1870), s 16 and sch I art 1*—*Court fee on appeal from decree granting partial relief*. The Court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against. Where a decree was made payable by three instalments and the plaintiff appealed on the ground that it should not have been made so payable—*Held* that the Court-fees should be calculated upon the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree. **LEKHN CHANDER ASH v KHODA BUXER MANSUR** I. L. R., 19 Cal., 272

178 — District Judge, Jurisdiction of Madras Civil Courts Act (III of 1873) s 13 (2)—*Appeal from Subordinate Judge*—Certain members of a Nephth family sued the others in a subordinate Judge's Court to recover their distributive share under Mahomedan law. The property to be divided was more than Rs 1000 in value but the share claimed by the plaintiffs was less. The subordinate Judge passed a decree against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. On appeal to the High Court the decision of the District Judge—*Held* that it is the value of the share claimed and not the value of the property from which that share has to be taken that is the value of the subject-matter of the suit, within the meaning of cl. 2, s 13 of the Madras Civil Courts Act, and therefore the District Court had jurisdiction to entertain the appeal. **KESAVAKUTTI v ACHOTTI** I. L. R., 423

177 — Madras Civil Courts Act (III of 1873), s 12—*Valuation of relief—Suit for partition*. On an appeal against a decree of a subordinate Judge ordering a suit brought by the members of one family and delivery of a moiety of another for partition and *mean* it appeared that the value of the share claimed was less than Rs 5000. *Held* that the appeal lay to the District Court. **Krishna v**

## VALUATION OF SUIT—continued

## 2 APPEALS—continued.

Kanikarabai, 1 L. R., 15 Mad., 153, followed. **NARAYANAN v NARAYANAN**

[I. L. R., 15 Mad., 89]

178. — Madras Civil Courts Act (III of 1873), s 13—*Civil Procedure Code (Act XIV of 1882), s 331*—The plaintiff, being the holder of a decree of a subordinate Court for more than Rs 5000, was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property which was the subject of the application, being valued at less than Rs 5000, and the subordinate Judge directed that the application be registered as a regular suit under the Civil Procedure Code, s. 331, and ultimately passed a decree in favour of the plaintiff. *Held* that the valuation of the appeal for the purpose of jurisdiction was to be taken as being less than Rs 5000 notwithstanding that the subject-matter of the original suit was valued above that sum, and that the appeal lay to the District Judge, and not to the High Court. **HAJIRA v NAINAN KUTTI. MAHOMED v NAINAN KUTTI** [I. L. R., 13 Mad., 529]

179 — *Suits for account*—*Civil Procedure Code (Act VII of 1857), s 8*—*Valuation for purposes of Court fees and for purposes of jurisdiction—Suit for account*—In a suit for an account the valuation entered in the plaint for the purpose of fixing Court-fees determines the question of jurisdiction, the valuation for both purposes being the same under s. 8 of Act VII of 1857. The plaintiff sued for an account, and valued the relief sought at Rs 120. The suit was filed in the Court of a Subordinate Judge of the first class. The subordinate Judge rejected the claim. Thereupon the plaintiff appealed to the High Court, valuing his claim in appeal at Rs 500. *Held* that the appeal lay to the District Court, and not to the High Court. **BHAGYANATH MANSURI v MENTA BAFERAO** [I. L. R., 18 Bom., 40]

180. — *Suits for account—Court fee stamp—Amount of claim as fixed by plaintiff—Relief incidental to the principal relief*—According to s. 8 of the Suits Valuation Act (VII of 1857), in suits for taking an account the Court fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff. In a suit for taking an account the plaintiff having obtained several items which were all incidental to the chief item of relief, the plaintiff was held to be substantially one to have a minor plaintiff's estate administered, that is, to have accounts taken and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account. The plaintiffs having put the valuation of the suit at Rs 120 in the plaint, *Held* that the High Court had no jurisdiction to hear the appeal against an order rejecting the plaint. The appeal lay to the District Court. The appeal was therefore returned for presentation in the proper Court. **HAI AMBA v PRASADIVANDAS DILLIBHARAN** [I. L. R., 19 Bom., 193]

## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

181. — *Suits Valuation Act (VII of 1887), s. 8—Suit for account—Court Fees Act (VII of 1870), s. 7 (iv), cl. (f), and s. 11—Bombay Civil Courts Act (XIV of 1869), s. 26.*—In a suit for an account of partnership dealings, the plaintiffs valued the claim approximately at Rs600. The Subordinate Judge passed a decree awarding to the plaintiffs a sum of Rs30,830-9-2. The plaintiffs thereupon paid an additional Court-fee of Rs900 under s. 11 of the Court Fees Act (VII of 1870). The defendants appealed to the High Court from the decree of the Subordinate Judge. The plaintiffs objected that the appeal lay to the District Judge, and not to the High Court. *Held* that the value of the subject-matter of the suit exceeded Rs5,000; the appeal therefore lay to the High Court under s. 26 of Act XIV of 1869. **IBRAHIMI ISSAJI v. BEJANJI JAMESDJI**. I. L. R., 20 Bom., 285

182. — *Bombay Civil Courts Act (XIV of 1869), s. 26—Administration suit—Suit filed in second class Subordinate Judge's Court—Decree in such a suit—Appeal from such decree.*—The plaintiff filed an administration suit in the Court of a Subordinate Judge of the second class, valuing the relief claimed at Rs130. The Subordinate Judge found that the property in suit was worth over a lakh of rupees, that the liabilities came to Rs5,729, and that the defendant was indebted to the estate in the sum of Rs5,199. He drew up a preliminary decree, directing (*inter alia*) that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court, on the ground, that the subject-matter exceeded Rs5,000. *Held*, reversing the order of the District Judge, that the appeal lay to the District Court. **SRET KAVASJI MANCHERJI v. DINSHAJI MANCHERJI**. I. L. R., 22 Bom., 963

183. — *Court Fees Act (VII of 1870), sch. I, art. 1, sch. II, art. 17—Suit on bond.*—In a suit upon a hypothecation-bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent. *Held* that the Court-fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered. **RAMPASAMI v. SUBBUSAMI**. I. L. R., 13 Mad., 508

184. — *Suit for ejectment—N.-W. P. Rent Act, s. 93, cl. (h)—General Clauses Act (I of 1857), s. 39, cl. (15)—Subject-matter of suit—Appeal valued for purposes of jurisdiction at a higher amount than the suit.*—Where a plaintiff in a suit under s. 93 of the N.-W. P. Rent Act valued his suit at Rs46-3, which valuation was not objected to either by the defendant or the Court, and subsequently, being defeated in his suit, preferred an appeal, which he valued at a very much greater amount, *Held* that he must be bound by the valuation put by him upon his suit, and could not by

## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint. **Ram Raj Tewari v. Girnandan Bhagat, I. L. R., 15 All., 63**, distinguished. **Alahabir Singh v. Behari Lal, I. L. R., 13 All., 320**, referred to. **RADHA PRASAD SINGH v. PATHAN OJAH** [I. L. R., 15 All., 363]

185. — *Court Fees Act (VII of 1870), s. 10, cl. 2, s. 12, cl. 11, sch. I, art. 17, cl. 6—Order in appeal by defendant for payment of fee by plaintiff.*—The plaintiffs, having raised a claim to a kanom attached in execution of a decree against their undivided brother, which was allowed in part, sued for a declaration of their title to four-fifths of the Kanom amount, adding to the plaint a Rs10 stamp. The plaintiffs obtained a decree, against which the defendant appealed to the District Court. While the appeal was pending, the District Judge, holding that the Court-fee paid on the plaint was insufficient, ordered that the plaintiffs should pay the balance due on an *ad valorem* computation of the fee, and in default, that the suit should stand dismissed. The plaintiffs first became aware of this order on the 26th March; the balance was not paid within the time fixed by the District Judge for the payment to be made, and on the 28th March he accordingly made an order dismissing the suit. *Held* that the plaint was sufficiently stamped, and that, in any case, the order dismissing the suit while the appeal was still pending was irregular. **КАМНАТИН v. КЕННАМЕН** [I. L. R., 15 Mad., 288]

186. — *Judge on appeal dealing with valuation of suit irregularly—Appeal by one of several defendants—Court Fees Act, s. 10, cl. (2), s. 12, cl. (2).*—The plaintiff sued four persons to recover, with arrears of rent, possession of three parcels of land and obtained a decree in the Court of a District Munsif. The suit was valued at Rs99-8-0. Defendant 4, who claimed to be entitled as jenni to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at Rs1,164-8-0, and he made an order that additional Court-fees should be paid accordingly; the order not having been complied with, he made an order, "Original suit rejected." He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant 4 with costs. On appeal against the above order and decree, *Held* that the order of the District Judge was irregular, and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law. **KEBALA VARMA v. CHADAYAN KUTTI**

[I. L. R., 15 Mad., 181]

187. — *Suit for declaration of title and for injunction—Consequential relief—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation Act (VII of 1887), s. 8.*—Where plaintiffs sued for a declaration that they were entitled to share in certain talukdhari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted for an order to defendant to

## VALUATION OF SUIT—continued

## 2 APPEALS—continued

keep a correct account of the timber removed the first class subordinate Judge rejected the claim for want of jurisdiction—*Held* that the suit was one for a declaration and consequential relief under s 7 cl 4 (i) of the Court Fees Act and that, as the claim was valued at Rs 30 only the appeal lay under Act VII of 188 s 8 to the District Court. An injunction is in the nature of consequential relief. **GRAS SINGJI v LAKSHMANINGJI** I L R, 18 Bom, 100

188 ———— *Suit for injunction and specific performance—Suits Valuation Act (VII of 1887) s 8 Court Fees Act (VII of 1870)—Valuation for purposes of jurisdiction—*The provisions of s 8 of Act VII of 1887 apply to Appellate Courts as well as to Courts of first instance, and the value of the subject matter of suits for the purposes of jurisdiction on must be determined by the provisions of that section. In a suit of the description mentioned in s 8 of Act VII of 1887 the plaintiff valued his claim at Rs 64 for the computation of Court fees and at Rs 1400 for purposes of jurisdiction. *Held* that the appeal from the decree of the Court of first instance lay to the District Court, and not to the High Court. **BAI VARUNDA LAKSHMI v BAI MANEGAVEI** I L R, 18 Bom, 207

189 ———— *Bengal N W P and Assam Civil Courts Act (XII of 1887), s 21 sub s (1) Value of the original suit—*Where the value of a suit was found by the lower Court to be less than Rs 5000 and the plaintiff contested that finding and preferred his appeal to the High Court on the valuation of Rs 600 made in his plaint—*Held* that the words "value of the original suit" in sub-s (1) s 21 of the Bengal N W P, and Assam Civil Courts Act (XII of 1887) did not mean the value as found by the original Court and the appeal was rightly preferred to the High Court; that as it did not appear in the present case that the overvaluation was the result of any design to change the venue of appeal the question whether "value" in the said section should be taken to be *bona fide* value need not be considered. **Lakshman Bhaskar v Babaji Bhaskar**, I L R 8 Bom 31 and **Makabir Singh v Behari Lal** I L R 13 All, 820, approved. **NILMOSY SINGH v JAGABANDHU ROY** [I L R, 23 Calc, 536]

190 ———— *Court Fees Act (VII of 1870) s 15 and sch II art 71, cl iii—Declaratory decree Suit for—Consequential relief—Right of priest to *charas* (offerings to idol)—Suit for arrears of maintenance—*In a suit upon an order executed by the priest of an idol for recovery of arrears of maintenance and for a declaration that the money due was realizable from the surplus of the *charas* (offerings to the idol) and recoverable from the defendant in office the original Court passed a decree for the arrears but refused to make the declaration. The plaintiffs appealed only against the order refusing the declaration, the memorandum of appeal bearing a Court fee stamp of Rs 10. The respondents objected that the declaration asked for in appeal involved consequential relief, and that an ad

## VALUATION OF SUIT—continued.

## 2 APPEALS—continued

valorem fee was payable by the appellant. *Held* the memorandum was correctly stamped under s 16 and cl ii art 17, sch. II of the Court Fees Act (VII of 1870). **Fenappa v Narasimha**, I L R, 10 Mad 167, and **Vithal Krishna v Balakrishna Janarand**, I L R, 10 Bom, 610, distinguished. **GIRJANUND DATTI JHA v SAILAJANUND DATTI JHA** I L R, 23 Calc, 645

191 ———— *Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject matter—Original valuation by plaintiff—Court Fees Act (VII of 1870), s 7 (iv) (c)—*A plaintiff was granted a decree (which was affirmed on appeal to the Subordinate Court) declaring a sale-deed invalid on the ground that it had been obtained by fraud coercion and undue influence and without consideration. The suit had been originally valued by plaintiff at Rs 500 but by an order of the Munsif's Court that figure was altered to Rs 5000 the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal. *Held* that s 7 (iv) (c) of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted. Whether the reference to an appeal in the sub section applies to a case in which the subject matter of the appeal is not co-extensive with the subject-matter of the suit—**Quere** **Karna Khan v Dargay Singh** I L R, 5 All, 331 considered. **SANITA MAVALI v MINAMMAL** [I L R, 23 Mad, 490]

192 ———— *Memorandum of appeal to Special Judge under Bengal Tenancy Act—Court Fees Act (VII of 1870) s 12 and 17, sch II, art 1, cl (b) part II, art 17, cl (iv)—Bengal Tenancy Act, s 104 cl (2) s 108 cl (2), and s 189—Joinder of parties in one application—Rule 25 of Rules of Government of India under Bengal Tenancy Act—*A number of tenants were joined as defendants in a proceeding for settlement of rents under s 104 cl 2, of the Bengal Tenancy Act and an appeal preferred by the landlords under s 108 cl 2 from the Revenue Officer's decision making all or nearly all the tenants respondents. The appeal was dismissed by the Special Judge on the ground that as many Court fees of Rs 10 each as there were tenants defendants had not been paid and the appellants petitioned the High Court to set aside the order under s 623 of the Civil Procedure Code. *Held* by a Full Bench that the Local Government acted within the powers conferred by s 189 cl 1, of the Bengal Tenancy Act in making rule 2, of Ch. VI of the Government rules under the Act by which the landlord was authorized to join as defendants several defendants in one application for settlement of rents. *Held* also that the decision of the Special Judge did not dispose of any question relating to valuation far less of any question relating to the valuation of a suit, and the decision was not final under s 12 of the Court Fees Act; and that the proceedings in the case could not properly be regarded as a suit, and neither art 17, cl. vi. of sch. II nor

## VALUATION OF SUIT—continued.

### 2. APPEALS—continued.

s. 17 of the Court Fees Act was applicable. The memorandum of appeal was nothing more or less than an application subject to one Court-fee of eight annas only under art. 1, cl. (5), part II of sch. II of the Court Fees Act. The case of *Petu Ghorai v. Ram Khehuan Lal Bhukul*, I. L. R., 18 Cal., 667, was wrongly decided. *UPADHYA THAKUR v. PERSIDH SINGH* . . . I. L. R., 23 Cal., 723

193. — *Court Fees Act (VII of 1870), sch. I—Relief in respect of costs—Distinct relief.*—When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, seek distinct relief on the ground that by the decree under appeal, the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court Fees Act. *IN RE MAKRI. IN RE RAMAN* . I. L. R., 19 Mad., 350

194. — *Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Appeal from decree granting two distinct declarations.*—A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff; and (ii) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions, and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree and stamped their memorandum of appeal with a stamp of ₹10 only. On the 9th November 1887 it was tendered to a Judge for admission, and it then bore a report dated the 7th November by the officer appointed under s. 5 of the Court Fees Act, "Report will be made on receipt of record." The Judge made an order, "Admit, subject to stamp report," and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September 1888 the office reported that there was a deficiency in the stamp of ₹615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888 it was made good. At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard. *Held* that there was before the Court no valid appeal as to the merits of which the Court could give a decision. *Held* also that the stamp of ₹10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection. *BALKARAN RAI v. GOBIND NATH TIWARI* . I. L. R., 12 All., 129

## VALUATION OF SUIT—concluded.

### 2. APPEALS—concluded.

195. — *Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court-fee payable on memorandum of appeal—Act VII of 1870 (Court Fees Act), s. 7, cl. 4.*—Where a mortgagor sues for redemption on the allegation that the mortgage-debt has been satisfied, and a decree for redemption is passed on payment of a certain amount, and the mortgagor appeals against the amount he is ordered to pay, the Court-fee payable on the memorandum of appeal must, under s. 7, cl. 9, of Act VII of 1870, be computed according to the principal money expressed to be secured by the instrument of mortgage, and not according to the balance which the mortgagor alleges to be due. *Semble*—If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the Court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due. *PIEDHU NARAIN SINGH v. SITA RAM* I. L. R., 13 All., 94

## VALUE OF PROPERTY.

### Statement in will as to—

*See EVIDENCE—CIVIL CASES—RECITALS IN DOCUMENTS* . I. L. R., 1 Bom., 561

## VARIANCE BETWEEN PLEADING AND PROOF.

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*See APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—PLAINT.*  
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*See HINDU LAW—CUSTOM—INHERITANCE AND SUCCESSION.*  
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*See HINDU LAW—PARTITION—RIGHT TO PARTITION—PURCHASER FROM CO-PARTNERS* . I. L. R., 20 Mad., 243

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*See LANDLORD AND TENANT—EJECTMENT—NOTICE TO SUIT.*  
[I. L. R., 17 Bom., 631]

# VARIANCE BETWEEN PLEADING AND PROOF—continued

See CASES UNDER PLAINT—AMENDMENT OF PLAINT

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[I. L. R., 1 Bom., 209]

## 1 GENERAL CASES

1. — Decision on point not raised in pleadings or issues—A plaintiff must recover *secundum allegata et probata* and no decree should be given in his favour on a point not raised in the pleadings nor embodied in an issue. *JOTTARA DASIE v. MAHOMED MOBARCK*

[I. L. R., 8 Calc., 675] 11 C. L. R., 389

JAYKEE v. HANJOO 2 N. W., 407

MOOKATAPPEZ DEBEA v. COLLECTOR OF BUNDWAN 12 W. R., 204

TARA CHAND ROY v. NOSH CHUNDER ROY  
[21 W. R., 132]

PROTAB CHUNDER BOROCHAN v. COLLECTOR OF GOWALPARA 23 W. R., 216

2. — Basis of decision of case—*Pleadings*—The determination of a cause must be founded upon a case either to be found in the pleadings, or involved in, or consistent with the case thereby made. *Eshen Chander v. Shama Churn Bhutta* 11 Moore's I. A., referred to. *MILFORD ITA SAWMY v. YAPGOOT MOODILIAN v. YEO KAT*

[I. L. R., 14 Calc., 801  
L. R., 14 I. A., 168]

3. — Exception to rule

*Secundum probata et allegata*—Admiss on of defendant—The rule that the decree should be in accordance with what is alleged and proved is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. *ATTAYTA v. RAMIREDDI* I. L. R., 11 Mad., 367

4. — Amendment of case—Mistake or misapprehension—A plaintiff can be allowed to amend his case only when he has an honest case but either through mistake or some misapprehension he has not placed the real facts before the Court. *BUTRO DITT v. LAKHRAJ HODGE*

[18 W. R., 123]

5. — Civil Procedure Code 1853 Operation of as compared with old procedure in equity—Under the Civil Procedure Code parties are not bound so strictly to the pleadings as in any equity suit under the old procedure if they are not bound would work in justice. *DOSHEE v. TARRACHUN COODOO CROWDNEY*

[Bourke, A. C. C., 48]

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 1 GENERAL CASES—continued

6. — Variance in plaintiff's demand of suit Ground for—Held by a majority that the Code of Civil Procedure does not require the dismissal of a suit by reason of any variance in the plaintiff. *MAHOMED REZZAODDIN v. HOSSEIN BUCKSH HAN* 1 W. R., 300

7. — Raising issues after variance is shown—A plaintiff will not be allowed to set up one case, and having proved another, to ask for issues to be raised to suit the proof, but when a plaintiff and its proof necessarily lead to one or more particular issues, it is the duty of the Court if these issues do not come by surprise on the defendant, to raise such issues, and to give the relief thereon to which the plaintiff is entitled. *OSMOYCHEN MULLICK v. WOONES CHUNDER PAUL* 2 Hyde, 283

8. — Proof of cause of action not alleged—Dismissal of suit, Ground for—Claim on one cause of action, evidence showing another—Where a plaintiff sues on one cause of action and in support thereof gives evidence which, if it establishes anything, establishes a different cause of action, the Court acts properly in dismissing his suit. *MUDROOSODIN GO-SAMER v. HILLS* 10 W. R., 242

9. — Amount proved exceeding amount claimed—Decree—Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaintiff's claim, it is restricted to the amount so specified. *NATHROOAN v. JARDINE, SKINNER & CO.* Cor., 118

10. — Presumption from failure to prove allegations—Onus of proof—An adversary is entitled to the benefit of such presumptions as naturally arise from a party's failure to prove his allegations, even though the onus was in the plaintiff in the case on the former. *GUYER BISWAS v. SURESH PAUL CHOWDHRY* 8 W. R., 395

11. — Failure to prove precise case pleaded—Decree, Right to—A previous ruling in *Deceywan Chatterjee v. Lukhee Moone Dore* 12 W. R., 248 explained not to mean that a plaintiff must either get the thing he claims or nothing at all, but that having come into Court upon one title, which he asks to have declared and fails to prove a plaintiff cannot claim the declaration of another. *GOLICK CHUNDER SIRCAR v. ISHAN CHUNDER DAS* 23 W. R., 437

12. — Suit for possession alleging fraud—Change to suit for redemption—Where a suit for possession the plaintiff went to trial on the question of fraud, and that question was tried or he is not entitled upon appeal to abandon that issue and to ask the Court to treat his suit as one for redemption. *RAM DAO MUNDAL v. INDRAMONI DAI*

[3 C. W. N., 325]

13. — Right to make party liable in different character—Suit against party personally—Representative's liability—In a suit to recover advances made to the defendant to carry on an

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 1. GENERAL CASES—concluded.

indigo factory under a kharbarnamah, in which it was agreed that the advance should first be repaid out of the profits realized from the manufacture, where it was found that the sale of the indigo had yielded more than the amount advanced, but had been credited by the plaintiff to old debts owing him by the defendant's father instead of to the defendant's personal debt.—*Held* that the plaintiff had violated the terms of the agreement, and had not in good faith attempted to make the defendant personally liable, and he could not be allowed to proceed against the defendant as representative of his father. **PANDEY v. LUCHMER SINGH** . . . . . 12 W. R., 113

14. ——— Unestablished defence—*Decree, Right to.*—The Court should not necessarily decree the plaintiff's claim in full because the defence set up by defendant has entirely failed. **MULSON ALI v. KIRIA** . . . . . 1 Agra, 276

15. ——— Defence not set up by defendant—*Inconsistent defence.*—It is not competent to a Court to set up a defence not only not made by the defendant, but inconsistent with his own statement. **SHURUT SOONDUREE DADSE v. PURES NABAIN ROY** . . . . . 13 W. R., 464

**RADHA BINODE DUTT v. KOOTADODE MUNDUL**  
[15 W. R., 363]

**CHITTRA COOMARY BEBEE v. RAM LALL MOOKERJEE** . . . . . 18 W. R., 334

**RAJARAM BANERJEE v. SONATON ROY**  
[23 W. R., 404]

### 2. SPECIAL CASES.

16. ——— Account, Suit for balance of—*Failure to prove balance alleged—Issues—Civil Procedure Code, 1859, s. 141.*—*Held*, in contravention of various rulings of the late Sudder Court, that a suit brought on an alleged settlement of accounts, and balance struck and admitted, should not be dismissed merely on account of the plaintiff's failing to prove the alleged settlement and admission of balance by defendant; but that the Court, being competent under s. 141 of the Civil Procedure Code to amend or frame additional issues that may be necessary to determine the real question or controversy between the parties, ought to enter into evidence regarding the items composing the account, and decree the claim regarding such items, if they are found to be due and not otherwise barred. **KISHUN PERSHAD BHAWANEE DEEN**

[Agra, F. B., 47: Ed. 1874, 35]

**RAMSAHOY v. SEETHOO**  
[1 N. W., 28: Ed. 1873, 26]

But where the issues had been framed solely on the alleged adjustment, the suit was held to be rightly dismissed. **NOBIN CHUNDER KOONDOL v. SREEDHUR BHUTTARCHABJEE** . . . . . 15 W. R., 24

17. ——— Accretion—*Gradual accretion to a formation of dry land already existing, and*

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

*appropriated to an owner of land, on a river's bank.—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed.*—Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made, following the ownership of that land, the rule is equally well established in both these provinces. Both parties were riparian proprietors of adjoining estates on both banks of the river Godavari. The plaintiff claimed the right to newly-formed land, in mid-stream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers. *Held* that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zamindar and owner of the land on both banks of the river, without either issue or evidence directed to such sub-aqueous ownership. **BALUSU RAMALAKSHMANIA v. COLLECTOR OF THE GODAVARI DISTRICT**

[I. L. R., 22 Mad., 464  
L. R., 26 I. A., 107]

18. ——— Alienation, Suit to set aside—*Variance between case in pleadings and evidence—Raising ground not taken in pleadings.*—The plaintiff, a Hindu, sued to set aside a certain alienation, on the ground that the alienor was an illegitimate son of the plaintiff's grandfather, and therefore had no interest in the property. Not being able to substantiate this ground in the first Court, the plaintiff, on appeal, raised a new ground, viz., that the alienation was bad, because under the Mitakshara law the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. *Held* that such variance could not be allowed, and that the plaintiff must prove his case as laid in the pleadings. **SHRI PRASAD v. RAJ GURU TRIAMBURNATH DEO** . . . . . 6 B. L. R., 555; 14 W. R., 386

19. ——— Alleged inconsistency in pleadings—*Construction of solehnama—Estoppel—Objection taken for first time on appeal.*—After the death of a Hindu widow, a suit was brought to have a sale of a portion of her husband's estate made by her set aside on the ground that the sale was invalid except in so far as it affected the rights of the widow herself therein. The plaintiff, who was a collateral relation, alleged himself to be the heir, and sued as such, but was not so in fact. It appeared, however, that a solehnama had been entered into between him and the heir by virtue of which he had acquired all the rights of the heir in the property in suit. It did not appear that any objection had been taken in the lower Courts to the framing of the suit on the ground that the plaintiff was not the heir, and the

# VARIANCE BETWEEN PLEADING AND PROOF—continued

## 2. SPECIAL CASES—continued

A defendant was allowed to raise the same objection to the suit as he might have taken had it been brought by the plaintiff. On appeal this was contended on behalf of the defendant that the plaintiff had sued as he could not be allowed to succeed in the basis of the sole basis as this would be contrary to the rule laid down in *Talwar Chander Singh v. Shama Chandra Khaito 11 Moore's I. A. 221*. It is held that, if this objection had been taken in the first Court, the plea of and issues in it and ought to have been amended, but as it was not so taken and the substance of the case in the plaintiff was that the sale by this widow was valid beyond her own interest, under the circumstances of the case there was no want in the contentions of the applicant. *ARTI MOHIN v. SHOSANAI LAL*

[I. L. R., 20 Cal., 1  
L. R., 19 I. A. 221]

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## \* SPECIAL CASES—continued

appeal that the document was invalid as being, under the provisions of the Act, a document which had been executed by a person who was not a party to the transaction. *MADHUSAN KHAN v. MOHAMMAD RAZA KHAN*

[4 C. L. R., 23]

## 23. ——— Contract—Assessment of facts

*Deo v. Co.*—The determination in a cause should be founded upon a case as to whether the facts are proved or consistent with the case thereby made. Therefore where the relief sought by the plaintiff is grounded on a contract, the case must not be determined upon an alleged equity resulting from a different state of facts and inconsistent with that alleged by the plaintiff. *ESHA CHANDER v. SHAMCHAND BHUTTO*

[3 Ind. Jur., N. S., 87 6 W. R., P. C., 57  
11 Moore's I. A., 7]

Followed in *Doss Ram Doss v. Mohendra Rao Decha*

18 W. R., 274

## 24. ——— Issues—Amendment of pleadings—Facts between case in point and evidence.

The plaintiffs sued the defendants for damages for breach of contract, alleging in their pleadings that they had agreed to sell and the defendants to purchase certain indigo seed, but that the defendants had refused to take delivery of the same. The plaintiffs were ready and willing to deliver the same. Upon the evidence of the plaintiffs, it appeared that there was no contract as alleged in the pleadings, but the contract, as stated by them, was that they (the plaintiffs) were to purchase seed as agents for the defendants. The Judge dismissed the suit on the ground that the plaintiffs were bound to prove their case as stated in the pleadings. It is held that the suit could not have been dismissed on that ground. The issues raised admitted of the true question being tried, viz. whether under the circumstances, the defendants were liable to pay the price of the seed and if they did not the Court ought to have amended the issues, or framed additional ones. The object of the pleadings is merely to bring the matter in dispute before the Court, but it is for the Court, upon the statements before it, to determine the real issue between the parties. *ANBURNOR v. BHUTTO*

[6 R. L. R., 273 14 W. R., 181]

## 25. ——— Ejectment, Suit for—Facts to prove lease—Evidence on facts at the trial.

*Case stated in point at trial*—Where a lessor sues to eject a tenant on the expiration of his lease and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fail back upon a general title as though he had acted up and failed to prove the alleged lease. A plaintiff must be limited to the case which he puts forward in his pleadings, but he may put forward an alternative case in his pleadings from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise. *LAKSHMI BAI v. HARI BAI RAO*

9 Bom., 1

## 26. ——— Failure to prove—Facts to prove—Facts to prove—Facts to prove

In a suit to set aside a sale of an ancestral property by a minor as father and guardian as made without necessity and for the father's profuse expenditure and without inquiry by the purchasers as to whether it was for the benefit of the defendant, it was held that the sale was made under pressure of a foreclosure suit on account of a demand under a form mortgage for an ancestral debt. Plaintiff having failed to establish his case, sought to go back and open the consideration for the mortgage loan as twenty years ago, but the Privy Council agreeing with the High Court, refused to allow him to do so. *HUMERDA alias KHAJOO v. AMATOO MHEER BEGUM*

[17 W. R., P. C., 108]

21. ——— Company Contributions List of—Amendment of pleadings—Where the holder of shares in a company was described in the list of contributors, against whom a balance order by the Court of Chancery had been made, as "Devji Bhauji cotton merchant," and as he is said "in his own right,"—Held that the plaintiff company could not be allowed to rely on evidence that the shares were in fact held by a firm consisting of two individuals named respectively by Bhauji Zantani and Devji Hemraj nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their pleadings originally framed against both partners with a view to making the firm liable for the amount of the calls, so as to sue Bhauji Zantani only who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhauji and to make him personally liable as the holder of the shares. *Wekerle v. Co. v. L. R., 8 C. A. 331* distinguished. *LONDON BORNEAL AND MEDITERRANEAN BANK v. BHANJI ZANTANI*

[I. L. R., 2 Bom., 116]

22. ——— Compromise—Facts to prove—Facts to prove—Facts to prove—Facts to prove—Where the plaintiff sued to have a deed of compromise set aside as having been fraudulently entered into behind his back and without his knowledge and failed to prove any fraud or collusion,—Held that he was not entitled to a decree on the ground taken on



# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 2. SPECIAL CASES—continued.

26. ——— *Suit for ejectment against defendant as tenants and on failure as trespassers—Case set up in appeal which was not that set up in the Court of first instance.*—The plaintiff came into Court on the allegation that she was the owner of a certain house, and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held* that the plaintiff could not under the circumstances be heard in support of a new plea of which the defendants had had no notice until the case was in appeal. *Lakshmi Bai v. Hari bin Raoji*, 9 Bom., 1, referred to. *NAIKU KHAN v. GAYANI KUAR*. I. L. R., 15 All., 186

27. ——— *Suit for ejectment of defendants as trespassers—Decree declaring right to rent as landlord.*—In a suit to eject the defendants as trespassers, although it was found that the latter were not so, the lower Appellate Court notwithstanding gave a decree declaring the plaintiff's title to receive rent from the defendants. *Held* that the entire suit ought to have been dismissed, inasmuch as the defendants were not found to be trespassers on the allegations made in the plaint, and on the suit as framed the plaintiffs were not entitled to get any other relief than the particular relief which they asked for. *KALI KISHORE CHOUDHRY v. GORI MOHUN ROY CHOUDHRY* 2 C. W. N., 166

28. ——— *Title to relief completed pending a suit—Amendment of plaint.*—A, having leased land to B, sold it to C. Persons having trespassed, B offered no objection, and it was alleged that he was in collusion with them. C now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending. *Held* that the plaintiff was not entitled to the relief sought, and could not be permitted, on appeal, to amend the plaint by adding a prayer for a declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner. *RAMANADAN CHETTI v. POLIKUTTI SERVAI*

[I. L. R., 21 Mad., 286]

29. ——— *Encroachment, Suit to prevent.*—Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes).—*Held* that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been misled or induced to refrain from calling evidence to rebut the plaintiff's case. *RANCHOORDAS AMTHABHAI v. MANEKAL GORDHANDAS*

[I. L. R., 17 Bom., 648]

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 2. SPECIAL CASES—continued.

30. ——— *Fraud—Failure to prove specific case of fraud.*—Where the plaintiff in his pleadings pledged himself to prove a specific case of fraud, and made his cause of action entirely dependent on that, he was not allowed to succeed, when he failed to prove fraud, on a collateral matter. *SAHEB ROY v. GUJADHUR PERSHAD NARAIN SINGH*

[22 W. R., 221]

31. ——— *Compromise by official assignee—Insolvent Act, 11 & 12 Vict., c. 21, ss. 28 and 29—Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Restriction of power to amend.*—The account of an estate formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the Official Assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over upon the passing of the consent-decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment. The plaintiff, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that, if he did know of it, he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court. *Held* that the amendment at the stage when it was made was not permissible. It is a well-known rule that a charge of fraud must be substantially proved as laid, and that, when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it. The High Court having decreed the claim on a finding of fraud different from either of the above.—*Held* that on this ground alone, the judgment might have been reversed. *Montesquieu v. Sandys*, 18 Ves Jun., 302, followed. *ABDUL HOSSEIN ZENAIL v. TURNER*

[I. L. R., 11 Bom., 620  
L. R., 14 I. A., 111]

32. ——— *Hathchitta, Suit on—Hathchitta given for amount of adjusted account—Failure to prove hathchitta—Frame of suit.*—Where a suit was brought to recover a sum of money due on an adjusted account, for which it was alleged that the defendant had signed a hathchitta, and the lower Appellate Court dismissed it on the ground that the defendant never signed the hathchitta, and that the plaintiffs had failed to prove their case.—*Held* that having regard to the frame of the suit, the plaintiffs

# VARIANCE BETWEEN PLEADING AND PROOF—*cont. nced*

## 2 SPECIAL CASES—*cont. nced*

ought not to be allowed to ask the Court to do term no  
whither the original debt for which the bailiff's  
was paid off as the defendant alleged  
and the Court could not be treated as a suit for the  
original debt. **GOSSEN v. MIAH**  
**JAY BEK** 1 C W N., 710

33. — Mortgage *suit for redemption*  
*in D. C. on mortgage to satisfy defendant's debt and*  
*not with alleged by plaintiff* In a suit to redeem  
the plaintiff produced a mortgage the genuineness of  
which the defendant denied, but they produced a  
mortgage of one of the last of the same to the same  
tutors. The Principal Sudler American made a decree  
for the satisfaction of the lands according to the terms  
of the mortgage produced by the defendant. The  
Civil Judge reversed the decision. *Held* on special  
appeal that the Principal American was justified  
in making the decree which he made, not being  
incumbent on him to find the fact for the plaintiff.  
**UNICHA KAN v. KUTTI NAIK v. ALIA**  
**PIDIGAIL KUTTHAM KUTTI MARACCAH**

[4 Mad. 359]

34. — Mortgage *suit for redemption*  
*in F. C. of one of other mortgage than the*  
*original mortgage of which the plaintiff is the owner*—*E. Decree*  
*Act I of 1853* Statement of a survey officer was  
to enter as an occupant for admission as his. The plain-  
tiff used to redeem certain lands alleged to have been  
mortgaged by his ancestor to the successors of the  
defendant in 1833. At the hearing, the deed of mort-  
gage in respect of which the suit was brought was  
produced but another mortgage of about the same  
date was produced and produced by the plaintiff. The  
lower Courts passed a decree for the plaintiff. The  
defendants appealed. *Held* (reversing the decree of  
the lower Courts) that where a particular instrument  
is sued on as the basis of a right to subinfeudation on the  
plaintiff to establish his case on that particular cause  
of action, not on a cause of action on merely bearing  
the same common name or of the same description and  
so included in the same class. Under s. 33 of the  
E. Decree Act I of 1853 a statement by the survey  
officer that the name of this or that person was  
entered as occupant would be admissible if relevant  
but it would not be admissible to prove the reasons  
for such an entry as facts in another case. **GOWIND-  
RAY DRAVURU v. RAGHO DRAVURU**

[I L. R. 8 Bom., 543]

35. — Mortgage *suit for redemption*  
*of a mortgage* The plaintiff sued to redeem a mortgage,  
a claim that it was made in the year A.D. 1821 for  
Rs. 700. The defendant admitted the mortgage, but  
alleged that it was made in A.D. 1811 for Rs. 110 and  
conceded that the entry was barred by limitation. The  
Subordinate Judge held that the mortgage had been  
made for the amount and at the date alleged by the  
defendant but that the suit was barred by time-barred as  
the mortgagee's title had been acknowledged by the  
mortgagee within the period of limitation. He  
accordingly made a decree for redemption on terms  
consistent with the plea of the defendant but opposed  
by the plaintiff. On appeal the Assistant

# VARIANCE BETWEEN PLEADING AND PROOF—*cont. nced*

## 3 SPECIAL CASES—*cont. nced*

Judge agreed with the first Court as to the merits of  
the case but reversed its decree on the ground that  
the plaintiff was not entitled to succeed on a state of  
facts inconsistent with the case set forth in the plaint.  
Observing that a plaintiff ought not to be allowed to  
change his cause of action. *Held* by the High Court,  
on second appeal that the decree made by the first  
Court in favour of the plaintiff did not in any way  
proceed upon a cause of action different from that  
made in the plaint, and that the cause of action  
remained the same namely the right of the mort-  
gagor to redeem from a mortgagee. A plaintiff on his  
not to be allowed to alter his case so as to convert  
a suit of one character into a suit of another and a  
consistent character. **LAKSHMAN BHISHAJ v. HARI**  
**DINKAR DESAI** I L. R., 4 Bom., 584

36. — Mortgage *suit for redemption*  
*from that made in a plaint*—Upon a mortgage of land  
made little less than sixty years before the present  
suit a decree followed in 1855 to the effect that an  
account having been taken of what was due on the  
mortgage the mortgagee might at any time make a  
tender of such mortgage-money with interest up to  
date and require that the land should be restored.  
The plaintiff, representing the interest of the original  
mortgagee, sued for redemption of the mortgage,  
treating the above decree as a regulation, the rights of  
the parties from the time when it was made. *Held*  
that the plaintiff was not bound by his plaint to  
redeem the mortgage, or, alleged that there had been  
acknowledgment, could not in the present appeal fall  
back on a right to redeem such mortgage, although  
the latter might be within limitation, as that would  
be to make a case different from the one tried and  
decided in the Courts below. Accordingly the suit  
had been properly dismissed. **HARI RAJJI CHIT-  
LUKAR v. SHARADH HORMASJI BHUT**

[I L. R., 10 Bom., 481]

37. — Mortgage *suit for redemption*  
*on by purchaser of equity of redemption*—*Evidence*  
*given by defendants of other mortgages than the mort-*  
*gage in respect of which the suit was brought*—*Right of*  
*plaintiff to have plaint amended and the question of*  
*whether mortgage determined*—The plaintiff as pur-  
chaser of the equity of redemption sued for redemption.  
He alleged a mortgage dated A.D. 1843 for Rs. 100.  
The defendants admitted a mortgage but alleged that  
it was executed at a different time and for a larger  
sum. After the evidence was given but before the  
judgment was delivered the plaintiff applied to  
amend the plaint and to set up the mortgage admitted  
by the defendants. His application was refused, and  
the Court dismissed the suit on the ground that he  
had failed to prove the particular mortgage alleged  
in the plaint. The District Judge confirmed the decree  
but observed that there probably was a mortgage  
for the larger sum as alleged by the defendants.  
On second appeal—*Held* reversing the decree and  
remanding the case that the plaintiff was entitled to  
have the question of the mortgage for the larger sum  
inquired into. **CHIMSAJI v. NAKHARAM**

[I L. R., 17 Bom., 365]

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

38. ———— *Cause of action set out in plaint—Burden of proof—Civil Procedure Code (1852), s. 50—Suit for redemption of mortgage.*—A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So, where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was held that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court. *Read v. Brown, L. R., 22 Q. B. D., 129; Murti v. Bhola Ram, I. L. R., 16 All., 165; Salima Bibi v. Muhammad, I. L. R., 18 All., 131; Ratan Kuar v. Jivan Singh, I. L. R., 1 All., 194; Parmanand Misr v. Sahib Ali, I. L. R., 11 All., 438; Zingari Singh v. Bhagwan Singh, Weekly Notes, All. (1889), 187; Krishna Pillai v. Rangasami Pillai, I. L. R., 18 Mad., 462; Govindrav Deshmukh v. Ragho Deshmukh, I. L. R., 8 Bom., 543; and Eshenchunder Singh v. Shamachurn Bhutto, 11 Moore's, I. A., 7, referred to. Lakshman Bhisaji Sirsekar v. Hari Dinkar Desai, I. L. R., 4 Bom., 584, and Chimaaji v. Sakharam, I. L. R., 17 Bom., 365, dissented from. SHEO PRASAD v. LALIT KUAR . . . I. L. R., 18 All., 403*

39. ———— *Mortgage sued on not proved—Admission by defendants of mortgage right—Right of redemption.*—The plaintiff sued to redeem a kanom of 1859. The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanom-dars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823, which was less than sixty years from the date of some of the admissions, and he passed a decree for redemption. Held that the plaintiff, having failed to establish the kanom on which the suit was based, should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question. *KRISHNA PILLAI v. RANGASAMI PILLAI . . . I. L. R., 18 Mad., 462*

40. ———— *Mortgage sued on inadmissible in evidence for want of registration—Secondary evidence—Inadmissible mortgage, consolidating two prior mortgages—Redemption, Right of—Decree to redeem prior mortgages.*—In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered, it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively. Held that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid. *ARUMUGAM PILLAI v. PERIASAMI . . . I. L. R., 19 Mad., 160*

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

41. ———— *Suit for redemption of immovable property brought as donee—Title of plaintiff as reversioner.*—In a suit for the redemption of immovable property brought by the plaintiff as donee from a Hindu widow of the equity of redemption, the plaintiff's right to the property as reversioner cannot be inquired into notwithstanding an allegation in the plaint that he was a near relative of the husband of the donor. *JAGANNATH VITHAL v. APAJI VISHNU . . . 5 Bom., A. C., 217*

42. ———— *Procedure.*—Where a mortgagor sues to recover possession of the mortgaged property on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to recover surplus collections, and the Court finds that a large balance in favour of the mortgagee still exists, the plaintiff is not entitled to a conditional decree, but the suit should be dismissed. *KUNDUN LAL v. SASTA KOER. SASTA KOER v. KUNDUN LAL . . . 8 W. R., 369*

But see *BOISTUB DOSS KOONDOL v. HURO NARAIN HALDAR . . . 17 W. R., 408*

43. ———— *Usufructuary mortgage—Failure of claim to enforce lien—Compensation for breach of contract to give mortgagee possession.*—A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage-money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage-money. Held that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation; that although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that on estimating the compensation which should be awarded, the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide. *MAHESH SINGH v. CHAUBHARIA SINGH I. L. R., 4 All., 245*

44. ———— *Usufructuary mortgage—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use.*—An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and interest, asking for enforcement of lien. The instrument of mortgage did not contain any hypothecation of the property. Held that, although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the



## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

*Debia v. Bydonath Deb*, 21 W. R., 444, and *Shiro Kumari Debi v. Govind Shaw Tanti*, I. L. R., 2 Calc., 418, distinguished. *Joytara Dassee v. Mahomed Mobaruck*, I. L. R., 8 Calc., 975, discussed. *SUNDURI DASSEE v. MUDHOO CHUNDER SIRCAR* [I. L. R., 14 Calc., 592]

54. ———— *Relief granted on a different ground from that asked for.*—Plaintiff's suit was that they were co-owners with B of a certain property as members of a joint family under the Mitakshara law; that after B's death a 3½ annas share of the property was registered under the Land Registration Act in the name of A, the mother of B, although the plaintiffs were the owners in possession, and A was entitled only to maintenance; that a gift was made of 1½ annas share by A to her daughter and daughter's son, without right, and the donees having granted a zar-i-peshgi lease in respect of that share, the zar-i-peshgidars took possession thereof. The plaintiffs accordingly prayed for recovery of possession by establishment of their alleged right of ownership, or, in the alternative, for a declaration that they were reversionary heirs to the estate of B, and as such not bound by the gift and the zar-i-peshgi lease aforesaid. A died during the pendency of the suit. It was found that plaintiffs were not co-owners with B as alleged; but that, as reversionary heirs, they became entitled to possession upon A's death after the institution of the suit. *Held* that, as the plaintiffs had claimed to recover possession in the suit, and as A died before the case was taken up for trial, the plaintiffs were entitled to the relief, although they asked it on a ground different from that on which they recovered judgment. *RASUL JIHAN BEGUM v. RAM SUBUN SINGH* . I. L. R., 22 Calc., 589

55. ———— *Defendant sued as a trespasser—Right to decree against him as a tenant.*—Where a plaintiff brings a suit for possession, alleging that the defendant is a trespasser the moment it is shown that the defendant is not in possession as a trespasser, but holds as a tenant under the plaintiff, the suit must be dismissed, no matter what the character of that tenancy may be. *RAM GOLAM SINGH v. HEET NARAIN SAROO* 2 C. L. R., 202

56. ———— *Failure to prove allegation of defendant's tenancy—Right to treat him as a trespasser.*—Where a plaintiff sued for khas possession on the ground that the defendant was his tenant and had forfeited his tenure by denying his landlord's title, and it was found that there was no relation of landlord and tenant between the parties, the plaintiff was held not entitled to succeed on the contention that the defendant was a trespasser. *LALJEE SINGH v. BUNWARY LALL ROY* [25 W. R., 448]

57. ———— *Failure to prove permanent character of tenancy—Right to decree as tenants.*—In a suit for possession of land on the strength of an alleged mirasi mukurari, one of the main issues was whether the plaintiffs were or were not tenants of the land in dispute, and upon this issue

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

it was found that the plaintiffs had acquired a title as tenants from long possession, although they failed to establish the mirasi mukurari character of their tenure. *Held* that the plaintiffs were entitled to a decree for possession. *Kalee Coomar Pattur v. Khetur Nath Baug*, 17 W. R., 47, and *Surjoo Pershad v. Kashree Rawut*, 21 W. R., 121, followed. *Bijoya Debia v. Bydonath Deb*, 21 W. R., 444, and *Brindaban Chunder Sircar v. Dhananjoy Luskur*, I. L. R., 5 Calc., 246 : 4 C. L. R., 443, distinguished. *SHIB CHUND LAHIRI v. JOYMALA DAS*

[7 C. L. R., 103]

58. ———— *Suit on ground of forcible dispossession where defendant's possession is found to be permissive.*—A suit to recover possession of land on the ground of forcible dispossession, in which it was pleaded by defendant and found as a fact that the defendant's holding was of a permissive character, should be dismissed at once, the defendant's possession not being a wrongful one of the kind alleged by plaintiff. The right mode of action in such a case would have been for plaintiff to serve the defendant with notice to quit the land, and thereby put an end to the permission relied upon by him. *PHILLIPS v. NUNDCOOMAR BANERJEE*

[8 W. R., 385]

59. ———— *A plaintiff's failure to prove dispossession on the particular date mentioned in the plaint is not a sufficient ground for the dismissal of the suit.* *HURO CHUNDER CHOWDHURY v. GOBIND CHUNDER MOITRO* . 15 W. R., 178

*BOGA KOLITA v. TROOLESSUR KAYASTA*

[24 W. R., 357]

*TORAB ALI v. MAHOMED AMEER HOSSEIN*

[3 C. L. R., 105]

60. ———— *Suit for confirmation of possession—Proof that plaintiff was out of possession—Change in form of suit.*—The plaintiff sued for an adjudication of his right to, and confirmation of possession of, certain lands, on the allegation that they had been conveyed to him by one of the defendants and that he was in actual possession thereof, and that his title thereto had been impeached by the subsequent sale of the same lands by his vendor to the other defendant. The Court of first instance found that the plaintiff's allegation of possession was false, and dismissed the suit. *Held*, on appeal, that the suit was rightly dismissed, for though a plaintiff who brings forward a *bona fide* case, which he proves in substance, though not in form, would be assisted by the Court, in the absence of such special circumstances no such assistance would be afforded. *TERIETPUT SINGH v. GOSSAIN SUPERSAN DAS* . I. L. R., 4 Calc., 46

61. ———— *Failure to prove case in plaint—Right to decree on other grounds.*—At a sale held under Bengal Act VIII of 1865, the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by

VARIANCE BETWEEN PLEADING  
AND PROOF—*cont. nced*

## 2 SPECIAL CASES—cont. NEED

the plaintiff for recovery of possession thereof in the ground that the property in dispute was a lakh; that the property was owned by the Raja of Jipora and that the plaintiff was owner thereof partly by purchase and partly by abritage. The lower Appellate Court found as a fact that the late lakshmi dar ad not the Raja had granted the lands in dispute as brahmavarut and in favour of the person through whom the plaintiff claimed. The Court however passed a decree in favour of the plaintiff as he had been unlawfully dispossessed. *Held* that the plaintiff having failed to prove the case as set up by him and upon which he claimed a right to be entitled to a decree upon grounds other than those stated in the plaint. ISWAR CHANDRA CHUCKERBUTTY DISTRICT JUDGE CHANDRA CHUCKERBUTTY

53 B L R. An 07 12 W R 32

62 *Future to prove*  
*case Chang vs. Mappal* Each of two prop-  
 erty to A and B's paralytic mortgaged the whole  
 of the joint property to different persons. B's mort-  
 gagee who was prior in time obtained a decree on his  
 bond and purchased the house. In subsequent  
 suit for confirmation of right and possession by A's  
 mortgagee he has alleged that the other bond and decree  
 were fraudulent and of no effect and that B had no  
 interest in the property. All these allegations were  
 found to be false by the lower Appellate Court. *Held*  
 on special appeal that the plaintiff could not recede  
 from the case he had made in the lower Courts and  
 claim to be entitled to a decree for A's interest in the  
 house. **DRAFTS 4000 - PAVAN RAY**

[2 C L R 538

63 *Failure to show*  
*alternat re case—Right to change case in special*  
*appeal*—So t for possession of certain property as  
 part of a joint family property sold by a widow  
 without authority. It is still applied to appeal spec-  
 ially on the ground but could cite no authority in  
 support of it, that when the eldest member and  
 manager of the family purchases out of his own  
 private funds, because the family is joint, the  
 property must be considered as joint property.  
 It is held in this character the Court declined to  
 allow him a special appeal to come in as a reverter over  
 and ask for a decree declaring the widow's act void  
 as against reversioner. **MADHO KISHAN v. LALLA**  
**JYOTI LALL** 17 W. R. 98

17 W H 98

84. \_\_\_\_\_ Joint claim—  
It ght to succ ed on proof of separate title—Where  
the plaintiff in a suit put forward a joint claim it  
is not enough that one of them make out his title  
the suit should be dismissed unless the joint claim  
is established. RAM COME CUCKERBUTTY V  
NEND RAM COOLAL 10 W R 282

10 W R 262

SHEO MUNDUN PERSHAD & MUNDOOM BUKSH

[20 W R. 364

65. — Joint claim—  
Right to succeed on proof of title to less share  
separately—A plaintiff, suing on the ground that

VARIANCE BETWEEN PLEADING  
AND PROOF—*cont. and.*

## 2 SPECIAL CASHS—cont. need

she was jointly entitled was not allowed to succeed in the suit where it was shown she was only entitled to a share in her own separate right. **HERRICK MONTE ROSSEA R. OXOOKOOL CHUNDER MOOKERJEE**  
13 W R. 481

[2 W R, 481

§ 13 W. 12, 3rd

DABIE  
113 W R. 248

SREENARAIN CHICKERBUTTY & MILLER

[15 W, R, O C, T

67 ———— *Claim to separate possession — Proof of joint possession — Duration of claim —* When a plaintiff claims property on the sole allegation that he purchased it from a person to whom it exclusively belonged, it is proved that the property was the separate property of the vendor he cannot have a decree for the share of the property to which he a vendor was entitled as a member of a joint family. (OUR DEARER FARM BUDGET — SHERIDEN KOOKWAR 10 W R. 243)

10 W R. 243

63. See possess on—Joint ownership p proved at hearing  
—Procedure— Exclusive possession can only be  
awarded on proof of exclusive title. If a case not  
alleged by the plaintiff is disclosed in the evidence  
the Court can allow it to be set up provided a specific  
issue is raised on it, and the defendant is given an  
opportunity of meeting it. **PARANSHRAM v. MALLYA**  
(11 L. R. 20 Bom., 566)

(L. L. H., 20 Nov., 56)

69 No. 1 for exch  
 as re posses on—Proof of hearing of joint con-  
 sh p—Procedure—The plaintiff sued for possession  
 of certain land. The lower Court held that the land  
 was the joint property of the plaintiff and defendant,  
 but finding that the plaintiff had been in exclusive  
 possession allowed him claim and gave him a decree.  
 On second appeal—Held that exclusive possession  
 could not be awarded unless exclusive title was  
 proved. On plaintiff's application which was not  
 opposed by the defendant the decree of the lower  
 Court was varied, and the plaintiff was awarded joint  
 possession of the property as such. VARIED APPEAL 637

[L.L.R. 20 Bom, 62]

70 *Fa la re of proof*  
of right to sole possession—Decree on admission of  
defendant of joint possession.—Where a plaintiff  
sued for sole possession and a declaration of sole title  
and the defendant admitted that he was in joint pos-  
session but the plaintiff went on with his suit in  
order to get a decree that he was solely entitled and  
in sole possession and failed to prove his case he  
was held not entitled to a decree founded on joint  
possession. LUKHUN SINGH v. DEVER SINGH  
AIR W. R. 311

118 W R., 31

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 2. SPECIAL CASES—continued.

71. ———— *Suit for possession of share—Decree for joint possession.*—In a suit to recover possession of a third part of a khana-bari, where the first Court, considering that there never had been a partition in definite shares, ordered restoration to the sort of possession plaintiff had enjoyed previous to being dispossessed,—*Held* that there was no objection to the decree being in that form; and although a plaintiff does not prove the precise claim which he makes, if he is substantially right he ought to have a decree, and not be left to bring another suit. *RAJKISHORE BRUDDUR v. HUREE MOHUN BRUDDUR* . . . 19 W. R., 195

Dissenting from *BEEJOYNATH CHATTERJEE v. LUCKEER MONEE DABEE* . . . 12 W. R., 248

72. ———— *Claim to share of property as being partitioned—Relief inconsistent with allegations on plaint.*—In a suit to recover a quantity of land alleged to have formed part of a joint estate which had descended to plaintiff and his brothers, but which was subsequently divided into separate shares,—*Held* that upon failure of proof of the allegation of partition plaintiff might obtain relief upon the first allegation; and the Court below was not debarred by law from framing an issue as to whether plaintiff was entitled to recover to the extent of the interest which he had in the land, if found to be joint property. *FUKKER DASS POOROHET v. GOPAL MOOKERJEE* . . . 12 W. R., 107

73. ———— *Suit for possession on allegation of partition—Failure to prove division—Change of case on appeal.*—Plaintiffs, being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than twelve years before suit, sued to eject a more recent purchaser? The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it. *Held* that the plaintiffs, having failed to prove division as alleged, were not entitled in second appeal to have their suit treated as a suit for partition. *MUTTUSAMI v. RAMAKRISHNA* . . . I. L. R., 12 Mad., 292

74. ———— *Claim to property on separate title—Right to decree on joint title.*—The plaintiff alleged in his plaint that the defendant had erected a hut, or challa, upon ground to which he, the plaintiff, was separately entitled. The lower Appellate Court found that the land in dispute was the joint property of both parties, and that the defendant was not at liberty to erect the hut without the express permission of the plaintiff, and ordered the demolition of the challa. *Held* that the plaintiff was not entitled to a judgment upon a ground which was inconsistent with the case set out in his plaint. *NABIN CHANDRA MITTER v. MAHES CHANDRA MITTER*

[3 B. L. R., Ap., 111: 12 W. R., 69

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 2. SPECIAL CASES—continued.

75. ———— *Pre-emption, Suit for—Claim to right in different ways.*—In a suit to establish a right of pre-emption, where the plaint is framed on right of Shufeh Khuleet, the plaintiff ought not to be allowed to shift his ground and make out a new case as Shufeh Jah. *GOBIND ROW v. GIRDHAREE SAHOO* . . . 24 W. R., 355

76. ———— *Principal and agent—Suit by principal against agent—Failure of suit on grounds pleaded.*—A bank sued H, its agent, who had appointed N to act in the matter of the agency, for money belonging to it which H had paid N for the purposes of the agency, and which was not accounted for by N, claiming the same on the ground that N had been appointed to act as a sub-agent without authority. The lower Appellate Court found that N had been appointed by H to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding, gave the plaintiff bank a decree against H on the ground that he had not exercised ordinary prudence in selecting N as an agent for his principal. *Held* that, inasmuch as the plaintiff bank had not claimed relief on the ground that H had failed in his duty in naming N as an agent for his principal, but on the ground that N had been appointed without authority and had failed to prove its case, the suit should have been dismissed. *HAMILTON v. LAND MORTGAGE BANK OF INDIA*

[I. L. R., 5 All., 456

77. ———— *Rent—Suit for arrears of rent—Failure to prove contract—Claim for use and occupation.*—Where a plaintiff sued for rent and failed to prove any contract, express or implied, to pay it, he was held not entitled to change his case and ask for compensation for use and occupation. *LUCHMEEPUT DOSS v. ENART ALI* 22 W. R., 346

78. ———— *Suit for arrears of rent—Failure of plaintiff to prove alleged rate of rent—Ascertainment of proper rate—Duty of Court—Form of decree.*—In a suit for arrears of rent at certain alleged rates in which the plaintiff fails to prove the rates alleged by him, it is not the duty of the Court to ascertain what were the fair rates, unless it is asked to do so. The case of *Punnoo Singh v. Nirghin Singh*, I. L. R., 7 Calc., 298, does not lay down a contrary rule. *RASH DHARY GOPE v. KHAKON SINGH*

[I. L. R., 24 Calc., 433

79. ———— *Suit for rent on unstamped lease—Failure to prove lease—Right to recover damages for use and occupation.*—The plaintiff alleged that he had given possession to the defendant of a certain estate, in consideration of the payment by the defendant of annual rent for a term of five years; that the defendant had paid the rent for the first three years of the term, but had neglected to pay any for the last two years, and that since the expiry of the term the defendant had remained in possession; and he claimed to recover possession of

# VARIANCE BETWEEN PLEADING AND PROOF—*cont. and*

## \* SPECIAL CASES—*see* *see*.

the property a certain sum for its use and occupation by the defendant. He also claimed to recover the same sum as damages for the refusal of the estate to let the defendant from the use to which the defendant had last paid for it. The agreement between the parties was contained in certain letters which were unstamped. *Held* that, although the claim to let made by the plaintiff on the basis of the contract must fail, because there was no evidence of the contract on which the court could act, yet he could fall back on his claim to recover damages for the use and occupation of the land, as the defendant could not afford him possession, he was equally interested in the plaintiff to rely on the terms of a contract of which he could not give proof, and as he did not deny the use and occupation all paid, he had no answer to the claim for damages. *MAR TERRY v WALLACE* 5 N W 63

80.

*Suit for rent*

*Evidence of need rent.*—In a suit for a balance of rent on the expiration of a lease, a plaintiff claimed a portion of the rent as he showed that when the defendant and the plaintiff were such time as the plaintiff and a mortgagee paid. *Held* that, even though the defendant failed to establish their plea, the plaintiff could not succeed as the plaintiff failed to make out the case, and it appeared that the defendant were holding the whole property at a single rate. *L. CHURCHMAN v. L. CHURCHMAN* 24 W R, 284

81.

*Suit for declaratory decree*

*Under Bengal Rent Act 1859.*—Where the plaintiff sued under Ben Act 1859 for a declaratory decree that certain land was mill, as well as for arrears of rent thereon and for arrears of rent at the rate assessed, and the suit was dismissed, and on appeal the plaintiff abandoned the two last points in his claim and asked merely for a declaratory decree. *Held* that the lower Appellate Court ought, notwithstanding the plaintiff had agreed to sue under the Rent Act, to have proceeded with that part of the case, and disposed of the appeal as to that only. *ANAND MOYEE DOSS v. LATE MOYEE DOSS* 20 W R, 14

82.

*Suit for hotel*

*On allegation of hold of specific quantity of land.*—*Failure to prove a legal case.*—In a suit for a habitation, on the allegation that the defendant is holding a specific quantity of land under him, if the plaintiff's allegations are disproved, and the relation of landlord and tenant is not established, the plaintiff's suit must altogether fail. *YAKOO ALI v. KATROOGIAN* 8 W R, 329

83.

*Suit for rent*

*Failure to prove habitation.*—The plaintiff having sued for rent upon a habitation and failed to prove it, is not entitled to a decree if he shows that the defendant had paid him rent for a number of years, the Court observing that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to

# VARIANCE BETWEEN PLEADING AND PROOF—*cont. and*

## 2. SPECIAL CASES—*see* *see*.

the execution of such document is found against him, and there are good reasons for leaving him the document is not genuine. *NORCHERY v. NORCHERY* 10 MARCH 70

[W R, F R, 23 1 Ind Jur, O. S. 9 1 May, 234]

*S. C. NARAYAN DOSS v. NORCHERY* 10 MARCH 70

*WOOD v. NARAYAN* 10 MARCH 70

*RAM NATH KHAIR v. DEWCHAND CHATTERJEE* 10 MARCH 70

*KUTUMMOO RAY DEWAS v. H. LOCKHART* 1 W R, 203

*GOTTFRED LAM NARAYAN GOKHLE v. ANAND* 15 BOM, A. C. 133

*LIQWAT CHUNDER CHOWHERRY v. HAKIM v. GHOSH* 1 MARCH, 561 2 May, 268

*SINGHOO HANLEY v. ANAND CHUNDER RAY* 1 MARCH, 57 May, 100

*See also JENTON v. BENTON* 1 MARCH, 47 1 Ind Jur, O. S. 55 1 May, 112

*FATIMA BEGUM v. ANAND CHUNDER* 1 MARCH, 263 2 May, 108

*See also in the case of a declaration.* *GOODWIN v. GROOM* 1 MARCH, 57 May, 100

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*See also in the case of a declaration.* *GOODWIN v. GROOM* 1 MARCH, 57 May, 100



# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 3. SPECIAL CASES—continued.

Appellate Court, being of opinion that the plaintiffs had made out a right of occupancy under the rent law and were entitled to obtain a pottah from the zamindar at a fair and equitable rate of rent, and finding no evidence as to what such a rate would be, gave them a decree at the old rate. *Held* that the decision was erroneous, as there was no evidence on which the question of a fair and equitable rate could be determined, and as it rested on a ground not taken by the plaintiffs, who came into Court on a special contract. If the plaintiffs' right to a pottah had rested on the ground of their being occupancy raiyats, they might claim a pottah from all the 16-anna shareholders, who ought to have been made parties and the case remanded for trial by the first Court. *UTHUR HOSSAIN v. RAMPHAL ROY*

[20 W. R., 75]

87. ——— *Suit for rent—Failure to prove kabuliati.*—Where a landlord sued a raiyat for arrears of rent alleged to be due under a kabuliati, and the Court found that such kabuliati had not been executed by the raiyat, although he had occupied the land, the landlord was held not entitled to have a further trial of the question whether any and what amount of rent was due on account of the raiyat's occupation of the land. *LUKHEE KANTO DASS CHOWDHRY v. SUMEERUDDI LUSKER*

[13 B. L. R., F. B., 243; 21 W. R., 208]

88. ——— *No alternative claim for use and occupation—Damages for use and occupation.*—In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation. *Lukhee Kanto Dass Chowdhry v. Sumeeruddi Lusker*, 13 B. L. R., 243; 21 W. R., 208, and *Surendra Narain Singh v. Bhui Lal Thakur*, I. L. R., 22 Calc., 752, referred to and followed. *Nityanund Ghose v. Kissen Kishore*; W. R., Sp. No., Act X, 83, and *Lalun Monnee v. Sona Monnee Dabee*, 22 W. R., 334, distinguished. *RACKHEA SING v. UPENDRA CHANDRA SINGH* . . . I. L. R., 27 Calc., 239

89. ——— *Suit for enhancement of rent—Suit on kabuliati—Amendment of plaint—Decree for rent on failure to prove kabuliati.*—In a suit on a kabuliati, where no alternative claim for rent at an old rate is in words expressly asked for in the plaint (although it is disclosed by the plaint that the defendant had previously occupied the land in suit at a rate which the evidence proved to be lower than the rent mentioned in the kabuliati), and where the kabuliati is not proved, it is in the discretion of the Court to amend the plaint or the issues, and to allow an alternative claim to be tried; and when the omission to make the claim in the plaint appears to have been an inadvertence, it is right that the Court should do so. *Lukhee Kanto Dass Chowdhry v. Sumeeruddi Lusker*, 13 B. L. R., 243, commented upon. *ROUSHAN BIDEE v. HURRAY KRISTO NATH*

[I. L. R., 8 Calc., 926]

# VARIANCE BETWEEN PLEADING AND PROOF—continued.

## 2. SPECIAL CASES—continued.

90. ——— *Suit for enhancement of rent—Statements in plaint.*—Although in a suit for enhancement the plaintiff should not be tied down too strictly to his statements, yet he must to some extent be limited to the case made in the plaint. *BONOMAZEE CHURN MYTEE v. SHORROOP HOOTAIT*

[14 W. R., 80]

91. ——— *Suit for enhancement of rent—Failure to prove rent as claimed.*—If the plaintiff is unable to show that he is entitled to the rent exactly as he claims it, the Court is not debarred from giving him a decree for such enhanced rent as it thinks ought to be paid, e.g., to divide the land into different classes and assign a separate rental to each description. *BRUGWAN CHUNDER ROY CHOWDHRY v. JEGUR KHAN*

[22 W. R., 456]

92. ——— *Suit for enhancement of rent—Failure to prove notice.*—In a suit originally treated by the plaintiff as a suit for enhancement of rent, he cannot, after failing to prove notice, treat the suit as one for enhancement, and say no notice was necessary. *RASH BEHARY MOOKERJEE v. KHEETRO NATH ROY* . I C. L. R., 418

93. ——— *Suit for enhancement of rent—Suppression of material fact.*—A plaintiff must state clearly in his plaint the substance of his claim, i.e., the particular mode in which his claim arose, as well as the amount of that claim. Thus, where a plaintiff allowed the Court below to decide the case as if his contention was an ordinary case between a landlord suing to enhance and a tenant resisting his claim, and the statement of the defendant divulged the material circumstances of the case that the plaintiff's estate was let in farm, the High Court refused to allow the plaintiff on appeal to rest upon an alleged stipulation in a farming lease, the existence of which he altogether suppressed in the Court below, reserving to him the right of collecting from the tenant an enhanced rent during the currency of the farming lease. *HURRO SOONDERY v. MUDDUN MOHUN DUTT*

[W. R., 1864, Act X, 34]

94. ——— *Right of suit—Cause of action not shown in plaint, but proved in course of case.*—Where a plaintiff brought a suit for confirmation of his title to an estate, in consequence of the opposition offered by defendant to an application for partition by a vendee who had purchased a portion of plaintiff's share and the Court of first instance tried the case on its merits and gave the plaintiff a decree, —*Held* that the lower Appellate Court was not justified in reversing the decision of the first Court on the ground that no cause of action had been disclosed, because, although the plaint itself disclosed no cause of action, yet, on the trial of the suit on its merits, a cause of action had been disclosed in the opposition which defendant had offered to the partition proceedings, and which had interfered with the enjoyment of his rights by the plaintiff. *LATLAH MAHTAB ROY v. DEBEE DUTT SINGH* . 25 W. R., 204

# VARIANCE BETWEEN PLEADING AND PROOF—continued

## 2. SPECIAL CASES—continued

95. **Specific performance—S. t. to enforce contract of betrothal.** The plaintiff on behalf of his son and the defendant, guardian of M. H. to recover possession of M. H. alleging that M. H. had been betrothed to her son and that under the Hindu law a betrothal was the same as marriage, and could not be repudiated, and that the defendant had refused to give up M. H. Held that, the suit having been brought on the allegation of a perfect betrothal equalling to marriage it could not be tried and decided by the Court as if it were a suit for damages or account of breach of contract. **NOBLET SINGH & LAD HOGER** 5 N. W. 102

96. **Title—Settling up a different title from that on which the suit was brought to prove.** **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

97. **Settling up a different title from that on which the suit was brought to prove.** The plaintiff failed to prove his title to the land in question. He failed to prove that the plaintiff was the son of the defendant. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

98. **Failure to prove.** The plaintiff failed to prove his title to the land in question. He failed to prove that the plaintiff was the son of the defendant. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

99. **Title of separate acquisition by purchase.** The plaintiff failed to prove his title to the land in question. He failed to prove that the plaintiff was the son of the defendant. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

# VARIANCE BETWEEN PLEADING AND PROOF—continued

## 2. SPECIAL CASES—continued

100. **Allegation of title by purchase—Failure to prove.** The plaintiff failed to prove his title to the land in question. He failed to prove that the plaintiff was the son of the defendant. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

**MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

101. **Failure to establish particular title—Title by long possession.** Where a plaintiff brought a suit to establish his title and the lower Court, on a trial of the merits, found that the title was not proved, yet gave judgment in favour of the plaintiff on the ground of his long possession for a long time. Held that the lower Court ought not to have given a decree upon a ground not supported in the plaintiff's case. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

102. **Failure to prove particular title—Title by right of occupancy.** Act X of 1859 s. 6—In a suit for possession of land after purchase, where defendant pleaded that he had long held under a lease which the Court below found to be false. Held that the defendant could not be allowed in special appeal to come in for the first time with an allegation of a new and separate title, viz., a right of occupancy under Act X of 1859. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

103. **Failure to prove specific title—Title by possession—Form of a suit.** Where a plaintiff who fails to prove a specific title which he sets up, yet causes it to appear that he has had a clear and free possession from which the Court can infer a good title, the Court will not shut him out in consequence of the mere form of the plaint. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

104. **Allegation of mokurari right and failure to prove it.** In a suit to recover possession of land which defendant alleged himself to have held for more than twelve years under a mokurari lease, where the lower Appellate Court, finding that defendant failed to prove his mokurari right, declared he had no title to hold as a tenant. Held that, notwithstanding the failure of the defendant to prove his mokurari lease the lower Court ought to have found what was the nature of the occupancy and how long it had subsisted. **MAHARAJA CHANDER SINGH & HARODA GOPTALAH** 13 W. R. 187

105. **Suit in one capacity, proof of right to succeed in another.** A suit was brought by a Hindu widow to recover her share

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—continued.

as heiress to her husband, in certain family property, of which she claimed a portion in her absolute right, and a portion as one of the joint shebait of certain idols. Among other properties plaintiff claimed one-fifth share in a talukh, not as a debutter property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance, and in giving the relief prayed for. *RADHA MOHUN MUNDUL v. JADOO-MONEE DOSSEE*. 23 W. R., P. C., 389

106. ———— *Amendment of plaint—Alternative relief—Ejectment suit—Failure to prove lease—General title.*—Where, in an action of ejectment against a tenant holding over, the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended to one containing an alternative claim for partition,—*Held* that the plaintiff could not be allowed to fall back upon his general title and obtain a decree for partition. *RAMCHANDRA BAPUJI GOKHLE v. VASUDEVI MORBHAT KALE*

[I. L. R., 10 Bom., 451]

107. ———— *Right to easement in suit for right of ownership—Decision on case not made in pleadings.*—In a suit brought to establish a right of ownership over certain land,—*Held* it was not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same. A question not raised by the plaint ought not to be decided by the Court. *LALJI RATANJI v. GANGARAM TULJARAM*

[2 Bom., 184 : 2nd Ed., 176]

108. ———— *Title by prescription—Making case different from that in plaint.*—In a suit for the removal of a pucca building recently erected by defendant upon land lying between the premises of the two parties to the dispute, where plaintiff's claim to use the land had been put upon his title as owner,—*Held* that, having failed to make out the case originally set forth in the plaint, plaintiff had no right to fall back upon a title by prescription. *BHOORUN MOHUN MUNDUL v. RASH BEHAR PAUL*

15 W. R., 84

109. ———— *Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—New case made on appeal.*—The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that therefore he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the

## VARIANCE BETWEEN PLEADING AND PROOF—continued.

### 2. SPECIAL CASES—concluded.

judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The Appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant,—*Held* that the order of the Appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower Appellate Court should be reversed. *IRANGOWDA v. SESHAPA* I. L. R., 17 Bom., 772

### 3. ADMISSION OF PART OF CLAIM.

110. ———— *Suit for rent—Failure to prove jummaabundi—Form of decree.*—The plaintiff sued for rent at Rs22 a year on a jummaabundi, which he alleged was signed by all the miyats when he came into possession ; the defendant denied that he was a party to the jummaabundi, but admitted that he held some portion of the land as tenant of the plaintiff at a yearly rent of Rs5, and that the balance due by him to the plaintiff was Rs5-15. The plaintiff failed to prove the jummaabundi. *Held* the plaintiff must, if he accepted the admission of the defendant at all, accept it as a whole, and was therefore only entitled to a decree for Rs5-15, and not to a decree for all the years for which he claimed rent at Rs4-13 per annum. *BONOMALEE CHURN MYTEE v. HAFIZUDDIN*

[13 B. L. R., 247 note : 12 W. R., 317]

And see *LUKHER KANTO DASS CHOWDHURY v. SUMERRUDDI LUKHER*

[13 B. L. R., F. B., 243 : 21 W. R., 317]

and *ROUSHAN BIBEE v. HURRAY KIBISTO NATH*  
[I. L. R., 8 Calc., 926]

111. ———— *Dismissal of suit on failure to prove it—Right to decree on defendant's admission.*—Where the plaintiff brought a suit for rent for Rs185, as rent for two years, which he alleged was payable in produce, and the defendants alleged that the rent was only Rs29 a year and that the plaintiff had sued them on a former occasion and obtained a decree at that rate, the Judge, finding the defendant's case proved, held that, as the plaintiff had set up a false claim, he was not entitled to a decree, and dismissed the suit. *Held*, on special appeal, the plaintiff was entitled to a decree for rent at the rate admitted by the defendant. *KISHEN MOHUN MOOKERJEE v. RAJOO DEY*

[13 B. L. R., 245 note : 19 W. R., 234]

*ROOKHINI KANT ROY v. SHARIKATUNISSA BIBI*  
[13 B. L. R., 246 note : 20 W. R., 64]

*RAJ COOMAR SINGH v. CHOTO RAJ COOMAR SINGH* W. R., 1864, Act X, 12

*HULODHUR SEN v. SEETUL CHUNDER BHOOHICK*  
[23 W. R., 85]

# VARIANCE BETWEEN PLEADING AND PROOF—*cont. used.*

## 3 ADML. 10% OF PART OF CLAIM

—*cont. used.*

**112.** — *Suit for arrears of rent—Failure to prove case—Right to decree on admission of defendant—Decree on admission.* In a suit for rent, based upon an admission that the plaintiff failed to prove such admission, it was held that no one having been raised as to what was the fair and proper value of the land the plaintiff was not entitled to have that question determined by the court, but that the decree at the rate admitted by defendant, or dismissed. **LUTE ALI KHAN v. FAKIRA SINGH** 8 C. L. R. 208

**113.** — *Suit for arrears of rent—Failure to prove rate—Decree on admission of rate.* In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed, the plaintiff is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rate admitted by the tenant. **PRASAD SINGH v. NIGHERI AGH**

[I. L. R. 7 Cal. 298 8 C. L. R. 310]

**114.** — *Suit on new agreement—Failure to prove agreement—Decree on admission of rate.* The defendant held lands under the plaintiff at a certain rate per bigha. The plaintiff brought a suit for arrears of rent on a new agreement alleged to have been entered into by the plaintiff and the defendant whereby the latter agreed to pay a higher rate per bigha. The lower Appellate Court found that the new agreement had never in fact been entered into, and gave a decree for the old rate of rent with a question into the question whether it was a fair rent or not. It was held that the decision was correct. **SHAM BEZA v. AMZAD ALI**

[I. L. R. 7 Cal. 703 10 C. L. R. 121]

**115.** — *Failure to prove rent—Failure to prove case—Decree on admission of defendant for money rent.* In a suit for arrears of rent as above, where the plaintiff failed to make out his title to the land, the first Court, finding that the evidence established a commutation of the rent into money, dismissed the suit with a reservation of the plaintiff's right to sue again for cash rent. The lower Appellate Court, agreeing in the first Court's view of the facts, and finding that the defendant admitted that he owed rent in money, decreed the claim to the extent of the admission. It was held that the lower Appellate Court was right, and that the reservation of the first Court was of doubtful operation. **BHABHA v. BHABHA** 21 W. R. 438

**116.** — *Omission to make alternative claim—Suit for rent—Rent Act VI of 1862, s. 10.* In a suit for rent where the claim was at the rate fixed by the revenue officer acting under Section VI of 1862, s. 10 and was dismissed on the ground that that officer had not the power to assess such rent as he thought proper—It was held that the plaintiff whose claim was not in the alternative was not entitled to a decree at the rate previously paid. **DWARKANATH BOSE v. LAL MOHUN BOSE** [23 W. R. 465]

# VARIANCE BETWEEN PLEADING AND PROOF—*concluded.*

## 3 ADMISSION OF PART OF CLAIM

—*concluded.*

**117.** — *Suit for ejectment—Entry under unregistered lease—Holding over—Landlord and tenant—Proof of terms of lease—Decree for rent upon admission of defendant's tenant.* The plaintiff sued in 1851 to recover certain land and arrears of rent from the defendant alleging that the defendants' ancestor entered on the land as tenant in 1850 under a lease for five years which was not registered. The defendant denied the lease of 1850, admitted that she was the tenant of the land, but denied that she could be ejected and claimed to deduct from the rent certain emoluments. **Held** (1) that the plaintiff could not prove the tenancy alleged in the plaint, inasmuch as the lease of 1850 was not registered, and therefore could not eject the defendant (2) that the plaintiff was entitled, upon the defendant's admission, to recover from the defendant, in this suit the amount of rent admitted to be due and no more. **NAGAI v. RAMAN** I. L. R. 7 Mad. 239

## VATAN

See **COLLECTOR** I. L. R. 18 Bom. 103

See **CASES UNDER HEREDITARY OFFICES ACT (BOMBAY)**

See **CASES UNDER SERVICE TENURE**

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See **CASES UNDER HEREDITARY OFFICES ACT (BOMBAY)**

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See **HEREDITARY OFFICES ACT (BOMBAY)**

See **CASES UNDER JURISDICTION OF CIVIL COURT—OFFICER, RIGHT TO.**

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See **REGISTRATION ACT 1874 s. 3 (1) s. 73** I. L. R. 1 All. 318

## VENDOR AND PURCHASER

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## VENDOR AND PURCHASER—continued.

## 1. BILLS OF SALE.

1. ———— *Effect of execution of bill of sale without delivery—Specific performance.*—It is very questionable in any case whether the effect of the execution of a bill of sale by a Hindu vendor is to pass an estate, irrespective of the actual delivery of possession. Where the vendor sells an estate of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate on tendering the balance of the purchase-money. *PREHLAD SEN v. BUDHU SING. KALIPRASAD TEWARI v. PREHLAD SEN*

[2 B. L. R., P. C., 111; 12 W. R., P. C., 6]

*S. C. PERHLAD SEIN v. BUDHU SINGH. KALIPERSHAD TEWARRE v. PERHLAD SEIN*

[12 Moore's I. A., 275, 282]

2. ———— *Suit to compel transfer of property.*—When a bill of sale, though signed and registered, has not been delivered, and no part of the purchase-money has been paid, the vendor cannot be compelled to complete the transfer. *LALLA INDURJEET LALLI alias GUJADHUR PERSHAD v. JUMONA* . . . . . 5 W. R., 248

3. ———— *Incomplete contract.*—A bill of sale, though duly executed, was not delivered to the purchaser, but was deposited with a third party, to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently by a trick got possession of the bill of sale before he had performed all the acts in question. *Held* that, under such circumstances, no effect could be given to the bill of sale as against the vendor, so that a suit for possession of the lands covered by it would not lie. *RAJ CHUNDER CHOWDHRY v. RAJ NATH CHOWDHRY*

[W. R., 1864, 222]

4. ———— *Vendor under bill of sale remaining in possession—Allegation of fraud—Suit to set aside bill of sale.*—When a person grants a bill of sale to another person absolute in its terms, he cannot sue to have it set aside on the ground that he has all along remained in possession; and if he alleges fraud in the contract, and adduces the fact of non-payment of the consideration-money as evidence of fraud, he will be bound to show proof of non-payment. *TEKAIT MEGHAJ SINGH v. JOYKUNGUL SINGH* . . . . . 1 Ind. Jur., N. S., 78

5. ———— *Bill of sale as construed by intention of parties—Right of purchaser to sue.*—Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize

## VENDOR AND PURCHASER—cont. nued

## 1 BILLS OF SALE—concluded

the purchaser's right of action to eject the trespasser or to redeem the mortgage. **BAI SURAS v DALPAT KAM DALASHANKAR** I. L. R. 6 Bom. 380

## 2 BREACH OF COVENANT

6 ——— Covenant to restore estate to original owner or heirs at fixed price before selling to another—*Sale under reservation to keep a vacant possession on or re-sell it to vendor at fixed price* Subsequent alienation—*Right of redemption*—Where a share in an estate had been sold under a stipulation that the purchaser should possess it himself as landlord or if desirous of parting with it, should restore it to the original owner or his heirs at a fixed price and the purchaser had been restrained by the agreement from selling off the property to a third person had on his term in the property given the persons a farming lease of it for fifteen years. *Held* that as the object of the original stipulation was to secure the co-tenant possession of the share to some one with whom the original owner or his heirs who still retained the reversion of the estate could keep up friendly relations the grant of the farmer's lease was a violation of the covenant; and that the heirs of the original owner were entitled to have the share in suit conveyed to them at the stipulated price. **LAKSHMI LESHKUR v WISS** 25 W. R. 378

7 ——— Covenant repugnant to interest created *Conditional sale as a karnamah* Condition to restore a share on alienation—If a co-sharer in a share transferred to another co-sharer a 2 annas share by deed of sale. Upon the same date a contract as a karnamah in which he agreed that he would not call the rents of the 2 annas transferred to him that he would not ever demand partition of that share and that he would not alienate or mortgage it otherwise exercise proprietary rights over it. It was further provided that in the event of a committing any breach of covenant the sale should be voided, and the proprietary rights in the 2 annas share should revert to him. *Held* that the deed of sale and the karnamah must be regarded as recorded one single transaction; and they must be read together as stating the nature of the transaction entered into upon that date between the parties and the defendant which on the face of it appeared to be a sale of a 2 annas share to the other by the former and that in this view it was clear from the karnamah that the proprietary title created by the deed was cut down to a limited and limited one placed upon which rendered it useless as a proprietary right. **SRI LAKSHMI v LAKSHMI** I. L. R. 10 Cal. 30 referred to. **MANI DAS v AJITHA** I. L. R. 8 All., 452

8. ——— Implied covenant for title—*Transfer of property Act (I) of 1882* s. 55 sub-2—*English Conveyance Act of 1881* ss. 44 & 45 Act s. 41 s. 7—In the absence of any contract to the contrary there is, under s. 2 sub-2 of the Transfer of Property Act an implied covenant for title on

## VENDOR AND PURCHASER—cont. nued

## 2 BREACH OF COVENANT—concluded

the part of the vendor. **BARABAD v SHEIKH v ENABADDI v ALBAH** I. L. R. 25 Cal. 298 3 C. W. N., 222

9 ——— Breach of implied covenant for title—*Transfer of Property Act (I) of 1882* s. 55(2)—*Covenant for title* Waiver of—*Fraud*—When a vendor who sues to cancel a sale on the grounds of fraud in representation or concealment by his vendor fails to establish these grounds of relief he is not entitled to set up a second appeal as a case founded on the implied covenant for title under the Transfer of Property Act, s. 55 sub-2. **MAHOMED v SITARAMAYAR**

I. L. R. 15 Mad. 50

10 ——— Breach of covenant for title—*Measure of damages*—A purchaser elected from his holding a covenant to recover from a vendor who has guaranteed his title the value of the land at the date of the eviction. **SAUBHAGYADAS v AHMEDKHAN**

I. L. R. 21 Bom. 175

11 ——— Transfer of Property Act (I) of 1882 s. 55—*Suit for damages for breach of covenant* Implied a regular deed—On 8th February 1889 the defendant sold to the plaintiff under a regular deed conveyance containing no express covenant for title land of which he was not in possession and the purchase-money was paid. The plaintiff and the defendant sued to recover possession but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1890 to recover with interest the purchase-money and the amount of costs incurred by him in the previous litigation. *Held* that the plaintiff was entitled to the relief sought by him. **KRISHNAN NAMBIAR v KANNAN** I. L. R. 21 Mad. 8

## 3 BREACH OF WARRANTY

12. ——— Suit on warranty—*Knowledge by purchaser of title being doubtful*—A purchaser aware of the doubtful character of the title to the estate he is about to purchase is justifiable in taking a guarantee from the seller who cannot successfully plead to a suit on the guarantee that the purchaser was aware of the facts which induced him to stipulate therefor. **PATHOO LAL v RADHIKA DAS** [3 N. W., 100]

13 ——— Sale of whole title—*Failure of title*—*Suit for money had and received*—A vendor legally conveying a title cannot be sued for money had and received, although the title proves defective. Accordingly where the plaintiff bought two kanam claims and sued upon them as unsecured fully—*Held* that he could not recover the purchase-money from his vendor's representative on the ground that the consideration for the payment had failed. **MUHAMMAD MOHIDIN v ORRATH UNNACHA** 1 Mad. 390

14. ——— Implied warranty—*War-ranty of title by vendor or originator*—*Right to*

**VENDOR AND PURCHASER—continued.****3. BREACH OF WARRANTY—continued.**

*sue for damages.*—A seller or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged; and if it be found that the title is defective, the vendee or the mortgagee can sue for damages or loss on the breach of implied contract, although there may be no express agreement for title. **DWARKA DASS v. RATTUN SINGH**

[2 Agra, 199

15. ——— *Description published in advertisement—Warranty of title—Misrepresentation—Fraud, Proof of.*—A zamindar (A) gave certain villages in putni to B and received consideration-money and rent from him, but B never got possession of them, nor derived any benefit from the putni, it having been found that the villages belonged to a third party as lakhirajdar, who obtained a decree against A in a suit to which B was made a party. A had published an advertisement setting forth a description of the property, and calling upon intending purchasers to come forward. *Held* that the advertisement published by A setting forth a description of the villages was substantially an implied warranty of title and would make him responsible to purchasers deceived by such misrepresentation; and fraud having been shown, the absence of a stipulation to refund would not protect A from refunding. *Held* that, in cases like this, it would be a sufficient proof of fraud to show that the fact (of ownership) as represented was false, and that the person making the representation had a knowledge of the fact contrary to it. **NIRMONEE SINGH v. GORDON STUART & Co.** 9 W. R., 371

*See KHULUT CHUNDER GHOSE v. KRISTO GONDIN DEB* 18 W. R., 276

16. ——— *Right to sue on warranty of title—Right to refund of consideration.*—A buyer may at once sue on a warranty of title if he can show that the seller has not a good title in accordance with his undertaking, and that he has sustained loss in consequence. *Semble*—It does not follow as a matter of course that on proof of breach of warranty the buyer is entitled to receive back the whole of the consideration-money, or that on its being ascertained that the seller had no title the conditional sale is nullified. **SAYER ALI v. MAHOMMED JOWAD ALI** 7 W. R., 198

17. ——— *Covenant against disturbance of possession—Loss of property by third person enforcing right of pre-emption—Disqualification of purchaser from buying—Covenant for good title to convey—Construction of covenant.*—An instrument of sale contained the following condition: "Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and costs of litigation." The purchaser, having lost the property by reason of a

**VENDOR AND PURCHASER—continued.****3. BREACH OF WARRANTY—concluded.**

person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the costs incurred by him in defending such suit, basing his claim upon the condition set forth above. *Held* that the suit was not maintainable, as such condition referred to flaws or defects in the vendor's title, and was not applicable to a loss accruing to the purchaser from his disqualification to buy. **GOHAM JILANI v. IMDAD HUSAIN** I. L. R., 4 All., 357

18. ——— *Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Auction-sale by mortgagee of mortgaged property—Condition of sale—Implied possession of some title in vendor.*—R having stolen from N the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to N, deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction-sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one: "The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced, a notice on behalf of N was read out to the persons then present, which stated that she claimed the property as absolute owner, and that R (who had mortgaged it to the vendors) had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of N's claim. He was told nothing to make the above condition of sale misleading. He bid for the property and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that R had no interest in the property, and thereupon he called upon the plaintiffs (the mortgagees) to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he having failed to do so, they filed this suit against him, to recover the balance of the purchase-money. *Held* that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary. **MONTANCO v. VINAYAK VEERCHAND** I. L. R., 12 Bom., 1

VENDOR AND PURCHASER—cont. *used*

## 4. CAVEAT EMPTOR

19 ——— Right of purchaser—*Warranty of title—Hindu law—Contract—Sale of land*—*B. Malay*—In England the law gives to the purchaser of land a right to have a good title to it shown by the vendor. No such rule appears to exist in the Hindu law and in contracts between Hindus for the purchase and sale of land in Bombay the intention of the parties must be ascertained from the terms of the agreement with respect to any implication. *DEVAI GHELA v JIVARAJ MUKUNDAS*

[2 Bom., 430 2nd Ed., 408]

20 ——— Condition of sale—*Defect in title previous to title shown by vendor*—When it is proved by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date the purchaser may insist upon a defect of title appearing *al modo* and before that date and if he proved to exist may rescind the contract and recover back earnest money tendered and expenses. *MANCHALU PISTANJ v NARAYAN LAKSHMANJI* 1 Bom., 77

21. ——— Land sold without warranty—*Purchaser with notice of title—Liability of vendor*—In the absence of fraud or express warranty of title in a sale of land the vendee cannot recover from the vendor the expenses incurred in defending a suit for possession brought against him by a third party having a better title. *AKHINOOR SINGH DEO v GORDON THURST & Co.*

[1 Ind. Jur., N S 308 6 W R., 153]

22. ——— Liability of purchaser—*Inquiry as to title—Effect on after purchase*—By the rule of caveat emptor the buyer is bound by law to take care of himself and to see that he buys or acquires himself that there is a good title. The purchaser is bound to look not only to his own title but to see that he is properly and notified by the covenants in his deed of purchase and if he does not choose to protect himself in this manner he has no remedy for if a deed of purchase has been once executed unless there is an evicton by the vendor or some person claiming under him the purchaser has no right of action against the vendor. *GOUD KISHORE SHAHA v CHETTER KISHORE DUTT MOJUMDAR*

25 W R., 45

23. ——— Sale of shares deposited with bank for advance—*Depreciation on account of security—Object on to disclose point on of shares*—Where a contract has been made for the sale of shares deposited with a bank as security for an advance the vendor is not bound to disclose the fact to the purchaser when there can be no reason to anticipate such a depreciation of value in the shares as would entitle the bank to refuse to transfer. *NARAYAN VUCCARAM v BHAWGO DALJE*

1 Ind. Jur., N S 154

24. ——— Fraudulent concealment by vendor of defect of title—*Absence in sale-deed of covenant for title of purchaser—Right to damages*—In 1851 a Hindu executed a sale-deed of a house in the mortmain. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the

VENDOR AND PURCHASER—cont. *used*

## 4. CAVEAT EMPTOR—concluded.

vendor was aware at the time of the sale, sued the vendor for damages. The Municipal Council claimed on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree holding that, as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks. *Held* that if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. *GAJA PATHI v ALAGIA* I. L. R., 9 Mad., 89

## 5. COMPLETION OF TRANSFER

25 ——— Oral transfer—*Hindu vendor and purchaser*—Land may pass by mere parol between Hindu vendor and purchaser. *MORRIS CHATTERJEE v ISSUR CHATTERJEE CHATTERJEE* [1 Ind. Jur., N S, 288]

26 ——— Want of registration—*Sale complete without payment of purchase-money on registration of deed*—A sale might be complete and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if by mutual agreement a sale had already been made. *KALKA CHUTTER GHOSH GOSWAMI v LALLA MUNDON KISHORE*

[7 W R., 317]

27 ——— Transfer of Property Act (IV of 1882) s. 54—*Transfer of immovable property by unregistered deed—Deed of sale not registrable is optional—Suit by purchaser for possession when vendor is out of possession*—S. 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immovable property of less than Rs. 100 should be made only by one of the modes there stated so as to confer a valid title. Where the plaintiff brought from the heirs of M who were out of possession, their right title and interest in certain immovable property and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) was not compulsory—*Held* in a suit to recover the property from persons in possession without title that the sale conferred a valid title on the plaintiff though not made by registered deed or by delivery of the property. The dictum of Garth, C.J., in *Sara v Chaudhri Chanderbhat v Dattaram Roy* 1 L. R. 8 Cal. 507 at p. 612 dissented from. *KRATU BIR v MADHON BARSICK* I. L. R., 16 Cal., 623

28. ——— Transfer of Property Act (IV of 1882) s. 54 para. 3—*Transfer of Immovable Property Act Amendment Act (III of 1892) s. 3—Immovable property of value less than Rs. 100, Transfer of—Suit by purchaser for possession when vendor is out of possession*—The transfer by one of the modes mentioned in s. 54, para. 3, of the Transfer of Property Act, viz. by a registered instrument or by delivery of possession. *Abbas B v*



**VENDOR AND PURCHASER—continued.****5. COMPLETION OF TRANSFER—continued.**

*v. Madhoram Barsick, I. L. R., 16 Calc., 623, overruled.* **MAKHAN LALL PAL v. BUNU BEHARI GHOSH** . . . I. L. R., 19 Calc., 423

**29. ————** *Transfer of Property Act (IV of 1882), s. 51—Oral sale with possession Land worth more than ₹100.*—The plaintiff entered into an oral contract to sell certain land to the defendant for ₹2,500, and he put him into possession. The defendant made default in payment of the purchase-money. The plaintiff, having professed to cancel the sale on the ground of this default, sued to recover possession of the land with mesne profits. *Held* that the sale was not complete under s. 51 of the Transfer of Property Act, and the plaintiff was entitled to the relief sought by him. **PAPIREDDI v. NARASAREDDI**

[I. L. R., 16 Mad., 484]

**30. ————** *Transfer of ownership of property—Decree for specific performance of contract of sale—Conveyance.*—In the mofussil of the Bombay Presidency, the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself does not wait for the execution of a conveyance,—even if the vendor is required, as he seldom is, to execute such a conveyance,—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money. **DHONDIBA KRISHNAJI PATEL v. RAMCHANDRA BHAGWAT**

[I. L. R., 5 Bom., 554]

**31. ————** *Possession given in execution of decree.*—The formal possession given by a Civil Court under an execution operates, in point of law and fact, as between the parties, as a complete transfer of possession from one party to the other. **LOKESHAH KOER v. PURAUN ROY**

[I. L. R., 7 Calc., 418]

**32. ————** *Execution and registration of conveyance—Failure to pay purchase-money and return of conveyance.*—D sold a house to P and executed a deed of conveyance which was duly registered. The purchase money, however, was never paid by P, who consequently never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P, the sale to him being incomplete. *Held* the sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house. The endorsement on the conveyance, not having been registered, could not affect the property. The plaintiff therefore, as purchaser of the right, title, and interest of P, became legal owner of the house, but subject to all P's liabilities; and as D had a lien upon the house for

**VENDOR AND PURCHASER—continued.****5. COMPLETION OF TRANSFER—continued.**

the amount of the unpaid purchase-money, the plaintiff could not obtain possession without paying off this charge. **UMEDMAL MOTIRAM v. DAYU BENDHONDIA** . . . I. L. R., 2 Bom., 547

**33. ————** *Execution of deed of sale—Failure of purchaser to perform preliminaries to possession.*—The vendor of certain immoveable property agreed to sell such property, and the purchaser agreed to purchase it on the understanding that the purchaser should retain a part of the purchase-money, and therewith discharge certain bond-debts due by the vendor, for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. *Held*, in a suit by the purchaser for the possession of such property in virtue of such conveyance, that the purchaser not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed, and the suit was therefore not maintainable. **IKBAL BEGAM v. GOBIND PRASAD** . . . I. L. R., 3 All., 77

**34. ————** *Part payment of purchase-money—Execution, registration, and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Transfer of Property Act (IV of 1882), s. 51.*—Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions, or conditions as the nature of the case may require. **Mohun Singh v. Shib Koonwer, 1 Agra, 85; Goor Parshad v. Nunda Singh, 1 Agra, 160; Heera Singh v. Ragho Nath Sahai, 3 Agra, 30; and Umedmal Motiram v. Dawa, I. L. R., 2 Bom., 547, referred to.** The difference between an executed contract of sale and an executory contract to sell, observed on **Iktal Begam v. Gobind Prasad, I. L. R., 3 All., 77**, dissented from. A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors,—*Held*, with reference to s. 51 of the Transfer of Property Act (IV of 1882), that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed. **SHIB LAL v. BHAGWAN DAS**

[I. L. R., 11 All., 244]

**35. ————** *Sale of immovable property—Transfer of Property Act (IV of 1882), s. 51—Delivery of possession—Registration of sale-deed.*—Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. **Narain Chunder**

**VENDOR AND PURCHASER—cont. sued****5. COMPLETION OF TRANSFER—cont. sued**

*Chakrabarty v. Isaiah* 1 L. R. 8 Cal., 49 followed. *LOYNATHA GOUDAN v. MUTTU GOUDAN* [L. R., 17 Mad., 146]

38

*Sale of immovable property v. Transfer of Property Act (IV of 1882) s. 54. Deed of possession under deed of sale survey s. 4 where registration is optional—Deed of sale v. Share in a tank—Legislation in Act (III of 1882) s. 17 and 18. Intention of parties. Question of fact—Second appeal.* The defendants purchased a share in a tank in 1884, and the consideration being of a less amount than Rs. 100 and registration on the formal deed of sale was unregistered. In 1886 the plaintiff purchased the same share from the same vendor under a registered deed of sale. It was found on the facts that the plaintiff purchased with notice of the defendants' previous purchase and that the defendant had possession of the purchased share from the date of their purchase. Held on appeal in the Letters Patent of the High Court *v. THE ALTAJ V. UPBOLD* the decision of *EVERETT J. (HILL, J. dissenting)* that the possession obtained by the defendant was a valid title to the property. With the warning of a deed of the Transfer of Property Act. *Makhan Lal Pat v. Bawa Bekara Ghos* 1 L. R. 19 Cal. 62, referred to. *PER TRIVELLYAN J.* It is not necessary that there should be any formal making over of possession. *PER HILL, J.* When the owner of immovable property of a value less than Rs. 100 has executed to the intended buyer an instrument purporting to transfer the ownership of the property and the instrument has not been registered but the intending buyer has been placed in possession on the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined on second appeal. *GRAGA NARAIN GOPE v. HARI CHAND GOALA*

[L. R., 22 Cal., 179]

37

*Transfer of Property Act (IV of 1882) s. 54—Vendor and purchaser—Deed of sale—Completion of sale—Registration of deed of sale—Where registration of a deed of sale unaccompanied by delivery of the deed to the vendee does not make the transaction a completed one. Although under the Transfer of Property Act the sale of a tangible immovable property of the value of one hundred rupees and upwards can be made only by a registered instrument, yet mere registration should not be taken as conclusive that the title has passed. If it was intended by the parties that the title should pass only upon the consideration money being paid, such intention should be given effect to.* *Saroj Datta v. Datta v. Datta* 2 C. W. N., 207 approved. *MATLADAN v. EUGENTHAYAN PRAKASH* 15 M. L. J., 27 Cal., 7

38.

*Contract of sale—Delivery of possession—Payment of the whole of the purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having*

**VENDOR AND PURCHASER—cont. sued****6. COMPLETION OF TRANSFER—cont. sued**

*no attached interest—Transfer of Property Act (IV of 1882) s. 40 of 45(6)(b)—Trusts Act (III of 1882) s. 91.—Under a contract of sale with respect to certain land, possession was delivered to the vendor and the whole of the purchase-money was paid to the vendor but the transfer was not effected, as the necessary registered conveyance had not been executed. Subsequently a judgment creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor. Before the case was decided by the Court of first instance a registered conveyance had been executed. Held that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property.* *Hormasji Manekji Dadashankar v. Keshav Parshottam* 1 L. R. 18 Bom., 13 distinguished. *KARALA VASUBHAI MAHOMED BHAI v. MRS. SETHNAM VAKRACHAND* 1 L. R., 24 Bom., 400

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*Transfer of Property Act (IV of 1882) s. 54—Sale of land—No payment of consideration—Delivery of deed—Completion of purchase—Under s. 54 of the Transfer of Property Act, though no title passes except upon registration of the conveyance where such registration is compulsory, yet mere registration may not be sufficient to pass a good title if the parties intend that no title shall pass upon registration till the consideration money has been paid and the deed is enrolled. The law will give effect to such intention. Registration is prima facie proof of intention to transfer the title, and the party who alleges the existence of a collateral agreement must strictly prove it.* *SRILO VARA V. SINGH v. DARBARI MAHTON* 2 C. W. N., 207

40.

*Default in completing contract of sale—Partial performance.—In suits arising out of the default on both sides to complete a contract for the purchase and sale of land in the mortgage, the Court should proceed as a Court of equity and should look to the acts and conduct of the parties subsequent to the making of the contract as well as the language of the contract itself and where the contract has been partially performed and the purchaser put into possession of a portion of the land and allowed by the vendor so to continue to do, after the period fixed for completion of the contract has elapsed, further time should be given by the Court for the performance of the contract in specie.* (TRUCKER, J., dissenting) *BALA VALAD SANKHA v. GABARI BALYANT KULKARNI*

[3 Bom., 170 2nd Ed., 163]

41.

*Conditional contract—Subject to approval of title by purchaser's solicitors.—Registration Act (III of 1882) s. 17 cl. (b)—An agreement for the purchase and sale of certain immovable property should be subject to the completion of the contract should be subject to the approval of the purchaser's solicitors (naming them) and that if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's*

**VENDOR AND PURCHASER—continued.****5. COMPLETION OF TRANSFER—concluded.**

solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered. *Held* in a suit to recover the amount of the earnest-money and costs that, assuming the objections to be reasonable, the purchaser was entitled to rescind the contract. *Held* further that the agreement did not require registration. **SREEGOPAL MULLICK v. RAM CHURN NUSKUR**

[I. L. R., 8 Calc., 856; 12 C. L. R., 125]

**42. ——— Specific performance—**

*Approval of title by purchaser's solicitor—Contract.*—In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, and that the title-deeds were to be sent to the purchaser's solicitors, and "on approval of the same the purchase-money to be paid prompt,"—*Held* that the carrying out of the contract was in no way conditional upon the approval of the solicitors, but that their approval was a condition precedent to the prompt payment of the purchase-money without waiting for a conveyance, and that the title was to be investigated and approved in the ordinary way. This case distinguished from *Sreegopal Mullick v. Ram Churn Nuskur*, I. L. R., 8 Calc., 856. **COHEN v. SUTHERLAND**

[I. L. R., 17 Calc., 919]

**6. CONDITIONAL SALES.**

**43. ——— Land sold on condition of re-purchase—Absolute sale.**—Where land was sold on a condition of re-purchase, and no time was mentioned in the instrument of sale,—*Held* that the sale had not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land. **GURUSAMY AIYAN v. SWAMINADHA AIYAN**

[2 Mad., 450]

**44. ——— Deed of conditional sale—Beng. Reg. XV of 1793—Beng. Reg. XVII of 1806—Usufruct.**—A deed of sale executed in 1701 (1794) was subject to the condition that if the vendors, "from the year 12 2 to the year 1203, should repay the whole of the consideration-money, they should receive back the deed of sale, which shall then become null and void; and if within the said period they fail to pay the said consideration-money, this conditional sale shall become absolute and be considered irrevocable." *Held* that Regulation XV of 1793 did not operate to prevent the assignment becoming absolute after the expiration of the time limited for repayment of the consideration, and that Regulation XVII of 1806 had not a retrospective effect, and therefore did not apply; and that, even if the entire amount of the purchase-money were satisfied out of the proceeds of estate before the time for the conditional sale becoming absolute, the vendees would acquire a perfect title. **BUDRO SINGH v. DHOKBUX SINGH** . **Marsh., 632**

**45. ——— Purchaser under conditional sale—Incumbrances.**—A purchaser under a

**VENDOR AND PURCHASER—continued.****6. CONDITIONAL SALES—concluded.**

conditional sale takes the property with all *bond fide* incumbrances created by his vendor previous to the sale. **RADHA MOHUN DEB v. NUND LAL DEB**

[W. R., 363]

**46. ——— Mortgage by conditional sale—Sale with subsequent agreement for re-purchase—Suit for pre-emption—Limitation.**—On the 6th of June 1877 one *R K* sold a certain zamindari share to *S*. On the 18th of May 1883 *B* brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1883 the vendor, the vendee, and the pre-emptor entered into an agreement, by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June 1891, the vendor, affecting to treat the transaction of the 6th of June 1877 as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act, accompanied by payment of the price of the property into Court, and prayed for redemption. The vendee refused to take out the money deposited by the vendor, and subsequently on the 13th of November 1891 *R K* applied for repayment to him of the said money, stating that he wished the vendee to remain in possession, and asking that the agreement of the 6th of July 1883 might be considered null and void. On the 1st of September 1892 one *R S* filed a suit for pre-emption of the said property. *Held* that the original transaction of the 6th of June 1877 was an out-and-out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by *R S* was barred by limitation. **RAM DIN v. RANG LAL SINGH**

[I. L. R., 17 All., 451]

**7. CONSIDERATION.**

**47. ——— Validity of contract of sale—Agreement without consideration—Right to sell afterwards to another.**—A mere agreement to sell a certain property, without any consideration passing, cannot bar the right of the vendor on the same day to sell a portion of the property to a third party, or invalidate the third party's purchase. **BHUYANKURIE DABEE v. TARINER CHURN CHUCKERBUTTY**

[7 W. R., 38]

**48. ——— Non-payment of purchase-money—Intention to pass subject of sale—Failure to pay consideration, Effect of.**—Although ordinarily, in a transaction of sale, it may be reasonable to suppose that the seller does not intend to pass the property to the purchaser until the purchase money has been paid or secured, it is not an absolute rule of law that the non-receipt of the consideration money in full entitles a vendor to make void a sale which is otherwise complete. **MOHUN SINGH v. SHIB KUNWER** . **1 Agr., 85**

**HEERA SINGH v. RAGHO NATH SUHAI** . **BHURTH SINGH v. RAGHO NATH SUHAI** . **3 Agr., 30**

**VENDOR AND PURCHASER—cont. sued****7 CONSIDERATION—cont. sued**

49. — *Intention of parties*—*Failure to pay consideration on effect of after execution and delivery of deed*—The intention of the parties from the facts should be ascertained; and when a deed is executed and delivered to the purchaser a subsequent fault by the purchaser in the payment of the purchase-money would not in the absence of fraud, make void the sale or give any other title to the vendor than a right to sue for the money. Further if it be proved that the vendor intended to retain possession until full payment the Court may pass a decree establishing the purchaser's right subject to execution or payment of consideration. **MORRIS SINGH v. SHIB KUMAR**

[1 Agra, 85]

50. — *Plea of valuable consideration—Allegation of failure of vendor and sale of absolute title*—A plea in suit upon a defence of purchase for valuable consideration should aver the amount for which and the balance of the purchase money for the consideration. **ADAM TH DAS v. FILLOR**

(S. C. L. R., P. C., 530)

S. C. PANDHARAY D. S. (S. B. R. & Co.)  
[15 W. R., P. C. 24 14 Moore's L. A., 1]

51. — *Failure of consideration—Bona fide purchaser not a rescuer—Right to refund of bonus*—When a bonus is paid for a patent taluk not in existence there is an entire failure of consideration and the person paying the bonus is entitled to a refund of it. The principle of *carrot employer* does not apply to such a case. **KRISHNA LALL MISHRA v. NARAYAN COOMAR RAY**

[5 W. R., 233]

52. — *Proof of payment of consideration—Burden of proof*—In a suit for possession of land to have been purchased under a registered deed of alleged sale the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated 1 January S. G. and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced evidence in proof of the payment of consideration. Held that although under ordinary circumstances, the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration and raised such a counter-presumption as to make it incumbent on the plaintiff to prove the fact that consideration had in fact passed. Held therefore, that in the absence of evidence, and of evidence to explain the fact of the plaintiff being out of possession the suit failed. **ACHARYA K. V. S. v. MANABU PRASAD**

[I. L. R., 8 ALL 641]

**VENDOR AND PURCHASER—cont. sued****7 CONSIDERATION—cont. sued**

53. — *Part payment of consideration—Right to sue for possession*—Held that non-payment of the consideration-money can be pleaded by the seller and inquired into by the Court, the admission of the seller at the time of registration before the Registrar being no conclusive proof of payment of the consideration-money with reference to the practice which obtains of preparing the deed and registering it before payment. Under the ordinary rule of law a purchaser has a right to sue for possession when a portion of the consideration-money has been paid, unless the contrary be shown to be the intention of the parties, and the seller has a right to sue for the balance of price. **GOV. PR. SHAR v. VANDASINGH**

1 Agra, 160

54. — *Right to refund of earnest-money—Agreement for sale of ship—Failure of consideration—Plaintiff and defendant entered into an agreement for the sale of the defendant's ship, who were thereby stated to be the absolute owners of a certain ship, to the plaintiff of the said ship. The defendant agreed with the plaintiff that they should, immediately upon payment of the purchase-money, execute to the plaintiff and another a proper bill of sale of the ship. The defendant was unable to get a properly registered bill of sale of the ship made out owing to infirmity of their own title but were willing so far as they could, to convey. The plaintiff had made part payment in respect of the price of the ship. Held that the consideration had failed, and that the plaintiff was entitled to a refund of the money paid by him in part payment, and of sums disbursed by him under the agreement on account of the expenses of the ship. **JASSIN LUXAS v. HAJI AHMED***

2 Ind. Jur., N. S., 13

55. — *Valuable consideration, Question of—Assessment of value of property*—The question whether an assessment of any equivalent redemption admitted by the assessor was made for a valuable consideration or not, is no material determination, the rights of the assignee against a party who holds adversely to the assignor. **HARAT BAHAN v. KACHORA VITHOBA**

10 Bom., 491

56. — *Sale of sir land with covenant to relinquish proprietary right—Non-performance of legal contract—Right to recover consideration on money*—A deed of sale which purports to convey to vendee the proprietary rights of the vendors in sir lands is an illegal contract and void as being in violation of ss. 7 and 9 of Act VII of 1881. Where therefore, along with some zamindari land, certain sir lands were sold and the vendors purported by their sale-deed to relinquish their proprietary rights in the sir lands but failed to put the vendee in possession of either the zamindari or the sir lands, it was held that the vendee could not recover from the vendors, as compensation, the consideration-money which they had paid in respect of the sir lands. **BRITAM SINGH v. HAJI PRASAD**

I. L. R., 19 ALL, 55

57. — *If a zamindar sells his zamindari rights and included in the sale the*

## VENDOR AND PURCHASER—continued.

## 7. CONSIDERATION—concluded.

right to cultivatory possession of the sir land, and agrees to relinquish his ex-proprietary rights in respect of the sir land, the vendee, in the event of such possession not being delivered or ex-proprietary rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. *Bhikham Singh v. Har Parsad, I. L. R., 19 All., 35*, approved. *MURLIDHAR v. PEM RAJ*

[I. L. R., 22 All., 205]

58. ——— Deed of sale set aside for want of consideration—*Contract Act (IX of 1872), s. 25*.—On the 18th November 1892 *A* executed to *B* a deed of sale of certain land. The deed was duly registered, and it recited that the consideration-money, Rs. 0, had been duly paid. *B* got into possession of the land *A* subsequently brought a suit to set aside the deed of sale, and to recover possession, alleging that he had been induced to execute the deed when incapacitated from illness, and that the consideration-money had not been paid. Both the lower Courts found that the consideration-money had not been paid. The lower Appellate Court dismissed the suit, holding that *A*'s remedy was to sue for the consideration-money if it was unpaid, and that he had a lien on the land for the amount, but that he could not set aside the deed. *Held* that the deed should be set aside, and the plaintiff should recover possession. *Per FULTON, J.*—The sale was void for want of consideration. S. 25 of the Contract Act applied to the transaction. *Trimatrao Raghavendra v. Municipal Commissioner of Hubli, I. L. R., 2 Bom., 172*, distinguished. *Per FABIAN, C.J.*—The facts serve to show that there was no sale at all, and that the plaintiff was tricked into executing and registering the conveyance. Conveyances of lands in the mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, should not, however, be put in the same category as contracts void for want of consideration. *TATTA v. BABAJI* . . . I. L. R., 22 Bom., 176

59. ——— Want of consideration for deed of sale—*Evidence that a deed is not intended to have the ordinary operation.*—The plaintiffs sued for certain land which they claimed in succession to *R*, deceased. The defendant who was in possession had executed a sale-deed comprising the property now in question in favour of the deceased. But it was pleaded by him and found by the Court of first appeal that the sale-deed was benami, and no consideration had passed, and a decree was passed dismissing the suit. *Held* on second appeal that the decree should be reversed. *Per curiam.*—When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed. *RANGA AYYAR v. SRINIVASA AYYANGAR* . . . I. L. R., 21 Mad., 56

## VENDOR AND PURCHASER—continued.

## 8. FRAUD.

60. ——— Evidence of fraud—*Inadequacy of purchase-money.*—In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. *SREEMUN-CHUNDER DEX v. GOPAL CHUNDER CHUCKERBUTTY* [7 W. R., P. C., 10: 11 Moore's I. A., 28]

61. ——— Notice of facts implying bad title—*Mala fides*—*Questions of bona fides.*—Notice of fact from which the infirmity of the vendor's title might be inferred is evidence of *mala fides*, but is not itself *mala fides*, and the question of *bona fide* purchase is one of fact. *SITHA UMMAI v. RUNGASAMI IYENGAR* . . . 5 Mad., 385

62. ——— Effect of fraud—*Goods obtained by fraud—Right of vendor.*—Where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re-vest the property in himself, and this even if the property had passed to the vendee with the consent of the vendor. Where a vendee purchased cotton, with the preconceived design of not paying for it, the sale did not pass the property: although the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered as the agent of the vendor, and his possession as that of the vendor, and the cotton as still the property of the vendor, as long as the price was not paid. *DURSON LALL PANDEY v. INDUR CHUNDER* . . . 6 W. R., 81

63. ——— *Contract Act, ss. 17, 19—Contract induced by fraud—Right to rescind.*—If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to s. 19 of the Contract Act. *MORGAN v. GOVERNMENT OF HYDRABAD*

[I. L. R., 11 Mad., 419]

64. ——— *Fraudulent misrepresentation—Sale of immoveable property—Misdescription of area sold—Suit for damages—Nature of proof required.*—A purchaser of certain immoveable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with the area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription. *Held* that the plaintiff, in order to succeed, must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into the contract, and which caused him damage. *Derry v. Peek, L. R., 14 Ap. Cas., 337*, referred to. *ABDULLAH KHAN v. ABDUL RAHMAN BEG* . . . I. L. R., 18 All., 322



## VENDOR AND PURCHASER—continued.

## 9. INVALID SALES—continued.

the transaction. RAJENDER CHUNDER NEWGEE v. BHOODUN KALEE DEBEA . . . W. R., 1864, 65

72. — Sale by old and illiterate woman without professional advice—*Fraud—Undue influence—Inadequate consideration—Terms on which deed will be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements.*—C was the widow of one R, deceased, and from the death of R until her own death remained in occupation of a house and chawl which had belonged to him. D was a sister of C's, and, shortly after R's death, D and her son B, the first and second defendants, went to live with C on the said property, and lived with C and were her only companions until C's death. While so living with C, D and B advanced to C at various times, on joint account, various sums of money, amounting to Rs. 500, for purposes such as would have justified C in pledging the property of her late husband to secure the repayment of the same. C became very ill, and D and B, fearing she might be going to die, requested her to take some steps to secure to them the repayment of the sums they had advanced to her. C thereupon offered to give D and B an absolute deed of sale of the said house and chawl in consideration of the said sum of Rs. 500 already advanced to her and of an additional sum of Rs. 500 then to be paid to her to defray her funeral expenses and the costs of the said conveyance. D and B consented, and called in their solicitor to take C's instructions and draw up the deed in question, which he accordingly did; and within three days of the said agreement the deed was executed. At that time C was very ill, and twelve days after the execution of the deed C died. C was an illiterate woman over sixty years of age, and had in this matter no independent professional or other advice. The additional sum of Rs. 500 agreed to be paid to C was never so paid to her, but after her death D and her son expended moneys in and about her funeral ceremonies amounting, as they alleged, to upwards of Rs. 400. The property in question so pledged to them for Rs. 4,000 was worth at least Rs. 2,000. The plaintiff, one of the heirs of R, sued to set the deed aside and for possession of the said property. *Held* that the deed of sale must be set aside as obtained under circumstances which amounted to fraud. *Held* also that the advances, amounting to Rs. 500, made to C by D and her son B, being made for purposes for which C would have been justified in pledging the said property, the deed of sale should be set aside only on the terms that the property in question should stand charged with the repayment of the sums so advanced. *Held* also that the property must stand charged with the repayment to D and B of such a sum as, having regard to her position and station in life, should be found to be a reasonable sum for the funeral expenses of C. After C's death, D and B remained in possession of the said property under the deed of sale, and expended considerable sums of money in and about repairs and improvements to the same; and they now claimed that, if the sale

## VENDOR AND PURCHASER—continued.

## 9. INVALID SALES—continued.

was to be set aside, the sums so expended should be repaid to them. *Held* that no allowance could be made to D and B for sums so expended by them, such sums having been expended at a time when D and B must be taken to have known that they were fraudulently in possession of the property in question. SADASHIV BHASKAR JOSHI v. DHAKUNAI

[I. L. R., 5 Bom., 450]

73. — Inadequacy of consideration—*Actual or constructive fraud—Cancellation of sale—Sales by expectant heirs of reversionary interests.*—In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, if not too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense, and delay on the other. The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person. AZIMUDIN KHAN v. ZIA-UL-NISSA . . . I. L. R., 6 Bom., 309

74. — Omission to register—*Fraud—Registration Act, s. VI of 1864, s. 18.*—Where the sale-deed was executed, and consideration paid, but the deed was not registered within four months owing to the seller's fraud,—*Held* that such fraudulent vendor could not benefit himself by pleading the provision of law (s. 18, Act XVI of 1864) as a bar to the purchaser's claim. PUNGA RAI v. JUGAUN SINGH . . . 2 Agra, Pt. II, 201

75. — Alienation to defeat execution of decree—*Rights of creditor without specific lien against purchaser—Fraud.*—On the 3rd October 1865 the plaintiff filed a suit against D to recover certain lands and money. While the suit was pending—viz., on the 13th October 1866,—D mortgaged part of his immoveable property to defendant R, and on 21st August 1871 executed a deed of sale to defendant R of all the immoveable property of which he (D) was then possessed, for the price of Rs. 4,000. On 30th April 1872 the plaintiff obtained a decree against D, and in execution thereof attached certain immoveable property other than the land mentioned in the decree. The defendant R applied under s. 246 of the Civil Procedure Code (Act VIII of 1859), and on the 21st August 1873 procured the removal of the attachment, whereupon the plaintiff brought the present suit to set aside the order of 21st August 1873 and to obtain a declaration that the

## VENDOR AND PURCHASER—continued

## 9 INVALID SALES—continued

at acted property belonged to D and was liable to execution. *Held* that inasmuch as neither the decree of the 30th April 1882 or the plaint on which it was founded established the right to establish any claim against a purchaser upon the immovable property the subject of the present suit it was perfectly competent for D at any time previously to an attachment of the property, to alienate it, and the question for decision as to that property was whether D had alienated it or not. If the deed of sale by which D conveyed the property on the 2nd August 1871 were merely colourable and the claim of ownership preferable only and not real, i.e., if it was the intention of the parties that the alienation should be a merely a trustee for D to hold the property from execution and that D should continue to be the beneficial owner of it, there would not be any all title and the deed of sale would be void as against an attaching creditor of D. If on the other hand the sale were a real transaction—i.e., if it was the intention of the parties that the full and complete title should pass from the vendor to the vendee, then the sale would be valid, even though it might have been in the contemplation of the parties that future attempts to attach the property by a creditor of the vendor (not leaving any specific title in the property) should be defeated by the sale. In that event the creditor has no right to interfere with the power of his debtor to deal with his property. **RAJAH HARI & ARDHRA HON MURTI** I. L. R., 4 Bom., 70

**SAKHARAM MANIPAT & DAWD YALD JAWAHRI** I. L. R., 4 Bom., 76 notes

**HALVANTRAY & JIVANJI HONMURTI** (I. L. R., 4 Bom., 77

76 — Sale to two successive purchasers—Non payment of purchase-money—Right of first and second purchasers.—The proprietor of certain immovable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non payment of the purchase-money and that the second sale being invalid as being made by a person who had no rights and was remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be due to him from the first purchaser, and to by reason of the property until the receipt of the purchase-money. **RAM LAKSHMI RAI & LAXMAN** two sc I. L. R., 2 All., 711

1890 b — Sale of property not belonging to the vendor—Loss sustained by purchaser on knowledge of fraud.—Where a party sells property to another, it is presumed that he has not the right to sell the property, and in consequence the loss ought to fall on the vendor and not on the purchaser. *Held* that in this case of selling

68. — who put faith in his act of selling relationship—**HONED VASIR** I. L. R., 23 W. R., 443

## VENDOR AND PURCHASER—continued

## 10 INVALID SALES—continued

78 — — — — — Deed of sale set aside as being fraudulent and void.—*Right of purchaser to compensation for improvements.*—A party is not bound under a deed of sale conveying real estate the property of a defendant in a pending suit, to hold not subject to any encumbrance for some expended by him for improvement upon the estate when the deed was found to be fraudulent and void as against the creditors of the vendor, and to have been executed to defeat a requisition. **MIRABE MAHOMED CADEM BHERAIE & ALI MAHOMED BHOOSTRY** O. Moore's L. A., 27

79 — — — — — Purchaser with notice of prior contract to sell.—*Trust Act (II of 1850), s. 91—Specific Relief Act (II of 1877), s. 27.*—In a suit for land it appeared that the plaintiff had obtained a registered sale-deed, comprising the property in question, from defendants Nos. 1 and 2 who had already (to the plaintiff's knowledge) contracted to sell it to another, and that the plaintiff had paid no consideration for the sale-deed, which in fact represented a collusive transaction entered into to defeat the prior contract. *Held* that the plaintiff was not entitled to recover. **NARASIMAYAN PILLAI & NELLAYAPPA PILLAI** I. L. R., 18 Mad., 43

80 — — — — — Execution of sale-deed without consideration.—*Subsequent transfer for sale—Transfer of Property Act (II of 1882), s. 24.*—In a suit for land, it appeared that in 1857 A had executed in favour of B a registered conveyance of the land in question which purported to be a sale-deed, but that no consideration was in fact paid and that A, who had retained possession, sold and delivered the land to C and D, and that they then discharged a mortgage which was to have been paid off by B. In the interval between the two transactions above referred to, the plaintiff had purchased the land from B and he now alleged that the persons in possession had executed a riot, rent, and interest found to be a forgery, under the terms of which he claimed to eject them. *Held* that the plaintiff's claim founded on the transaction of 1857 and not against C and D. **DAVID ARYAN & CHIMMA SAMI MUDALIAR** I. L. R., 18 Mad., 61

81. — — — — — Colourable sale—Deed of property to defraud creditors—Indemnity of fraud.—Where in a suit to establish plaintiff's title to property purchased by him it was found that his vendor who had many debts to pay, had sold to the plaintiff all his property reserving nothing to himself, that the plaintiff bought the property without seeing it or valuing it, that the consideration for the sale consisted of time-barred debts or debts which were not payable at the time; that the property sold remained in the possession of the vendor, who paid no consideration, and that the consideration was grossly inadequate. — *Held* that there was no bona fide or valid sale but a mere colourable transaction without consideration not intended to transfer the property to the plaintiff. **NANA MANSARAM SHET & BATHAL TARICHAND SHET** I. L. R., 23 Bom., 255



## VENDOR AND PURCHASER—continued.

## 10. LIEN.

82. ———— *Creation of lien—Title—Notice of charge—English law as to right of bond fide purchaser for value without notice.*—By contract and deposit of title-deeds *B* charged certain land in favour of *A* as a security in respect of the non-delivery of the title-deeds of an estate bought by *A* from him. After the creation of this charge, the land was transferred by *B* to *C*. The Sudder Court having decided that the contract was not operative as an hypothecation or pledge, even between the parties to it, and that *A* had no right of suit against *C*, to whom the land had been transferred,—*Held* by the Privy Council, reversing that decision, that the agreement created a lien on the land, and that no positive law was shown to forbid the giving effect to such agreement. The owner of property subject to a lien or charge can in general convey to another no title higher or more free than his own; it lies always on a succeeding owner to make out a case to defend such prior charge. The law in India does not enable a purchaser of land to look only to the apparent title in the Collector's books, or the presumed title of the owner in possession; and it is beyond the province of a Court of justice to give effect to the title of such a purchaser to the extent of defeating a prior lien or charge. Conceding that a purchaser for value *bond fide*, and without notice of the charge, would have an equity superior to *A*'s right,—*Held* that a purchase in good faith by *C* had not been proved. If the English doctrine on this subject be adopted, as the rule prescribed by justice, equity, and good conscience, its qualifications and restrictions should not be rejected. *VARDEN SETH SAM v. LUCKPATHY ROYJEE LALLAH* [Marsh., 461: 9 Moore's L. A., 303]

83. ———— *Purchaser, Right of—Produce of land, Sale of—N. W. P. Rent Act, XVIII of 1873, s. 56—Hypothecation.*—The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by s. 56 of Act XVIII of 1873, takes such produce subject to such lien. S. A. No. 1393 of 1870 decided on the 4th February 1871, and *Achal v. Gunga Pershad, 2 Agra, 73*, followed. *KINLOCK COLLECTOR OF ETAWAH v. COERT OF WARDS* . . . I. L. R., 3 All., 433

84. ———— *Lien by deposit of title-deeds—Subsequent purchase by another.*—In 1865 *C* gave *H* a lien on his property by a deposit of title-deeds. In 1867 *B* purchased the same property *bond fide* and without notice of *H*'s lien. *Held* that *B* took the property free of the lien. *BUNSEE DHUR v. HEERA LALL* [I. N. W., Part VI, 74: Ed. 1873, 166]

85. ———— *Priority—Inchute agreement to purchase—Deposit of earnest-money.*—The claimant entered into an agreement for the purchase of certain property, and on the execution of the agreement deposited Rs15,000 as earnest-money of the contract and in part payment of the purchase-money. The claimant was not satisfied at that time with the title-deeds supplied by the vendor, but afterwards entered into fresh negotiations for

## VENDOR AND PURCHASER—continued.

## 10. LIEN—concluded.

the purchase upon different terms. The vendor died, and the present claim was filed in a suit to administer his estate. *Held* that the claimant was entitled to be paid in full the Rs15,000 in priority to all other creditors, and that his lien was not lost by the failure either of the original contract or the subsequent negotiations. *KENNY v. ADMINISTRATOR-GENERAL OF BENGAL* . . . 3 B. L. R., O. C., 75

86. ———— *Lien, Concealment of—Estoppel.*—In execution of a money-decree, the decree-holder caused the right, title, and interest of the judgment-debtor in a certain property which had been mortgaged to him by a registered bond to be sold, but without notice of the existence of such lien. He afterwards obtained a decree upon the bond, and sold it to the defendants, who caused the same property to be attached. The purchaser intervened under s. 246, but without success. In a suit by the purchaser to establish his absolute right,—*Held* that, as the defendants' vendor has suppressed the fact of the charge, and thereby induced the plaintiff to purchase as the absolute property of the judgment-debtor, they were now precluded from setting up his lien. *DULLAB SIKKAR v. KRISHNA KUMAR BAKSHI* 3 B. L. R., A. C., 407: 12 W. R., 303

87. ———— *Right to enforce lien—Sale subject to decree declaring lien on property.*—If a decree declares a lien over *A*'s property for a certain sum in favour of *B*, and subsequently *A* sells part of this property to *B* and part to *C*, *B* cannot sue to enforce his lien against *C*'s purchase without bringing his own into contribution. *RAM LOCHUN SIKKAR v. RAM NARAIN* . I. C. L. R., 296

88. ———— *Lien on land created by agreement—Sale to stranger without notice—Purchaser, Right of.*—*D* mortgaged certain land to *S* to secure repayment of a loan, and covenanted that in a certain event *S* might realize the money from the house of *D*. *D* sold this house to *C*, who purchased without notice of the covenant. *Held* that *C* could not resist the claim of *S* to have the house sold under the covenant. *COOLING v. SARAVANA* [I. L. R., 12 Mad., 69]

## 11. NOTICE.

89. ———— *Necessity of notice of title—Equitable doctrine of secret ownership.*—It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an inquiry which, if prosecuted, would have led to a discovery of the real title. *RAMCOOMAR KONDHO v. McQUEEN*

[I. B. L. R., 46: 18 W. R., 166  
L. R., I. A., Sup. Vol., 40]

## VENDOR AND PURCHASER—cont. used

1 NOTICE—cont. used.

90 ————— Purchaser without notice  
— Secret owners & Fraud A vendor who purchases for all or a portion and without notice of his name from the actual owner of the property held by him under an apparently good title will be protected from a subsequent attack of the owner on his behalf of which was part of the fraud; and his purchase will hold good against any subsequent sale made by them. LENNIE & GUNGANARATNE  
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**VENDOR AND PURCHASER—continued.**

## 11 NOTICE—continued.

and the plaintiff was entitled to recover VIRA-  
PRADHA LILLAI & HARI LAMA PILLAI

See contra CHIDAMBARAM NAYANAR & ANNAITTA  
NAYAKKAN. 1 Med, 62

**80** *Bond file per*  
*chaser—Omission to make proper inquiries into*  
*title—in order that a purchaser of unencumbered*  
*property from a landlord in the land of Bombay may*  
*be entitled, as against the legal owner of such*  
*property, to set up the defence of bona fide*  
*purchaser. I don't notice he must show that he has*  
*made all proper inquiries into the title and as to the*  
*state of the family of his vendor and of his vendor's*  
*predecessors in title for a period of twelve years at*  
*least before the date of his purchase.* **SAKILL**  
**HARRISON & CO. NIXON & SONS, BOMB. O. C. 77**

87 Value of per

28 \_\_\_\_\_ Purchaser, Obligation of—

99 Incumbrance—Fraud—Equity mortgage—Purchaser for value & consideration without notice—The reason for the rule of equity that a purchaser of property, though for valuable consideration, yet with notice of a prior incumbrance, purchases subject to such an incumbrance, is that such purchaser is acting *in mala fide* in taking away the right of the prior incumbrancer by getting the legal estate while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration without notice of the prior title of a third person is not guilty of or party to a fraud upon the rights of a prior purchaser. The Courts of equity therefore will not interfere with his right to the possession, enjoyment, and disposal of the property; and though subsequently he has purchase he may become aware of the prior incumbrance, yet he has the right

# VENDOR AND PURCHASER—continued.

## 11. NOTICE—continued.

to convey to a subsequent purchaser, who, at the time of such subsequent conveyance, has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bona fide* purchaser without notice be able otherwise freely and completely to dispose of the property which he innocently acquired. On the same principle, any subsequent purchaser, however remote, though having notice, must be protected. Where, therefore, the second defendant, having notice of the plaintiff's equitable mortgage, purchased from one who, also with such notice, had purchased from a *bona fide* purchaser for value without notice,—*Held* that the second defendant held the property free from the equitable mortgage. *Carter v. Carter, 3 K. and Johns, 617, distinguished. DAXAL JIVRAJ v. JAIRAJ RATANSI* . . . I. L. R., 1 Bom., 273

100. ————— *Bona fide transferee for value of mortgaged property—Ignorance of existing incumbrance.*—*Held* that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that at the time of the purchase he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an existing incumbrance. *SHEO DAXAL MAL v. HARI RAM* [I. L. R., 7 All., 590]

101. ————— *Purchaser for value—Notice of prior mortgage.*—The plaintiff in 1867 obtained a decree against one Ramzan Mohidin for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immovable property situated in Gujarat on which the debt had been secured under a *sankhat*. On the attachment of the immovable property in execution of that decree, the defendant objected under s. 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having accordingly been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower Courts threw out the plaintiff's claim. On special appeal the decrees of the lower Courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bona fide* purchaser for valuable consideration, without notice of the plaintiff's *sankhat* or lien on the property in dispute at or before the time of his purchase. *GRIDHAR RAN-CHODDAS v. HAKAMCHAND REVACHAND* [8 Bom., A. C. 75]

102. ————— *Priority—Registration—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.*—The plaintiff sued to recover land purchased by him in 1866 from the first defendant, and which was in possession of defendants 2, 3, and 4. The conveyance to the plaintiff was duly registered,

# VENDOR AND PURCHASER—continued.

## 11. NOTICE—continued.

The third defendant claimed part of the land under a previous sale to him in 1883 by the first defendant. The conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff, of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the repayment of this sum. *Held* (1) that the plaintiff was not entitled to the lands in the hand of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered. (2) That the plaintiff was entitled to the land in the possession of the fourth defendant, who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered. (3) That, if the fourth defendant's purchase money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied. *NARAYAN LAKSHMAN v. BAPU VALAD HAIBATRAY* [I. L. R., 17 Bom., 741]

103. ————— *Transfer of property subject to trust—Purchaser for value—Constructive notice—Tenant in possession as object of charitable trust.*—If the purchaser of an estate for value takes with notice, actual or constructive, of a trust he is bound by such trust to the same interest and in the same manner as the person from whom he purchased. A person purchasing an estate where there is a tenant in possession is bound to inquire into the title of such tenant, and if he neglects to do so he takes subject to such rights as the tenant may have. The equities are the same where there is a person in possession as the object of a charitable trust and under the trust. *MANOHARI SORABJI CHULLA v. KONGSEOU* [8 Bom., O. C., 59]

104. ————— *Sale by landlord subject to rights of tenants—Notice to purchaser of rights—Suit by tenants to enforce rights against purchaser—Limitation.*—In 1806 the East India Company granted a village to A, subject to the raiyats' customary rights and privileges which were embodied in Regulation I of 1808, but the deed of conveyance was not passed until 1819, and it was then executed to the executors of A, who had died in the meantime. This deed made no reference to the rights and privileges of the raiyats. In 1868 the defendant purchased the village from its legal owners. In 1889 plaintiffs sued defendant for themselves and on behalf of the other raiyats of the village to enforce their rights. The defendant pleaded that, as the deed of conveyance of 1819 made no mention of these rights, he was not bound by them. *Held* that, as at the time of the conveyance of the village to the defendant the lands were in the occupation of the raiyats, the defendants ought to have made inquiry as to their rights. Having failed



# VENDOR AND PURCHASER—continued.

## 11. NOTICE—continued.

having himself had notice of that particular fact. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title, but not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails. *Agra Bank v. Barry, L. R., 7 H. L., 135*, followed. If an agent authorized to sell property commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger. *DOORGA NARAIN SEN v. BANERJEE MADHAB MOZUMDAR, L. L. R., 7 Calc., 199*

**114. — Registration — Possession—Registration Acts, Effect of—English Registry Acts, Stat. 7 Anne, c. 20, s. 1; 2 & 3 Anne, c. 1, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. 2, c. 6, s. 1—Irish Registry Act, 6 Anne, c. 2, s. 4 (Ireland).—**Neither in England nor in Ireland has mere registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property. Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immovable property without ascertaining the nature of the claim of him who is in possession does so at his own risk. This is the rule in England also. The Indian Registration Acts prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, s. 1); the Yorkshire Registry Acts (Stat. 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. II, c. 6, s. 1), and the Irish Registry Act (Stat. 6 Anne, c. 2, s. 4, Ir.), gave priority of rank to priority of registration. The later Indian Registration Acts—viz., Acts XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optional registrable instruments. The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration. In the reported case under the Indian Registration Acts passed in, and subsequently to, 1864, which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the

# VENDOR AND PURCHASER—continued.

## 11. NOTICE—continued.

instrument earlier in date has been registered, but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and therefore to atone for the absence of, and be a sufficient substitute for, possession in the validation of title. The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it. *LAKSHMAN DAS SARUPCHAND v. DASRAT*

[I. L. R., 6 Bom., 168]

## 115.

**Priority—Possession—Vendor and purchaser—Purchaser without possession—Subsequent purchaser with possession and without notice of prior purchase.—**The plaintiff purchased the land in dispute on the 28th February 1878, and on the same day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 29th April 1878. He was not put in possession of the property. The defendant purchased the same property on the 1st April 1878, and on the following day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 26th May 1878. His purchase was accompanied with possession. In a suit brought by the plaintiff against the vendor and the subsequent purchaser for possession of the property, —*Held* that the registration of the plaintiff's deed of purchase, not having been effected until after the execution of the defendant's deed, could not have operated as notice of the plaintiff's deed to the defendant, and therefore could not be equivalent to possession. *Held* also that, as the defendant was a purchaser without notice, either actual or constructive, of the plaintiff's prior purchase, and had taken the precaution of obtaining possession, both parties being Hindus and innocent purchasers, the defendant could not be deprived of the benefit of his possession. *HASHA v. RAGHO, I. L. R., 6 Bom., 165*

**116. — Priority — Notice of prior contract—Specific Relief Act, 1877, s. 27—Oral agreement—Sale to third person in contravention of agreement—Civil Procedure Code, 1882 ss. 261, 262.—**Where a bona fide contract whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase. *CHUNDER KANT ROY v. KRISHNA SUNDER ROY*

[I. L. R., 10 Calc., 710]

*See NEVAI CHARAN DHABAL v. KOKIL BAG*  
[I. L. R., 6 Cal., 534; 7 C. L. R., 487]

**117. — San-mortgage in Gujarat—Priority—Priority as between a purchaser at execution sale and prior mortgagee by**

## VENDOR AND PURCHASER—continued

## 11. NOTICE—concluded.

*unregistered mortgages—Flea of purchase without notice*—The general rule in the 1<sup>st</sup> section of Bombay is that an onget him his possession is necessary in order to perfect a transfer of immovable property by mortgage or deed of sale as against subsequent transferees or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of all parties in possession. It is, however, the established and judicially recognized custom of Gujarat that possession is not necessary in the case of a sale or mortgage to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a sale mortgage, in other respects good is valid as against a subsequent mortgage or purchaser, whether or not such mortgagee or purchaser has notice of the sale mortgage. To hold that a subsequent mortgage or purchaser for valuable consideration and without notice of a sale mortgage is entitled to priority over it would be tantamount to depriving the sale mortgagee of the benefit of the custom that possession is unnecessary. *PER MELVILL, J.*—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. See that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance. It is if he omits to do so in *per delicto* with the prior mortgage and it is difficult to see how he is entitled to any relief. **SORHAGCHAND GOLBACHAND v. BHAI CHAND** . . . I. L. R., 6 Bom., 193

## 12. POSSESSION.

118 — Vendor remaining in possession.—*Presumption*—Where a deed was executed conveying a man's entire property to his son only two years old and reserving to himself one rupee a day for his subsistence and after execution the conveying party remained in possession.—*Held* that in the absence of explanation no other inference could be drawn than that the deed was merely intended to be used as a blind. **SREENATH BISOH CHOWDHRY v. HUNDEPRA** . . . 10 W. R., 449

119 — *Condition of sale—Acceptance of security by vendor—Suit to realize security*—The defendant purchased certain jewels at a sale by auction subject to a condition that, if not paid for in three days, the goods should be sold at the risk of the purchaser. Being unable to pay within the time stipulated, he gave a promissory note for the price, upon an agreement that the vendor should retain the jewels for him, but should not exercise the power of sale within three days. *Held* that the vendor could sue on the note, though he retained the jewels in his possession under the lien so created. **ALLEN HAYES & Co. v. ANUNDO CHANDRAN MUNDEN** . . . Bourke, O. C., 156

120 — Absence of change of possession.—*Hindu law—Incomplete sale*—According to Hindu law, a change of possession is neces-

## VENDOR AND PURCHASER—continued

## 12. POSSESSION—continued.

sary to complete a sale of corporeal property, in order to prevent successive purchases from being claimed by successive sales of the same property, and to obviate disputes as to what was really sold. A purchaser from a Hindu vendor, who buys corporeal property without possession, does not thus obtain a title which in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant. **KACHU BHAI v. KACHU VITHORA** . . . 10 Bom., 491

121. — Necessity of change of possession.—*Hindu and Mahomedan laws—Priority*—It is a general but not an invariable rule that possession in the grant of a mortgage is deemed essential amongst Hindus and Mahomedans to the complete transfer of immovable property either by gift, sale, or mortgage. *Exemption to the above rule is noted out.* **LAKSHMAN BHAI DARGACHAND v. DAYRAM** . . . I. L. R., 6 Bom., 168

**SORHAGCHAND GOLBACHAND v. BHAI CHAND**

I. L. R., 6 Bom., 193

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— *Hindu law—Delivery of possession—Notice*—Delivery of possession of property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction. The rule prevails as between competing conveyances both of which have been registered. Attention to Hindu law texts on the subject reviewed. **LAL-BHAI SURCHAND v. BAI AMBIT** . . . I. L. R., 2 Bom., 299

123. — Sale when vendor is not in possession.—*Hindu law—Necessity of possession—Ejectment*—A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor purporting to convey the estate itself, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. *Precedent* **Sew v. Baidh Singh**, 3 B. L. R., P. C., 111, and **Bhobosoodhree Dasseah v. Issur Chander Dutt**, 11 B. L. R., 36, followed. **Bikan Singh v. Jashbhai Koer**, 22 W. L., 99; **Gangashree Dandee v. Raghobram Dandee** 14 B. L. R., 367, and **Ichamoti Ghose v. Juggobundoo Roy**, 1 L. R., 1 Cole 227, referred to. **BAI SURAJ v. DAYPATRAM DATTASHANKAR** . . . I. L. R., 6 Bom., 380

124. — Possession, Delivery of.—*Hindu law—Sale*—Possession is not essentially necessary by Hindu law to give validity to a transfer by sale of immovable property. **BAIKAN BHAI DAYA v. BHAI PRAG** . . . 1 Bom., 19

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— *Title—Hindu law*—Delivery of possession is not necessary to the transfer of ownership among Hindus. *PER MARKET, J.*—As a general rule of law, when a vendee has got

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## 12. POSSESSION—continued.

a document which in terms professes to make over property, and the document is registered (in case registration is necessary), he becomes at once the owner without actual delivery of possession. *GUNGAHURRY NUNDEE v. RAGHUBRAH NUNDEE*  
[14 B. L. R., 307; 23 W. R., 131]

126. ———— *Hindu law*—*Per curiam*.—Delivery of possession is not, under the Hindu law, essential to complete the title of a purchaser for value. *NARAIN CHUNDEE CHUCKERBUTTY v. DATARAM ROY*  
[I. L. R., 8 Calc., 597; 10 C. L. R., 241]

*NAGUBAI v. MOTIGIE GURU* . . . 1 Bom., 5

127. ———— *Hindu law*.—Under the Hindu law current in the Madras Presidency, possession is not necessary to complete a sale. *VASUDEVA BHALLU v. NARASAYNA*  
[I. L. R., 5 Mad., 6]

128. ———— *Want of possession—Hindu law—Sale before Transfer of Property Act—Possession*.—Under the law administered in the Madras Presidency in the case of sales of land between Hindus made before the date of the Transfer of Property Act, 1882, where all has been done that the parties contemplated to complete a sale, the title of the purchaser cannot be defeated in favour of a second purchaser merely by reason that the latter obtained and the former did not obtain possession. *RAMASAMI AYYANGAR v. MARIMUTTU BHATTAN*  
[I. L. R., 6 Mad., 404]

129. ———— *Sale of land by a Hindu—Vendor without possession—Conveyance of right of action*.—Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority; and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits,—*Held* that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself. *Held* further that the purchaser acquired the same right of action that his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale. *VASUDEVA HARI v. TATIA NARAYAN*  
[I. L. R., 6 Bom., 387]

130. ———— *Transfer of property by a person not in possession—Validity of such transfer—Hindu law*.—The plaintiffs sought to recover possession from the defendants of certain land, claiming under a *kararnama* executed to them by one M. The defendants contended that M had never been in possession of the land. The lower Appellate Court held that, as M was not in possession at the time, when the *kararnama* was executed, the plaintiff's claim was not maintainable. On appeal to the High Court,—*Held*, reversing the decree of

# VENDOR AND PURCHASER—continued.

## 13. POSSESSION—concluded.

the lower Appellate Court, that the circumstance of M's not having been in possession at the time the *kararnama* was executed did not prevent the plaintiffs from recovering possession from the defendants. *Kalidas v. Kanhaya Lall, I. L. R., 11 Calc., 121; L. R., 11 I. A., 219*, referred to and followed. *UGARCHAND MANACKCHAND v. MADAPA SOMANA* . . . I. L. R., 9 Bom., 324

131. ———— *Hindu law—Sale of land*.—Though by Hindu law on a sale of land it is not absolutely necessary that the purchaser should be put in possession, it is requisite that the vendor should at the time of sale be in possession of the property sold. *GIRDHAR PARJARAM v. DADJI DULABHEAM* . . . 7 Bom., A. C., 4

132. ———— *Mahomedan law—Sale when vendor is out of possession*.—A sale among Mahomedans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. *ADAMKHAN v. ALABAKHI*  
[I. L. R., 6 Bom., 645]

See also *MOHINUDIN v. MANCHERSHAH*  
[I. L. R., 6 Bom., 650]

## 13. PURCHASE OF MORTGAGED PROPERTY.

133. ———— *Bonâ fide purchase without notice of prior charge—Per PEACOCK, C.J., NORMAN and PUNDT, JJ. (BAXLEY and CAMPBELL, JJ., dissenting)*.—The fact of a purchase of land under a deed of sale being *bonâ fide* and without notice of a prior charge does not pass the land free from the prior charge. *MAHESWAR BAX SING v. BHUKHA CHOWDHRY*  
[B. L. R., Sup. Vol., 403]

1 Ind. Jur., N. S., 122; 5 W. R., 61

134. ———— *Obligation of purchaser—Inquiry by intending purchaser*.—An intending purchaser of property which has been previously mortgaged, who has no reason to suppose it to be joint family property, or the vendor to be a member of a joint family, and who has inquired of and learnt from the mortgagee that there was no fraud, is not bound to make any further inquiry. *KYNASH KAMINEE DOSSEE v. TARINER CHURN BOSE*  
[20 W. R., 100]

135. ———— *Priority—Mortgage—Possession—Registration*.—A registered mortgagee, though without possession, is entitled to priority over a subsequent purchaser. *SUNDAR JAGJIVAN v. GOTAL ESHVANT* . . . 4 Bom., A. C., 68

But an unregistered mortgage without possession is not valid against a purchaser with possession. *GANPAT BAJASHET v. KHANDE CHARGSHET*  
[4 Bom., A. C., 69]

136. ———— *Mortgage by member of joint Hindu family—Surrender of equity of redemption—Purchaser for valuable consideration*.—

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## 13 PURCHASE OF MORTGAGED PROPERTY

—contd and

*Flooded up*—A deed of sale on H. de laun granted a usufructuary mortgage; he subsequently without the knowledge of the co-partners sold the equity of redemption. On hearing of this the co-partners contested the validity of the sale. *Held* that the part sale was of the person to whom the sale was made and took so far as the co-partners were concerned a title only as mortgage. **C. RADHAKRISHNAN DAS & ELLIOTT** 6 B. L. R., 530

C. I. A. HANATH DAS & GIBSON & Co.  
[15 W. R. P. C. 24 14 Moore & L. A. 1

137 — Purchase by mortgagee—*Possession—Privity—Regulation*—A registered mortgage without possession on his prior vendor's subsequent sale at redemptive sale with possession. By a duly registered deed D mortgaged land to the plaintiff with power of sale. On default made by D the plaintiff took possession for a sale of the mortgaged land but D sold the land to the defendant who sold it to the plaintiff. The plaintiff sought to recover the land from the defendant. *Held* that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as to sale at the date of the mortgage. The property was brought to sale by the plaintiff and a right to recover from any creditor subsequently to the mortgage and subject to the mortgage. **SHRINAGAR & LITTON**

[I. L. R. 2 Bom., 662

138 — Rights of mortgagee—*Mortgage sale—H. de laun*—*Estoppel*—The three senior members of an undivided Hindu family—the remaining members of the family had disappeared—acting to the ground of necessity—entered into the plaintiff's mortgage in 1804 a mortgagee, duly registered of a piece of land which formed part of the family estate. Certain judgments were entered of the absent members of the family and sold his share in the said land and the decree. The plaintiff sold the land and purchased it and in 1823 resold his right, title and interest to the defendant's father without disclosing the fact of his father's mortgage but without any act or fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser. In 1841 the plaintiff obtained a decree upon his mortgage and attached the land. In a suit by the plaintiff to establish his right as to the land included in his mortgage—*Held* that the mortgage being void the circumstances, and done the sale of the absent son's share was subject to the mortgage thereby which was voided by the purchase and subsequent sale of the share by the son of the mortgagee. The mortgage of the son's share was stated in the deed of sale of the new purchaser who, by the fact of his being a sale of a share, was put upon inquiry. The mere want of disclosure by the plaintiff and voided son of his father's mortgage was not enough to create an

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## 13 PURCHASE OF MORTGAGED PROPERTY

—continued

estoppel against his father seeking to establish his claim under the mortgage. **JOSEPH & JOSEPH**  
[I. L. R., 2 Bom., 660

139 — Redemption—*Right of purchase—Arises*—By two deeds dated respectively the 3rd February 1818 and 17th September 1824, and duly registered, a mortgaged piece of land in dispute to B for a term of years which expired in 1850. On 10th October 1824 executed a rasmama in favour of B relinquishing all his right, title and interest, and B next day executed a hablutat to Government for the land which was forwarded and entered in B's name. In 1850 to the second mortgagee and rasmama to B—on 21st March 1850—A had by a duly registered deed mortgaged the same lands to the plaintiff who in 1854 brought a suit against A upon his mortgage and obtained a decree, under which he sold the mortgaged property and became himself the purchaser thereof. Before and at the time of the institution of this suit, B was in possession of the mortgaged land, but was not made a party to the suit. In 1854 B sold the land to C by a duly registered deed. In a suit brought by the plaintiff against B and C to recover possession of the land so purchased by him as to the mortgaged land at the sale in execution of his own decree—*Held* that B's possession at the date of the plaintiff's suit upon his mortgage was sufficient to put the plaintiff on inquiry and to constitute legal notice to him that the equity of redemption was at that time vested in B and it was therefore the plaintiff's duty to have made B a party to the suit brought by him against A who had then alienated the equity of redemption to B and not having done so, the plaintiff could not rely in support of his own title upon a purchase under his own irregularly obtained decree, and could not therefore stand in a better position as against B than if his original suit had been properly constituted, and he was found to be in a position of redemption his mortgage. **VARADACHARI & GILLIES**  
[I. L. R., 4 Bom., 63

140 — Purchase subject to mortgage—*Right to redeem—Good title at time of hearing of suit—Certificate of sale*—The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October 1847. On the 3rd December 1841 A obtained a money decree against the son and heir of the mortgagor. In execution of that decree, the property was sold subject to the mortgage, and purchased by B on the 17th August 1844. Before confirmation of the sale B on the 1st September 1864 sold it to C who on the 3rd March 1867 conveyed it by deed to the plaintiff. On the 17th September 1864 the plaintiff brought a suit for redeeming the property and at the hearing produced a certificate of sale dated the 27th October 1857. The certificate was applied for on May 1856 and issued to C reciting the sale to B and the sale by B to C. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge on appeal, reversed the decree of the first Court on the



**VENDOR AND PURCHASER—continued.****13. PURCHASE OF MORTGAGED PROPERTY—continued.**

ground that the certificate of sale was not in existence at the date of the institution of the suit, and that therefore the plaintiff had then no complete title. On appeal to the High Court,—*Held* that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced. If a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption. *Harkisandas Naranadas v. Bai Ichha*, I. L. R., 4 Bom., 155, and *Lal-bhai Lakhmidas v. Narai Mir Kamaludin Husen Khan*, 12 Bom., 247, explained and distinguished.

KRISHNAJI RAJJI v. GANESH BAPUJI

[I. L. R., 6 Cal., 189

141. — *Purchaser of mortgagor's interest—Priority—Purchaser of value without notice of a prior san-mortgage—Suit by mortgagee against purchaser to establish right to attach property—Right of purchaser to redeem—Parties—Form of decree.*—On the 23rd March 1869 a house was mortgaged by its owner, P, to J, by a san-mortgage. After the death of P, his heirs, D and T, on the 9th July 1869 executed to the plaintiff a san-mortgage of the same house for Rs. 62. That mortgage was neither registered nor accompanied with possession. On the 27th July 1869 D and T sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first san-mortgage, which was then delivered up to the defendant, with a receipt on it by J, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued D and T on his san-mortgage of the 9th July 1869, and in 1872 obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree, but the attachment was raised on the application of the defendant under s. 245 of the Civil Procedure Code, Act VIII of 1859. The plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his san-mortgage. The defendant answered that he was a purchaser for value, without notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the Appellate Court. On special appeal,—*Held* that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's san-mortgage, would not avail to defeat that mortgage under the established usage of Gujarat in favour of san-mortgages. *Held* further that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem

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the house from the plaintiff's mortgage. *Sobhagchand Gulabchand v. Bhaichand*, I. L. R., 6 Bom., 193, followed. *NABAN PURSHOTAM v. DODATRAM VIRCHAND*. I. L. R., 6 Bom., 538

142. — *Assignment of the equity of redemption by the mortgagor—No notice to mortgagees of such assignment—No change of name in Collector's books—Further advances by mortgagees to original mortgagor on same security—Suit by assignee of equity of redemption to redeem—Liability of assignee to pay off the further advances to mortgagor—Standing by—Allowing original mortgagor's name to remain in Collector's books.*—In order to complete an assignment of an equitable estate in immovable property, it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered analogous to the holder of the legal estate in English law. By a registered mortgage-deed P in 1869 mortgaged certain property with possession to the defendants. In 1871 P sold his equity of redemption to the plaintiffs, who allowed it to remain in P's name on the Collector's register. Subsequently in 1873 the defendants made further advances to P on the security of the same mortgaged property. The plaintiffs sued to redeem. The Court of first instance rejected the plaintiffs' claim, being of opinion that their purchase was not proved. On appeal, the District Judge reversed the decree, holding that the sale to the plaintiffs was proved. He held further that the plaintiffs could not redeem without paying off the further advance made by the defendants in 1873, on the ground that the plaintiffs had given no notice of their purchase to the defendants, and had allowed P's name to remain on the Collector's register as the ostensible owner. The plaintiffs appealed to the High Court. *Held* that the plaintiffs' title as assignee of the equity of redemption was complete, although no notice of the assignment had been given to the defendants. But although such notice was not necessary to complete the plaintiffs' title, it was plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by and allowing the defendants to make further advances to P under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in P's name in the Collector's books, the allowing it so to remain after the assignment would be sufficient for the purpose. *GOVINDRAY v. RAJJI*. I. L. R., 12 Bom., 33

143. — *Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.*—In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgaged

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## 13. PURCHASE OF MORTGAGED PROPERTY—concluded

premises to him that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered. *Held* that although the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance and the plaintiff has purchased the equity of redemption with notice as above was not entitled to redeem. *Per curiam*. The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground. **ADAKALAM v. THESTHAN**  
(L. L. R. 12 Mad., 500)

## 14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER

144. — Non payment of purchase-money.—*Transfer—Payment to Court—Suit for specific performance*. Plaintiff had entered into a contract with one of the defendants for the purchase of certain immovable property and after he made a small advance the contract was written out and registered. The purchaser refused to pay up the purchase-money unless the vendor paid the costs, or half the costs of registration the latter resold the property to a third person. The present suit was to compel the completion of the contract and delivery of the property. *Held* that the Court was bound to see whether it was or was not the intention that a complete and binding sale should take place although the purchase-money was not paid. *Held* also that in bringing such a suit the plaintiff was bound, if he had not previously tendered the money to the defendant, to pay it into Court. **MAHABOO BEGUM v. HUBERBOO HOSEIN**  
15 W. R., 44

145. — Advance of purchase-money. *Lien on purchase—Repayment—Suit for possession*. B advanced money to A for the purchase of an estate. The estate was purchased by A but was not conveyed to A. *Held* that, before A could maintain a suit to obtain possession of the land, he was bound to pay or tender the money advanced by B. **BOHORA CHUNDER SING v. ASTORNOOR CHOWDHURY**  
Marsh., 494

146. — Right to refund of purchase-money. *Faith to give possession—Suit for purchase-money*. A purchaser of property of which possession was contracted to be given but the vendor was unable to fulfil the contract, is at liberty to sue for repayment of the purchase-money and is not obliged to sue for possession of the property. **MORAN LAL BEHARI LAL**  
3 N. W., 336

147. — *Blanket purchase-money*. A *blanket* purchase-money was held to be entitled to a refund of the purchase-money in a case where some dispute has arisen

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### 14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—contd and

arisen as to the purchase, the matter was referred to arbitration; and it was held that the vendor had no authority to sell. The principle of caveat emptor does not apply to such a case. **KISHEN MOHUN SHARMA v. RAM CHUNDER DIX**  
3 W. R., 28

148. — *Refusal to perform contract—Omission to repudiate sale—Suit for recovery of purchase-money*. The defendant had sold certain property to the plaintiff. They afterwards refused to effect mutation of names in favour of the plaintiff, on the ground that he had not paid off a certain mortgage on the property which he had promised in the contract of sale to do. They did not repudiate the sale or the plaintiff's title under it. *Held* that the refusal was not tantamount to a rescission of the sale and that a suit for the recovery of the purchase-money would not lie. **SIRAJ-UD-DOWLAH v. NOOR AHMED**  
5 N. W., 194

149. — *Suit to recover deposit of purchase-money—Obligation to tender conveyance for execution*. In a suit by a purchaser of immovable property to recover a deposit paid by him on account of the purchase-money to the auctioneer the vendor having refused to convey to the purchaser save by a deed which should describe the premises by reference to another deed, not shown to the purchaser at the auction and of the contents of which he had not then any notice. *Held* that the purchaser was not bound to have tendered a conveyance endorsed to the vendor for execution, together with the residue of the purchase-money before suing to recover the deposit. **ESAM ADAMI v. BUDAY PRESHOTAM**  
4 Bom. C. 125

150. — *Illegal sale—Sale by co-partners without assent of others*. Where a sale by two co-partners in favour of another was set aside on the ground that the sale by a co-partner without the consent of the others was illegal. *Held* on the suit of the vendor to recover the purchase-money from the descendants of the vendors, that the purchase-money was like a debt, and payable by the heirs in proportion to the shares inherited by each. **OOMEDER v. CHEDA LALL**  
3 Agra, 284

151. — *Refund of purchase-money by heir taking after widow—If the estate a party succeeds, as heir to an estate, the sale of which, by the widow of the person from whom he inherits, has been set aside, is bound to refund the purchase-money paid to the widow for the purpose of discharging liabilities on the estate.* **BOORHUN SING v. ALAM SINGH**  
1 Agra 281

152. — *Failure to register—Suit for refund of purchase-money*. The plaintiff agreed to purchase land and paid down the purchase-money taking from the vendor an agreement that if he did not register the conveyance he would return the purchase-money. The plaintiff entered into possession but the vendor failing to register the conveyance he sued to recover back the purchase-money. *Held* that he was entitled to a

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refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the occupation of the land; but when no set-off is pleaded, the vendor could only claim such amount by a separate action. *COURT OF WARDS v. NATTA KALI DEBI* . 3 B. L. R., A. C., 353; 12 W. R., 287

*See GURU PRASAD ROY v. DHANPAT SINGH*

[5 B. L. R., Ap., 46; 14 W. R., 20

*PRABHURAM HAZRA v. ROBINSON*

[3 B. L. R., Ap., 49; 11 W. R., 398

**153. ————— Purchaser at**

*revenue sale afterwards set aside—Suit to recover purchase-money—Voluntary payment.*—A person who, with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase-money merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit. *RAMTUL SINGH v. BISSESSUR LAL SAHOO*

[15 B. L. R., 208; 23 W. R., 305

L. R., 2 I. A., 131

Reversing the decision of the High Court in *BISSESSUR LAL SAHOO v. RAMTUL SINGH*

[11 B. L. R., 121; 19 W. R., 351

**154. ————— Right of vendor**

*to interest claimed in part of purchase-money left unpaid by arrangement—Tender.*—By an agreement between vendor and vendee part of the purchase-money was retained by the latter, but not as a mere deposit by the vendor. The money was to be retained as security, that the property sold should be cleared of incumbrances and good title made. The vendee was not liable for interest unless he should refuse, or omit, to pay the money so retained when the vendor should have shown readiness to clear off the incumbrancer. Till then the vendee was not bound to pay or to tender to the vendor the money retained. *MUHAMMAD SINDIQ KHAN v. MUHAMMAD NASIR-ULLAH KHAN* . . . I. L. R., 21 All., 223

[L. R., 26 I. A., 45

3 C. W. N., 201

**155. ————— Deposit by purchaser**

*under contract—Contract going off through default of purchaser—Vendor's right to retain deposit.*—Held that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. *Ex parte Barrell: In re Parnell*, L. R., 10 Ch. 1p, 512, and *Howe v. Smith*, L. R., 27 Ch. D., 89, referred to. *BISHAN CHAND v. RADHA KISHAN DAS* . . . I. L. R., 19 All., 489

**156. ————— Right of purchaser**

*to return of deposit—Lien of purchaser for the part of the purchase-money paid by him.—A*

**VENDOR AND PURCHASER—continued.****14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—continued.**

purchaser of land who has paid part of the purchase-money by way of deposit, but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out, is not entitled to recover the deposit from the vendor. The vendor is not necessarily entitled to retain the deposit merely because under the circumstances the Court refuses to grant specific performance against him. From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract. *BALVANTA APPAJI v. WHATEKAR BIRA*

[I. L. R., 23 Bom., 56

**157. ————— Unsuccessful**

*denial of contract by defendant—Dismissal of suit by purchaser for specific performance for non-payment of the balance of the consideration-money within the stipulated period—Right of plaintiff to return of deposit of the part of the consideration-money paid where specific performance is refused—Equity and good conscience—Bengal, N. W. P., and Assam Civil Courts Act (XII of 1887), s. 37.*

—In a suit for specific performance of a contract, the defendant denied the contract *in toto*. The lower Appellate Court, while finding that there was a contract between the parties, refused to grant specific performance on the ground that the plaintiff failed to pay the balance of the consideration-money on the stipulated day, but made a decree for the refund of the deposit. On appeal by the defendant to the High Court,—Held that, inasmuch as the defendant unsuccessfully denied the contract *in toto*, and as there was no repudiation of the contract by the plaintiff, he (the plaintiff) was entitled to a refund of the deposit made by him. *AIKESHI DASSI v. HARA CHAND DASS* . I. L. R., 24 Calc., 897

[C. W. N., 705

**158. ————— Contract to**

*purchase property in cantonment—Rights of Government in such property—Contract making no mention of Government rights—Knowledge of purchaser—Suit by purchaser for specific performance or return of earnest-money—Earnest-money when repayable—Amendment of plaint so as to claim refund of earnest-money.*—On October 12th, 1887, the first defendant executed the following agreement in favour of plaintiff with respect to certain property situated in the Poona Cantonment: "I have agreed to sell to you . . . both my bungalows described above, including the sites and buildings together with the compounds, rooms for servants, stables, out-houses . . . and I have this day received from you Rs. 5,000 as earnest money. After the sale-deed in regard to the said bungalows is executed, I will get them transferred to your name in the Brigade-Major's office." On the same day the first defendant received from the plaintiff Rs. 5,000 as earnest-money. A notice of the proposed sale was published in the newspapers, upon which the Poona Cantonment Committee wrote to the plaintiff

**VENDOR AND PURCHASER—contd and****14 PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—continued.**

stating that Government possessed certain rights over the property. Plaintiff then demanded that the first defendant should obtain from Government a title deed to him a full and complete title in the property. The defendant refused and prepared a draft deed transferring the ordinary cantonment tenure which was a mere occupancy and sent it to plaintiff. Plaintiff declined to accept it, and brought this suit to compel the first defendant to execute a deed transferring to him a full and complete title for possession of the property and for rent and damages. Although apparently not arising upon the pleadings, an issue was raised by the parties as to whether by his conduct the plaintiff had forfeited his right to have the earnest-money returned to him. This issue was however struck out at the trial by the Subordinate Judge who also refused to allow the plaintiff to be amended by inserting a claim for the repayment of the earnest-money on the ground that it would change the character of the suit from being one based on the contract of the 12th October 1881 into a suit based on the fact that there had never been a contract at all between the parties. He dismissed the suit. The plaintiff appealed and intended that the contract was that the defendant should give an absolute title to the property and that as he was unable to carry out this contract, he should return the earnest-money to the plaintiff. *Held* (1) upon the evidence *per* FARRAY C.J. and FULTON JARJINE and RAMADE, J.J. (CASSIDY J. dissenting), that the knowledge that the property in question was held upon cantonment tenure was not brought home to the plaintiff and that the Court could not impute such knowledge to him; that the terms of the contract itself were calculated to induce the plaintiff to believe that the defendant was selling not a mere revocable license to occupy the land, but the land itself. The defendant agreed to sell the land and having done so, the onus lay upon him to show not only that he intended to sell only cantonment occupancy rights, but also that the plaintiff understood that he was purchasing the same. (2) That the defendant, being in default and being unable to give the title contracted for should return the earnest-money to the plaintiff. *Held* by the Full Bench that the amendment of the plaint so as to make it include a claim for the refund of the earnest-money ought to have been allowed although not asked for until a late stage of the case. The right to specific performance of a contract, or, in the alternative to a return of the earnest-money should be determined in one and the same suit, and the plaintiff failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit, if he is entitled to relief in that form. The circumstance that a purchaser is not entitled to specific performance is by no means conclusive against his right to a return of the deposit. If having regard to the terms of the contract he is justified in refusing to accept the title, which the vendor is unable to give, he is entitled to a refund of the deposit. INKISHINHAJI v. FLETCHER [I. L. R., 31 Bom., 827]

**VENDOR AND PURCHASER—continued****15 PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER—concluded**

150. — Voluntary payment—*Payment to prevent sale*—A payment of money to prevent a sale about to be effected in execution of a decree cannot be called a voluntary payment, whether it is made by the judgment-debtor or by a third party claiming the property. OMRILO LALL SINGH v. HAMDROO CHAKR. 18 W. R., 803

160. — Payment by purchaser at execution sale—Purchaser took no application of money to pay debts on sale—A purchaser was held entitled to recover the amount paid by him on account of previous mortgages when, in making three payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied in clearing off the debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant. WALID HOSEIN v. AHMED KHAZ. 17 W. R., 480

161. — Sale without attachment—Caveat employer—Fraud—Tadil a mutadil, of which he was owner, to Z. At the time of sale the mutadil was under attachment in execution of a decree obtained against T by R. Z paid the amount of that decree to prevent the property which he had purchased being sold in execution. Z was under no obligation otherwise to pay the amount of the decree. *Held* that Z was entitled to recover against T the amount so paid. FARTAN v. TAYLER [3 B. L. R., A. C., 88, 10 W. R., 350]

162. — Purchase from Hindu widow—Alienation on her side by heir—Said by purchaser to recover money paid on mortgage—The plaintiff purchased an estate from a Hindu widow in possession, and after his purchase he paid a debt for which the property sold had been mortgaged by the late husband of his vendor. Subsequently the daughter of the vendor claimed the property as heir of her father and recovered possession of it from the purchaser by suit. The purchaser then sued the heir for a refund of the amount of the mortgage-debt paid by him. *Held* that the purchaser was entitled to recover. PORAY MISRA v. HARSARAN MISRA. 8 B. L. R., Ap., 55

**15. PURCHASERS, RIGHTS OF**

163. — Right to good title—In mortgage property—A purchaser of immovable property is entitled to receive, and the vendor is bound to give, a title free from reasonable doubt. PITAMBER CHANDRANI v. CASSIRAI [I. L. R., 11 Bom., 273]

164. — Purchaser from Hindu executor—Inquiry by purchaser—Said to a purchaser from a Hindu executor is not bound to see to the exact amount of the debts which the testator has directed the executor to pay or even to inquire if any such debts actually existed, he need

**VENDOR AND PURCHASER—continued.****15. PURCHASERS, RIGHTS OF—continued.**

not look further than the will itself. **ROOPLAAL KHETTRY v. MOHIMA CHURN ROY**

[10 B. L. R., 271 note

**165. ——— Specific performance, Right to—Sale bona fide, but not of final character—Priority over attaching creditor.**—A deed of sale, though not strictly of a complete and final character, yet, if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor. **LALLA CHCONER-LAL NAGINDAS v. SAWARECHUND NAMEDAS**

[5 W. R., P. C., 111

**166. ——— Validity of sale—Sale for valuable consideration—Intention to transfer.**—Held that the mere fact that the sale to the plaintiff was instigated by some discharged mortgagee does not of necessity make void the plaintiff's right as purchaser, if it be found that the vendor to the plaintiff had some right or interest in the property by inheritance, and transferred it for valuable consideration, with the intention that it should take effect as a transfer of his rights as heir. **MAHOMED FAIZALI KHAN v. GUNGA RAM.**

. 1 Agra, 112

**167. ——— Conveyance by mortgagee with power of sale—Absence of confirmation by mortgagor.**—B & Co., mortgagees with power to sell, sold the mortgaged property to the defendants. No deed was executed until some years afterwards, when the mortgagor was dead. The deed was in the form followed when a mortgagee is the vendor and the mortgagors join in the conveyance; but the words of conveyance were by the mortgagees alone, and without any confirmation by the mortgagor. Held that the purchaser did not by the deed acquire an indefeasible estate. **DOUGETT v. WISE**

. 3 W. R., 157

**168. ——— Effect of sale—Purchase of rights of Mahomedan widow—Failure to take actual possession.**—By an order passed under Act XIX of 1841, A was declared entitled to take possession of a fourth share of her deceased husband B's estate which devolved upon her according to Mahomedan law. B's nephew C sued to recover this share on the ground that A had been divorced and this suit was pending when the present suit was brought by the purchasers of A's rights. It being found that A never took actual possession of her share under her decree and that C was in possession of the whole estate, —Held that A's vendees could not be placed in a higher position than their vendor was when C's suit was brought against her, and all that they were entitled to was the right to present her in the pending suit. **MAHOMED GOWHUR ALI KHAN v. AZEMOODDEEN. MAHOMED GOWHUR ALI KHAN v. SHURUBUNISSA BEGUM**

. W. R., 1864, 93

**VENDOR AND PURCHASER—continued.****15. PURCHASERS, RIGHTS OF—continued.**

**169. ——— Purchaser of fractional share of estate—Right to cultivate land—Rate of rent.**—In the absence of any reservation or restriction, the purchaser of a fraction of a share of an estate acquires a right either to cultivate a proportionate share of the lands cultivated by his vendors on the same conditions as to favourable rents as those under which they, as proprietors, cultivated it, or to claim his share of the rents of these lands just as he would from any raiyat of the estate, but without any other sum as mesne profits. **CHITUN SINGH v. KATYESSUR KCONWUR**

. 5 W. R., 117

**170. ——— Specification of land sold—Purchase of specified land with description of amount.**—A party who buys a specified talukh with the additional description that that talukh contains so much land, gets the whole land which the specification of his vendor covers and which was intended to be sold, although it may be more than was contained in the description. **AMBERCONISSA KHATOON v. KUMOLA KANT ROY**

. 14 W. R., 117

**171. ——— Omission to specify area sold—Misdescription—Compensation for smaller area.**—The specification in a deed of sale of land of the area of the land sold *prima facie* implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land the real area of which is found to fall short of the area specified in the deed of sale. **SULEMAN VADU v. TRIKAMJI VELJI**

. 12 Bom., 10

**172. ——— Specification in sale certificate—Sale by purchaser at execution sale who has obtained possession under a certificate of sale more extensive than the decree.**—Where a decree-holder obtains an order for the sale of his judgment-debtor's interest in certain property, and becoming purchaser at the sale which follows, receives a sale certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order. If, however, he obtains possession according to the certificate, and sells to a *bona fide* purchaser without notice of the difference between the certificate and the order of sale, the latter has a good title. **GOWREE KUMUL BRUTTACHARJEE v. SCRUTH CHUNDER DOSS BISWAS**

. 22 W. R., 408

**173. ——— Non-registration, Effect of—Proof of actual contract of sale and possession on payment of purchase-money.**—Held that it does not follow from the non-registration within the time fixed for registration of a deed which was executed before the Registration Act came into operation that the purchaser has acquired nothing by his purchase, or that the vendor is to resume possession of the property, if it be shown that there was a contract of sale, and that in pursuance of that contract the purchaser paid the money and obtained possession. **RAM SURUN DASS v. RAM CHUND**

. 1 Agra, 283

**174. ——— Non-registration—Sale of decree—Decree on mortgage bond—Registration—**

VENDOR AND PURCHASER—*con. and*15. PURCHASERS RIGHTS OF—*cont. and*

*Right to execute decree*—A decree-holder purported to sell to *A* by private sale all his right, title and interest in a mortgage-deed obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale *A* conveyed all his right, title and interest in the same decree to *B*. *Held* that the right to execute the decree as a mortgage-deed did not pass to *B*. **KHOJ LAL CHOWDHRY v. NITTA VENUNING** I. L. R. 8 Cal., 839

**S. C. HOJ LAL CHOWDHRY v. NITTA VENUNING**  
[12 C. L. R., 393]

## 175. Assignment of indigo factory—

*Right to rent and to send goods manufactured*—Where a plaintiff sued on the alleged purchase by him of the rights and interests of certain part in an indigo concern, it was held that the rents collected and appropriated and the indigo manufactured and taken away before the date of the purchase could not form part of the stores and assets sold to the plaintiff unless the sale of the assets, etc. had been as from some date prior to the date of purchase. **CHANDER COOMAR BOY v. WILKINS**

[10 W. R., 311]

## 178. Assignee of the factory—Creditor's

*Rights of—Dena powna Contract to take over*—A by deed duly registered, assigned his interest in an indigo factory to *B*. In the deed was a recital that it had been agreed that *B* should take over the dena powna account of the factory as the same stood on the 30th September 1856. *C* sued *A* and *B* jointly to recover rent in respect of lands which had been occupied under a lease from *C* with and for the use of the factory and which was due on the 30th September 1856. *B* raised the defence that the debt was not included in a schedule, dated 30th September 1856, signed by *A* and which he alleged had been furnished to him by *A* as containing a list of the liabilities of the factory. *Held*, if a trader or other person in this country assigns his stock in trade and effects to another and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favour such contract is made, which they may enforce by suit, nor is the creditor bound to elect between his original debtor and the assignee, but he may join them as co-defendants in the same suit. *Held* also per **FRACOCK C.J.** and **NORMAN** and **KEMP J.J.** (dissenting) the case must be remanded to the lower Court to try what was the agreement between *A* and *B* as to *B* taking over the dena powna account of the factory whether the schedule was an essential part of the contract or not. **KHARNE v. BHAWANI CHARAN MITTER**

[B. L. R., Sup. Vol., 54 W. R., F. R., 187]

**PHOOL KOOJWAR v. CHANDON**

[6 W. R., Act X., 89]

## 177

*Assignee to creditor—Bond given by former proprietor*—When the holder of a bond from the former

VENDOR AND PURCHASER—*continued.*15. PURCHASER'S RIGHTS OF—*concluded.*

proprietor of an indigo factory had made no demand on it for twelve years, nor appeared the assignee of its existence as a debt due by the factory, it was held that he could not come down on the present proprietors, but must look to the obligor of the bond personally for satisfaction. **HARSHANATH v. COX**

[W. R., 1884 288]

178. — *Right of purchaser to trees standing on land—Sale of land—Transfer of Property Act (IV of 1882) s. 6*—Trees being attached to the earth are included in the legal incidents of the land and pass to the transferee under a deed of sale of the land on which they stand, unless a different intention is expressed or necessarily implied. No such intention is necessarily implied because the trees are mortgaged prior to the sale and no mention of the mortgage is made in the sale-deed. **LANDMAN v. BULSHAGIR v. BULSHAGIR KISHAY HIRALAKAR** I. L. R., 22 Bom., 610

179. — *Right to rescind sale—Concealment of defect in title—Transfer of Property Act (IV of 1882) s. 53—Meaning of words "material defect in property"*—The expression "material defect in property" in s. 53 of the Transfer of Property Act (IV of 1882) includes a defect in the title to an estate. Such a defect, if concealed by the vendor gives the purchaser the right to rescind the sale. **KASA SULESHMAN v. DATARAT L. ARMANANDAS** I. L. R., 20 Bom., 522

## 16. SETTING ASIDE SALES

180. — *Ground for setting aside sale—Stipulation to have mutation of names—Refusal of revenue authorities to register name of purchaser*—Where a person purchased certain lands under a deed of sale, in which the vendor undertook to apply to the revenue authorities for the transfer of the lands to the name of the vendee, and did so and both persons clearly understood what they were doing—*Held* that the refusal of the revenue authorities to enter the purchaser's name in the mutation register did not constitute a ground for cancelling the sale and recovering the purchase-money. **GEETIKA KOLITA v. BHANENDRO VARMA BOHAR**

[25 W. R., 353]

181. — *Bond filed by class from guardian of Hindu widow as co-claimant*—The plaintiff was entitled, in right of her deceased husband, to the equity of redemption in a mortgaged estate. Her guardian in collusion with the mortgagee, instituted a foreclosure suit, in which she was represented by the guardian, who submitted to a decree, and under that decree the property was sold and the defendant became the purchaser. *Held* that, the defendant being a bond fide purchaser, the sale was not liable to be set aside. **ANANTMOY DASS v. KRESHTNORTY MITTER** Marsh., 313

**S. C. KRESHTNORTY MITTER v. KRESHTNORTY MOYEN DASS** 3 May, 1906

## VENDOR AND PURCHASER—continued.

## 17. TITLE.

182. ——— Implied contract for good title.—*Suit by vendor for specific performance—Specific Relief Act (I of 1877), s. 25—Title derived through will of former owner—Necessity for probate—Succession Act (X of 1865), s. 187—Notice to complete contract—Rescission of contract—Clause in contract requiring vendor to hand over deeds relating to property, Construction of.*—By an agreement in writing, dated the 20th June 1888, the defendant purchased a certain house in Bombay from the plaintiff for Rs. 6,000. By this agreement the plaintiff agreed that at the time of the execution of the deed of sale he would hand over to the defendant "the title-deeds, vouchers and bills, whatever there may be relating to the said property." The agreement further provided: "The time in respect of this bargain is fixed at two months; within this time we are duly to have everything cleared." In September 1890 the plaintiff filed this suit for specific performance of the agreement. The defendant pleaded: 1st, that the plaintiff had failed to show a good title to the property; 2nd, that the plaintiff had not handed over to him all the deeds and documents relating to the property; 3rd, that he (the defendant) had lawfully rescinded the contract on the 30th August 1890. It appeared that in 1880 the then owner of the property, one N, had mortgaged it to one V, and that on the 26th October 1882 both mortgagor and mortgagee had joined in conveying it to one C. This deed, however, had not been registered and was consequently inadmissible in evidence, and was rejected at the hearing. C had, however, after his purchase taken possession of the property and had held it until 1885. On the 6th May 1885 he sold it to H. Prior to his sale, viz., in 1883, N had died, and left a will appointing V his executor, but no probate of this will had ever been obtained. In the sale deed, however, to H of the 6th May 1885 V had joined as a conveying party both in his own right and as executor of N. On the 29th September 1887 H sold the property to the plaintiff, who, as already mentioned, sold it to the defendant on the 20th June 1888. Held that the plaintiff was bound to give the defendant a good title, or, in other words, a title free from reasonable doubt (s. 25 of the Specific Relief Act I of 1877). In the absence of a contract providing that the plaintiff should show only such title as he could give, or of some other special contract as to title, the general law laid down in s. 25 of the Specific Relief Act I of 1877 must prevail. Held further, dismissing the suit, that the title shown by the plaintiff was not a good title. The conveyance of the 26th October 1882 by the mortgagor and mortgagee to C not being registered was not admissible, and could not be referred to, so that it was necessary to regard N as still the mortgagor and V as still the mortgagee of the property, while C had, in some capacity or other, the actual possession. That being the state of things, N died in 1883, and it was alleged that he had left a will appointing V his executor, but no probate of that will had been obtained. The equity of redemption remaining in

## VENDOR AND PURCHASER—continued.

## 17. TITLE—concluded.

N as mortgagor passed on his death to his executor V. On the 6th May 1885 C sold the property to H (the plaintiff's predecessor), and V joined in the deed of conveyance as executor of N. But it was necessary for the plaintiff to show not merely that he joined as executor, but that he had a right, as executor, to convey to H the equity of redemption which had come to him from N. By s. 187 of the Succession Act (X of 1865) the only mode of doing this was by the probate of N's will, and this had not been obtained. If an heir of N sued for redemption, the defendant would have no defence, unless he could prove that he had acquired the equity of redemption. For this purpose, by s. 187 of the Succession Act (X of 1865) probate would be necessary, and he would consequently be obliged to prove the will and pay duty upon all the property included in it. That would be a liability which the Court could not impose upon a defendant resisting specific performance of a contract like the one made by the plaintiff. Where a vendee ascertained that the title of property sold to him was derived through the will of a former owner which had not been proved, —*Quers*—Whether a notice given by him (the vendee) to the vendor to produce the will and give satisfactory proof, its being the last will of the said owner within four days, was a reasonable notice so as to entitle the vendee afterwards to rescind the contract. A contract of sale provided as follows for the handing of the title-deeds of the property to the purchasers: "And at the time of the execution of the deed of sale you" (i.e., the vendor) "are duly to give us, the purchasers, the title-deeds, vouchers, and bills whatever there may be relating to the said property." Held that this clause meant that whatever documents of title were necessary under the terms of the contract, or under the general law, should be handed over by the vendor to the vendee at the execution of the deed of sale. MAHOMED MIRZA v. MUSAJI ESAJI . . . I. L. R., 15 Bom., 657

## 18. VENDOR, RIGHTS AND LIABILITIES OF.

183. ——— Unpaid vendor—Refusal to deliver under payment—Right after delivery.—A party selling land may refuse to give delivery until the consideration is paid; but having given delivery, he has no right to retake possession and pay himself the purchase-money out of the usufruct. PREM SOONDUREE DOSSIA v. GRISH CHUNDER BHUTTA-CHARJEE . . . 10 W. R., 104

184. ——— Failure to pay whole of consideration-money.—When a vendor of land is not paid a portion of the consideration-money, he cannot wholly disaffirm the contract, but he can establish his lien on the land as an unpaid vendor. MOHSEN ALLY v. BALASOO KOER . . . 2 Hay, 576

185. ——— Vendor's lien for unpaid purchase-money.—In a suit claiming possession of land purchased by the plaintiff from the defendant, the Munsif threw out the claim for want

## VENDOR AND PURCHASER—continued

18 VENDOR RIGHTS AND LIABILITIES  
OF—continued.

of consideration but the District Judge found that the plaintiff was entitled to have the land, and that the defendant was liable for the purchase-money. *Held* that the equitable doctrine of the vendor's lien for unpaid release money applied to the case but as the District Judge had not decided whether the defendant had succeeded in proving that the purchase money had not been paid the suit should be remanded for a finding by him on that issue. **122**  
**LALPA BID HUSAPPA v. WASTAPPA MUN HASAPPA**

[3 Bom. A. C. 102]

## 180 Contract to sell

*land—Rescission. Re sale by registered deed—A sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of the sale to A, M had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale to A had not been executed because only Rs. 200 of the purchase money had been paid to the vendor. *Held* that A could not rescind as it was not open to his vendor to rescind the contract with M. **MOHINI v. AVABAN***

I. L. R., 11 Mad., 283

## 187 Failure to pay

*portion of purchase money—The vendee of certain land, a portion of which only was in the possession by virtue of the sale the rest being in the possession of mortgagees sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held* that, inasmuch as the sale to them had taken effect they were entitled, notwithstanding the whole of the purchase money might not have been paid, to a decree as claimed and the vendors, if they had any claim in respect of the purchase-money, should be left to seek their remedy. **KESRI v. GANOA PRASAD***

I. L. R., 4 All., 168

## 188 Stoppages in

*transit—Lien of unpaid vendors—Agents for purchase of goods—Insolvency—Right of carriers*

A firm at Calcutta sent an agent to Saran plaintiff's residence to effect purchases in cotton, and the plaintiff at the instance of the person so deputed made purchases and supplied funds, both for purchase and for the carriage and insurance the agent doing nothing but consenting to the arrangements and giving bonds on his employer's correspondents in payment. The goods were despatched and insured, but before reaching their destination on the firm became insolvent, and the plaintiff proceeded to take possession of them, but was prevented on account of the goods being previously attached by the defendant, a judgment creditor. It was held on plaintiff's suit that the plaintiff was an unpaid vendor and had a lien on the goods for the price, and might detain the goods till he received or was satisfied about the payment for the said goods, a completed contract for the sale of the goods notwithstanding. An unpaid vendor, in case of the vendee's insolvency, may stop the goods while in transit. Agents for the purchase of goods have a lien on the goods when purchased for the money paid and liabilities incurred by them in respect

## VENDOR AND PURCHASER—continued

19 VENDOR, RIGHTS AND LIABILITIES  
OF—continued.

to such purchase, and are not bound to deliver the goods until they are reimbursed or secured for such advances and liabilities, and an agent in this character is in the position of an unpaid vendor. Where the vendor is not otherwise paid than by having received the insolvent's acceptance, he may, in the event of the purchaser's insolvency, stop the goods though he have negotiated the bills, and they are still outstanding and not yet at maturity. Whilst the goods sold remain in the hands of the carrier employed to convey them to their original destination, as between buyer and seller, no case of constructive possession arises, unless when the carrier enters expressly into some new agreement distinct from the original contract for carriage. So also the mere acts of making or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with intention to take possession, do not establish a constructive possession, or affect the right to stop in transitu. Where the right of stoppage in transitu vests in the consignor it cannot be defeated by the claims of other creditors of the consignee the unpaid vendor having an elder and preferential lien. **BHOLAKATHI v. BALI NATH**

2 Agr., 11

## 189 Stoppages in

*transit—Railway receipts—Effect of endorsing railway receipts—Title of endorsees of such receipts—Contract Act (IX of 1872), s. 103—The firm of C D carried on business in Bombay. A, the agent of the firm, bought from the first defendant H at Bijapur a quantity of wheat which at A's request was on the 25th and 26th May 1889 consigned by H to the firm of C D at Bombay, on the understanding that the consignees were not to have the wheat until they had paid the bunds drawn in respect of it. The wheat was sent to Bombay on the 28th and 30th May 1889, in three consignments, viz., of 56, 104 and 181 bags respectively, and two bunds for Rs. 1000 and Rs. 500 respectively payable at sight were drawn by A on Bijapur on the firm of C D in Bombay, and were given by him to H, who thereupon handed to A the three railway receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur railway station. The bunds were sent by H to his agent in Bombay for collection. The bund for Rs. 1000 arrived in Bombay on the 31st May and was paid on the 1st June. The bund for Rs. 500 arrived in Bombay on the 1st June and was dishonoured on the 2nd June by the firm of C D which afterwards stopped payment and became insolvent. The railway receipts given by H to A at Bijapur were in the following form: "Received from H the undermentioned goods, 181 bags of wheat. This receipt must be produced by the consignee or the goods will not be delivered; if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment, or the railway receipt, is sold once or more times the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one-anna stamp. If more than one order appear on the fact*



## VENDOR AND PURCHASER—continued.

18. VENDOR, RIGHTS AND LIABILITIES  
OF—continued.

thereof, each order must bear a stamp. I-(we) hereby certify that I (we) am (are) aware that the Southern Mahratta Railway has received the abovementioned goods subject to the conditions noted on the back, and that I (we) agree that it should receive them subject to these conditions. (Sender's signature.)" On obtaining these railway receipts, A sent them at once to the firm of C D in Bombay, and on the 31st May 1889 they were endorsed by C, a member of the firm, to the second defendant V to secure an advance of Rs. 2,000. The endorsement was as follows: "Signature of C D. I have sold the delivery, as per this receipt, to V. The handwriting of C." Two consignments (*viz.*, 55 bags and 104 bags) and part of the third (*viz.*, 73 bags out of 181) had arrived in Bombay by the 2nd June in bags bearing C D's marks. On that day V applied to the Railway Company for delivery, and paid full freight on all three consignments. He was allowed to remove the 55 bags and the 104 bags. After having done this, he loaded his carts with the 73 bags, which had then arrived, out of the consignment of 181 bags without any objection on the part of the Railway Company, but he was not allowed to take them out of the station yard, and the 73 bags were consequently unloaded, and together with the balance of the consignment of 181 bags, which subsequently arrived, were retained by the Railway Company. The reason given by the Company's servants for the detention was the receipt of a telegram sent by H from Bijapur, on hearing of the dishonour of the hundi for Rs. 1,500, directing that the 181 bags should not be delivered. At the trial the Judge found that this telegram had probably been received before all of the 73 bags had been loaded into the carts. *Held* (1) that there was no such delivery of the 181 bags to C D's agent at Bijapur as to deprive H of his right of stoppage *in transitu*. (2) That there was such a delivery of the 73 bags at the railway station to V as to determine H's right of stoppage *in transitu*. It was to be assumed that H's telegram did not arrive in time to prevent the bags being placed, with the consent of the Railway Company, on V's carts, for it was not until the carts had been loaded that the Company's servants interfered to prevent their leaving the station yard. Before that time the freight for the 73 bags had been paid by V and the railway receipt had been given up to the Company duly signed by V's servant. Everything had been done on the part of the Company to divest themselves of their lien as carriers; for the mere fact that the carts were still standing in the goods compound of the railway station after the bags had been placed on them could not affect the question, there being no suggestion that the matter as between the Company and V had not been completely settled. (3) That the railway receipts were not instruments of title within the meaning of s. 103 of the Indian Contract Act (IX of 1872), and that by endorsing and handing them over, the firm of C D did not assign them to V within the meaning of the said section. **GREAT INDIAN PENINSULA RAILWAY CO. v. HANMANDAS RAMKISON** . . . I. L. R., 14 Bom., 57

## VENDOR AND PURCHASER—continued.

19. VENDOR, RIGHTS AND LIABILITIES  
OF—continued.

190. ————— *Sale of immovable property—Non-payment of purchase-money—Vendor's remedy.*—A vendor of immovable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to sue for the sum due, and he has a lien on the property for the amount. **TRIMALRAY RAGHAVENDRA v. MUNICIPAL COMMISSIONERS OF HUBLI** . . . I. L. R., 3 Bom., 172

191. ————— *Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase-money—Remedy of vendor.*—The plaintiffs owned land on which the defendant, with the plaintiffs' leave, built a house. Disputes arose between plaintiffs and defendant, and in February 1893 the defendant obtained an order from the Mamlatdar in a possessory suit against the plaintiffs directing the plaintiffs to give up possession of the property to him. In August 1893 an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of Rs. 100. On the 25th November 1896 the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the Rs. 100, and holding that the defendant was therefore justified in putting an end to the contract contained in the rent-note. *Held* (reversing the decree) that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiff for Rs. 100, possession being given to the plaintiff under the lease for four months; that the sale was a completed transaction, although the Rs. 100 had not been paid, and that the only remedy of the defendant was to sue for the amount. **SAGAI v. NAMDEV** . . . I. L. R., 23 Bom., 525

192. ————— *Purchase money, Suit, by vendor to recover—Non-registration of bonds given for purchase-money of land.*—The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered, and were therefore not admissible in evidence. *Held* that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under art. 132, sch. II of the Limitation Act. **VIRCHAND LALCHAND v. KUMARI** . . . I. L. R., 18 Bom., 48

193. ————— *Transfer of Property Act (IV of 1882), s. 55—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract—Right to recover unpaid purchase-money—Lien.*—On 16th August 1855 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that he had this

**VENDOR AND PURCHASER—cont. next.****18 VENDOR RIGHTS AND LIABILITIES  
OF—cont. next**

day purchased the house belonging to Ghousah B-um Sahib (plaintiff) for Rs 1000 that he had paid Rs 1000 as an advance and took possession that he would pay the balance with interest at the rate of 11 per cent per mensem within fifteen days, and obtain a sale-deed from the said Jagan. The plaintiff at the time of the agreement had not obtained a conveyance of the house to her and was not able to tender a conveyance to the defendant until January 1887 when she had so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase-money he also executed certain repairs to the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 29th December 1886 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the same was not completed in the following month the interest on the balance of the purchase-money should cease but no evidence was given as to a receipt on of the purchase-money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase-money with interest at 12 per cent. Held that the acts of the defendant amounted to a waiver of the unpaid covenant for title and that the plaintiff was entitled to recover the unpaid purchase-money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount. **GHOUSAH B-UM SAHIB v. JAGAN**  
(I. L. R., 13 Mad., 158)

**184. Lien—Creditor of vendor—Right of to lien—Mortgage**—Although an unpaid vendor holds a lien upon property sold for the consideration-money yet a creditor of that vendor cannot claim the same right. **HARI RAM v. DEVI PRASAD**  
(I. L. R., 9 Calc. 167 11 C. I. R. 539)

**185. Conditions of sale—Sale by Government—Act on sale of confiscated property—Ground for selling as a sale**—Where it was made a distinct condition of sale that the property should be sold to the highest bidder without any restriction of the purchaser being a rebel or not. Held that the Government may like any other seller impose any condition it pleases in reference to the property which it offers for sale prior to sale, but is not at liberty subsequently to the sale to disaffirm or annul it on a ground not only novel but directly at variance with the terms on which it offered the property for sale. **SKTA LALL v. MAHOMED**  
2 Agra 180

**186. Vendor keeping vendee out of possession—Suit for partition—Trustee—Meecham property**—Where a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor though

**VENDOR AND PURCHASER—cont. next****18. VENDOR RIGHTS AND LIABILITIES  
OF—concluded.**

liable for such a profit, was not in the position of trustee of the rents for the party kept out of possession. **NILKAM v. LAHURI v. GHANMUKH DARI**  
(7 B. L. R., P. C., 113 15 W. R., P. C., 33)

**19 MISCELLANEOUS CASES**

**187. Deed of sale, Proof of—Suit for possession on under deed of sale—Delivery of deed of sale**—In a suit for possession of land on the ground of title under a kotala it is not enough for the plaintiff to prove the writing and signature of the kotala, he must also prove that it was delivered as a complete instrument. **OWED ALL v. NIDHEE RAM**  
22 W. R., 367

**188. Fictitious sale—Mortgage—Suit by purchaser for confirmation of possession—Issues**—Where a sale by A to the plaintiff had taken place shortly before a mortgage of the same property by A to the defendant, the defendant is entitled to have raised, in a suit brought for confirmation of possession and to declare the sale void, an issue whether the sale was bona fide and for consideration and whether possession passed under it to the plaintiff. The proper issue is not whether the deed of sale was genuine or not. **GAREKH BHAIR v. RENUJAL SING**  
7 B. L. R., Ap. 33

**189. Owner standing by and seeing property sold—Right to have sale set aside**—The rule that one who, knowing his own title, stands by and encourages a purchase of property as another's, will not be allowed to dispute the validity of the sale, implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence. **BASWANTAPA SHIDAPA v. RAY**  
(I. L. R., 9 Bom., 66)

**200. Purchaser from husband—Acquiescence of a wife—Suit to set aside purchase as being wife's property**—Where a husband was alleged to have given a share in some property to his wife, and the husband subsequently sold the whole property to another party and put the said party in possession, without any objection from the wife who for years behaved as though she had no interest in the property other than that arising from her husband's possession of it in his own right—Held that a person afterwards claiming to have purchased the wife's share, and seeking to be put in possession, could not displace the bona fide purchaser from the husband if a person in the position of the wife in this case who chooses to stand by for years not asserting her rights, but allowing another to deal with her property as his own has no equity to come into Court and eject any one who has purchased in ignorance of her title. **MOJIB MAHOMED v. MAHOMED TORAN**  
25 W. R., 281

**201. Grant of estate when having bad title—Vendor afterwards obtains a good title—Specific Relief Act (1 of 1877) s. 19—A holder of a certain mahal as a ghatwal, mortgaged**

## VENDOR AND PURCHASER—continued.

## 19. MISCELLANEOUS CASES—continued.

to *B* by way of a *zur-i-peshgi* lease for twenty-one years. Shortly after the granting of the lease, the zamindar got a decree against *A*, by which *A*'s *ghatwali* right was extinguished. In execution of that decree, the zamindar ousted and took *khas* possession of the mehal. Some years afterwards, the zamindar granted to *A* a perpetual *mokurari* lease of the same mehal. Held in a suit against *A* instituted by the assignee of *B*'s rights in the *zur-i-peshgi*, that under s. 18, Act I of 1877, *A* must, out of his present estate in the mehal, make good the *zur-i-peshgi*. LOOR NARAIN SINGH v. SNOOWKEE. LALL. . . . . 2 C. L. R., 382

202. — Separate agreement by purchaser—Subsequent exercise of pre-emption—Co-sharers.—Where a vendor in selling his property got the vendee to execute another deed in his favour for certain *bighas* of land for his maintenance, and subsequently, on the completion of the bargain, a co-sharer took that property by right of pre-emption, —Held that the agreement, being in fact a part of the consideration for sale and *bona fide*, was binding on the pre-emptor, who could not claim to have the bargain made with him on more favourable terms than those offered by the stranger and accepted by the vendor, the fact that he was no party personally to the agreement notwithstanding. KHAIR SINGH v. HEBBA DASS. . . . . 1 Agra, 75

203. — Decree in favour of vendor —Sale set aside—Possession—Purchaser in possession after decree and pending appeal—Accident—Loss by fire—Liability for damage.—The plaintiff and the second defendant *A* were brothers, and worked a cotton press in partnership. In August 1884 *A* sold the press for Rs5,000 to *V* (the first defendant), who paid *A* Rs5,000 earnest-money and was put into possession. The plaintiff then brought a suit (No. 327 of 1884) against *A* praying for a dissolution of the partnership. *V* was also a party defendant to that suit. The plaintiff alleged that Rs5,000 was much too low a price for the press, and he objected to the sale. He prayed that *V* might be restrained from continuing in possession of the press and working it, and that a receiver might be appointed to take possession of it until further orders. On the 21st April 1885, on a motion, the Court refused to grant an injunction and receiver, but ordered *V* to pay Rs30,000 (*i.e.*, the balance of the purchase-money) to the solicitors of the parties of investment until the hearing of the suit, and directed that, if that sum was not paid by the 21st May 1885, a receiver should be appointed to take possession of the press. The suit (*i.e.*, No. 327 of 1884) was heard on the 15th February 1887, when it was held by the Court that the sale by *A* to *V* was without authority; that the defendant *V* took nothing under it, and that the plaintiff was entitled to have it set aside. Certain matters still remained to be decided; but on the 28th February 1887 the decree in the suit was made, giving effect to the findings already arrived at on the 15th February. The decree by consent directed various accounts to be taken, and, among others, an account of the profits

## VENDOR AND PURCHASER—continued.

## 19. MISCELLANEOUS CASES—continued.

realized by the working of the press by the defendant *V* since his possession thereof, credit being given to him for all sums expended by him in the repairs, maintenance, and working of the said press and for the management thereof by him. The decree further ordered that the defendant *V* should be repaid the Rs30,000 which he had paid under the order of the 21st April 1885, and directed "that on such payment the said defendant *V* do forthwith give over possession of the press to the plaintiff and the defendant *A*." The defendant *V* at once gave notice of his intention to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March 1887; the decree was sealed on the 13th April 1887. Meantime, on the 6th April 1887, and while the defendant *V* was still in possession, a fire broke out in the press, and much damage was done. Subsequently to the sealing of the decree as above stated, the press in its damaged condition was handed over to the plaintiff's firm by *V*, who also desisted from prosecuting his appeal, the injury to the press having made it contrary to his interest to appeal. In May 1887 the plaintiff filed the present suit, claiming to recover Rs50,000 from the defendant *V* as the value of the press, or such further sum as might be necessary to rebuild and restore it. He alleged that the fire was caused by the working of the press, and contended that the working of the press by the defendant *V* after the decree of the 28th February was an act of trespass by him, and that therefore, independently of the question whether the fire was caused by the negligence of *V* and his servants, the said *V* was liable for the loss occasioned by the fire. Held that, independently of negligence, the defendant *V* was not liable to the plaintiff for the loss occasioned by the fire. Down to the decree of the 28th February 1887 the defendant in keeping possession of the press and working it was, no doubt, a trespasser, but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. The maxim *volenti non fit injuria* applied to the circumstances of the case. Held also that, no negligence having been proved against the defendant, the suit must be dismissed. JAMSETJI BURNJORJI BAHADURJI v. EBRAHIM VEDINA.

[I. L. R., 13 Bom., 183]

204. — Right of pre-emption—Option of getting estate re-transferred—Mortgage.—In July 1870 *R*, the owner of a share of a village, executed in favour of *M* an instrument whereby he transferred by sale the share to *M* absolutely. In November 1870 *M* agreed to re-transfer the share to *R*, if *R* desired, at any time within thirteen years, to re-purchase it, on payment of the sum which *M* had paid for it. During the term mentioned in the agreement of November 1870, *R* not having taken advantage of the agreement, *M* sued, as owner of the share, to enforce the right of pre-emption in respect of the sale of another share of the village. Held that *M* having become, under the transfer of July 1870, the out-and-out proprietor of the share, until *R* availed himself of option given him by the agreement of



## VERDICT OF JURY—continued.

## I. GENERAL CASES—continued.

the fifth clause of s. 263 of the Code of Criminal Procedure. *GOVERNMENT OF BENGAL v. MAHADDI* . . . I. L. R., 5 Calc., 871

*S. C. EMPRESS v. MAHUDDI* . . . 6 C. L. R., 349

4. ——— Dissent from verdict—*Criminal Procedure Code, 1872, s. 263, cl. 4.*—The "dissent" referred to in the 4th clause of s. 263 of the Criminal Procedure Code (Act X of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. *EMPRESS v. BHAWANI* . . . I. L. R., 2 Bom., 525

5. ——— Reference to High Court—Statement by Judge of offence committed—*Criminal Procedure Code, 1872, ss. 263, 464.*—It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, 1872, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed. *EMPRESS v. SAHAJ RAY* [I. L. R., 3 Calc., 623; 2 C. L. R., 304

6. ——— Questioning jury as to their verdict—Questions to member of jury as to reasons for verdict.—A Judge ought not to put questions to any of the jury as to his reason for the verdict he has given. *QUEEN v. MEAJAN SHEIKH*

[20 W. R., Cr., 50

7. ——— Questions as to grounds for verdict—Power of Sessions Judge.—*Per GARTH, C.J., and PRINSEP, J. (MAREBY, J. contra).*—The rule laid down in *Queen v. Wazir Mandal*, 25 W. R., Cr., 25, goes too far. *PRINSEP J. (MAREBY, J. contra).*—The law does not prevent a Sessions Judge from asking a jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See *Queen v. Sustiram Mandal*, 21 W. R., Cr., 1. *EMPRESS v. MUKHUN KUMAR* . . . 1 C. L. R., 275

8. ——— Ambiguity in verdict—*Criminal Procedure Code, 1872, s. 263.*—Under s. 263 of the Code of Criminal Procedure, 1872, a Court was authorized to ask the jury such questions as were necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question. *IN THE MATTER OF DHUNUM KAZEE, EMPRESS v. DHUNUM KAZEE*

[I. L. R., 9 Calc., 53; 11 C. L. R., 169

9. ——— Criminal Procedure Code, 1882, s. 503.—Although s. 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as

## VERDICT OF JURY—continued.

## I. GENERAL CASES—continued.

to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict with hesitation, and if he differs from it he should proceed as directed by s. 307. *HURRY CHURN CHUCKERBUTTY v. EMPRESS*

[I. L. R., 10 Calc., 140; 13 C. L. R., 358

10. ——— *Criminal Procedure Code, 1872, s. 263.*—In a case in which the accused was tried on charges of murder, culpable homicide, and causing grievous hurt, the jury acquitted him of murder, but convicted him on the other counts. This verdict was recorded by the Sessions Judge, who then, in accordance with s. 263, Criminal Procedure Code, 1872, questioned the jury as to the grounds for their verdict, and the jury eventually intimated their willingness to convict of murder. The Sessions Judge differed from the first verdict of the jury, but as he had recorded that verdict, he doubted whether he could accept the second verdict, and referred the case to the High Court under s. 263. *Held* that s. 263 did not apply to such a case as this. There could be no verdict delivered, and no verdict finally recorded, until the last of the questions put by the Judge to the jury was answered; and as it appeared from the answers of the jury that their findings of facts disclosed that the verdict ought to have been one of guilty on the charge of murder, the Judge should have entered the verdict of the jury as one of guilty of murder. The case was accordingly returned to the Judge to enable him to do that, and to pass such sentence as the law directed. It is only when it is necessary, in order to ascertain what the verdict of a jury really is, that a Judge is justified under s. 263 in putting questions to the jury. *QUEEN v. SUSTIRAM MANDAL* . . . 21 W. R., Cr., 1

11. ——— Special verdict—Question put by Judge to jury after special verdict—*Penal Code, s. 330.*—The prisoners were tried under s. 330 of the Penal Code (for voluntarily causing hurt to a girl), and under s. 318 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well, and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations, and also the charge of illegal confinement, but that they believed that some slaps had been given. The Judge then asked the jury whether they convicted on either, and if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and they convicted them under s. 330. *Held* that the question put by the Judge to the jury was a proper one, and not one of law. The conviction upheld. Such a case is not governed by the rules of English law as to special verdicts. *QUEEN v. HARI PRASAD GANGGOOLY* 8 B. L. R., 557; 14 W. R., Cr., 59

12. ——— Special verdict—*Criminal Procedure Code (1882), ss. 298 and 302.*—Duty of Sessions Judge.—The accused was tried for rape. The jury, after considering their verdict, announced through their foreman that the accused "did the

## VERDICT OF JURY—contd

## 1 GENERAL CASES—contd

*a t w h consent* The Sessions Judge then upon without equipping them to reconsider the verdict or giving them any fresh directions, asked them whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty upon which the Sessions Judge sentenced the prisoner to three years rigorous imprisonment. *Held* reversing the conviction and sentence that the first verdict of the jury being a special verdict and it being no real ambiguity about it the Sessions Judge was bound under s. 303 of the Code of Criminal Procedure (Act X of 1882) to reconsider the verdict and apply the law thereto. *Held* also that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions or explained to them that a finding that the woman had consented was tantamount to an acquittal. **QUEEN v. MADHAVRAO L. L. R. 19 Bom., 735**

13.

*Murder Calpa*

*Loss of self-control—Criminal Procedure Code (1882) s. 239*—The accused was tried for murder. The verdict of the jury was guilty of murder under grave and sudden provocation. The Sessions Judge told the jury that it was their duty after considering the question of provocation to return a simple verdict of guilty or not guilty. The jury thereupon brought in a second verdict of "not guilty." The Judge considering this verdict to be perverse referred the case to the High Court under s. 30 of the Code of Criminal Procedure (Act X of 1882). *Held* that the direction given to the jury after the first verdict was wrong as the case fell under s. 239 of the Criminal Procedure Code (Act X of 1882). Although the charge was only one of murder the jury had a right to bring in a verdict of culpable homicide if there was grave and sudden provocation so as to deprive the prisoner of the power of self-control. *Held* also that the jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, or findings on material facts to which the Judge applies the law. *Held* also that the first verdict was a verdict of murder as he jury did not find that the provocation had reduced the power of self-control. It is not a necessary consequence of anger or other emotion that the power of self-control should be lost. Except where unconsciousness of mind or real fear of death is proved, the presence of temptation is not a excuse for breaking the law. **QUEEN v. ENTRISS v. DISTRICT JUDGE I. L. R. 20 Bom., 215**

## 14. Form of verdict—Culpable

*lowe d—M d r—Illegal finding*—The finding of a jury that, although the accused killed the deceased, he never was not murdered because the accused had not by intention killed him is not a legal finding, and does not amount to a conviction of culpable homicide not amounting to murder. **QUEEN v. L. R. 1 W. R., Cr., 50**

15.

*Penal Code ss 322*  
15. *Trial of guilty under section not a*

## VERDICT OF JURY—contd

## 1 GENERAL CASES—concluded

*charge—Grievous hurt with protocol on*—Where a prisoner was charged under the Penal Code ss. 304, 305, and 306, and the jury brought in a verdict of guilty under s. 305—*Held* that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 323 with the extenuating circumstance which would confine the punishment within the limits specified in s. 235. **QUEEN v. LAKSHMINARAYAN AGGAR I. L. R. Cr., 61**

16.

*Offence proved though not independently charged—Code of Criminal Procedure (Act X of 1882) s. 457—Penal Code (Act XLV of 1860) ss 149 325*—The accused were charged under s. 149 coupled with s. 305 of the Penal Code with, while being members of an unlawful assembly committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly but unanimously found two of the accused guilty of grievous hurt under s. 325. *Held* that such verdict was, under s. 457 of the Code of Criminal Procedure legally sustainable although the offence did not form the subject of a separate charge. S. 457 enables a verdict to be given on some of the facts which are a component part of the original charge provided that those facts constitute a minor offence. **GOVERNMENT OF BENGAL v. MINADEI I. L. R. 5 Cal., 871**

**C. EMPRESS v. MAHDEBI 8 C. L. R. 349**

17. *Objections to verdict—Ground for setting aside verdict of error*—Where a party objects to the verdict of a jury he ought to give the Magistrate reasonable *prima facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them. **BENDARY CHANDER DEB v. DWARKA NATH SEN 23 W. R., Cr., 15**

## 2. POWER TO INTERFERE WITH VERDICTS.

18. General principle regulating interference—*English law—Position of Judge in India—Criminal Procedure Code 1882 s. 263*—The Code of Criminal Procedure s. 263, casts upon the High Court the duty both of Judge and jury but notwithstanding this difference which clothed with greater powers and responsibilities than the superior Courts in England it will as far as may be be guided by the principle of English law that the verdict of a jury will not be set aside unless it be perverse and patently wrong or may have been induced by an error of the Judge. In a proper case however the High Court will rectify the verdict of a jury. **REG v. HANSTON BASIRAV I. L. R. 1 Bom., 10**

19.

*English law—Agreed by jury—Disagreement by Judge—Criminal Procedure Code (Act X of 1882) s. 26*—Although the finding the large discretionary power vested

**VERDICT OF JURY—continued.****2. POWER TO INTERFERE WITH VERDICTS—continued.**

in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, *viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. **IN THE MATTER OF DRUNUM KAZEE. EMPRESS v. DRUNUM KAZEE**

[1 L. R., 9 Calc., 53; 11 C. L. R., 169]

**20. — Exercise of powers of High Court—Criminal Procedure Code, 1872, s. 263.**—The Court should exercise the powers vested in it by s. 263 of the Criminal Procedure Code (X of 1872) only when it finds the verdict of the jury clearly and patently wrong, and only set such verdict aside, even if the Sessions Judge disagrees with it, when it is found unsustainable by the evidence. **QUEEN v. SHAM BAGDI**

[13 B. L. R., Ap., 19; 20 W. R., Cr., 73]

**QUEEN v. NOBIN CHUNDER BANERJEE**

[13 B. L. R., Ap., 20; 20 W. R., Cr., 70]

**QUEEN v. IDWARYA**

14 B. L. R. Ap., 1

**QUEEN v. HURRO MANJI** 14 B. L. R., Ap., 1

[14 B. L. R., Ap., 2 note; 21 W. R., Cr., 4]

**21. — Inconsistencies in evidence otherwise sufficient for conviction—Criminal Procedure Code, 1872, s. 263.**—Where there are reasons sufficient to warrant a jury in disbelieving the witnesses and in giving the prisoner the benefit of the doubt raised by inconsistencies in that evidence, although another jury might have come to a different conclusion, the High Court will not interfere. It must be shown that the verdict of the jury is certainly unreasonable and perverse. **Queen v. Sham Bagdi, 13 B. L. R., Ap., 19; 20 W. R., 73**, cited and followed. **IN THE MATTER OF HUBBEN NABAIN MOOKERJEE** 2 C. L. R., 518

**22. — Exercise of power of interference—Ground for setting aside verdict—Verdict contrary to Judge's charge to jury.**—Where a jury convicted a prisoner contrary to the charge of the Sessions Judge, which charge was held by the High Court to have been a proper charge, the High Court refused to interfere, although it concurred with the Sessions Judge in thinking that the verdict of the jury was not correct. The case was one in which an application could be made to the Government; but as regards the Court, the petitions were rejected. **QUEEN v. NIDIRERAM BAGDEE** 18 W. R., Cr., 45

*Contra*, **QUEEN v. SHIB CHUNDER MUNDLE**

[18 W. R., Cr., 46]

**23. — Omission to sum up properly—Ground for setting aside verdict.**—

**VERDICT OF JURY—continued.****2. POWER TO INTERFERE WITH VERDICTS—continued.**

The omission of the Judge to sum up the case properly to the jury is an error in law sufficient to justify the setting aside of the verdict. No general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but in general, if the finding of the jury in such a case is one that an Appeal Court would set aside if the trial had taken place with assessors, the Court will interfere and set the verdict aside. **REG. v. FATTECHAND VASTACHAND**

[5 Bom., Cr., 85.]

**24. — Criminal Procedure Code, 1872, s. 263—Ground for setting aside verdict—Misdirection.**—The High Court set aside the verdict of a jury in this case, because the Judge in his direction to the jury omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the jury to attribute an undue importance to the statements or excuses made by the prisoner in the explanation of certain documents. **QUEEN v. GUNGA GOVIND PALIT**

[23 W. R., Cr., 21]

**25. — Inconsistent verdict—Verdict of guilty.**—Where a jury found an accused person guilty of murder, but refused to convict him because there had been no eye-witness of his crime, and on a second charge from the Judge refused to find him guilty at all,—*Held* by the High Court, to whom the case was referred, that the Judge ought to have explained to the jury that the testimony of eye-witnesses was not necessary to the establishment of a charge of murder, and that the jury, if they had no doubt of the guilt of the accused, were bound to give effect to the conclusion at which they had arrived. **QUEEN v. GOKOOL KAHAR**

[25 W. R., Cr., 36]

**26. — Criminal Procedure Code, 1872, s. 263—Discretion of Court—Setting aside verdict of acquittal of murder.**—A very large discretionary power is vested in the High Court by s. 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance, and the decision in each case submitted must depend upon its own peculiar circumstances. In this case the Court set aside a verdict of acquittal of murder. **EMPRESS v. MUKHUN KUMAR**

1 C. L. R., 275

**27. — Judge disagreeing with verdict—Criminal Procedure Code, 1872, s. 263—Ground for setting aside verdict.**—On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held* that the High Court had power to set aside the verdict of the jury, and to direct an acquittal. S. 263 of the Criminal Procedure Code (Act X of 1872) explained. **QUEEN v. KOONJO LETHI**

[11 B. L. R., 14; 20 W. R., Cr., 1]

**28. — Judge differing from verdict—Acquittal by majority of jury—Criminal Procedure Code, 1872, s. 263.**—Where a

**VERDICT OF JURY—cont. sued****2 POWER TO INTERFERE WITH VERDICTS**  
—cont. sued

jury are not unanimous in their find up, and the Judge directs the opinions expressed by them on the case before, referred under a 263 of Act V of 1872, the High Court is competent to find the prisoner guilty notwithstanding an acquittal by the majority of the jury. **EXPRESS v. HARAI MINDHA**  
[1 L. R. 3 Cal. 823 2 C. L. R., 304]

**29** — **Criminal Procedure Code 1872 s. 263 Verdict of acquittal**—Where the jury acquitted the prisoners on the charges framed but found certain facts which amounted to another offence and omitted to convict the prisoners of that offence as provided by s. 457 of the Criminal Procedure Code—Held that the High Court could on the case come before it under s. 263 of the Criminal Procedure Code find the prisoners guilty of such offence. **EXPRESS v. HARAI MINDHA**  
[1 L. R. 3 Cal. 189]

**30** — **Criminal Procedure Code 1872 s. 263 Acquittal by jury**—The High Court was not a party of the Criminal Procedure Code 1872 on which the accused in this case on the facts, notwithstanding the verdict of acquittal come to by the jury. **QUEEN v. SHIDHAM SINGAR**  
[20 W. R., Cr 18]

**31** — **Criminal Procedure Code 1872 s. 263—Acquittal by jury—Confession—Evidence Act s. 29**—The Court on a consideration of the evidence found that the verdict of acquittal came to by a majority of the jury holding that a confession made by the accused before the Assistant Magistrate was good, such confession even if obtained by deception is not admissible under s. 29 of the Evidence Act 1872. **QUEEN v. RAM CHURN GHOSH**  
[20 W. R., Cr 33]

**32** — **Criminal Procedure Code 1872 s. 263 Acquittal by jury**—The prisoner who was charged with having committed murder was found by the jury who tried him to have been of unsound mind at the time he committed the offence. The Sessions Judge, differing on that point from the jury referred the case to the High Court under s. 263 of the Code of Criminal Procedure. Held that in a case of this kind the High Court was not warranted in holding the very clearest proof that the jury were mistaken and that the interests of justice imperatively required the Court to take action under the various powers conferred upon it by s. 263, Code of Criminal Procedure. On a consideration of the medical evidence the Court declined to interfere with the verdict of acquittal which the jury came to. **QUEEN v. DOORJOURN SHAMOSTO alias DEJOURN**  
[19 W. R., Cr 45]

**33** — **Criminal Procedure Code 1872 s. 263—Judge disagreeing from verdict of majority**—A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict and referred the case to the High Court under s. 263 of

**VERDICT OF JURY—cont. sued****3 POWER TO INTERFERE WITH VERDICTS**  
—cont. sued.

the Code of Criminal Procedure because in his opinion the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probable guilt and sentenced the prisoner. **IN THE MATTER OF THE DRAXES**  
[2 C. L. R., 1]

**34** — **Criminal Procedure Code 1872 s. 263—Interference with verdict of majority of jury where Sessions Judge differed**—The Sessions Judge differing from a majority of the jury who acquitted the accused, referred the case to the High Court under s. 263 of the Criminal Procedure Code 1872, to be dealt with as an appeal. Before proceeding, with the case the High Court considered it fair to the accused to give him notice to bring forward any objections to the recommendation of the Sessions Judge's recommendation. On a consideration of the evidence the High Court convicted the accused of the offence with which he had been charged in the Court below. **QUEEN v. GOTTICK DRAX**  
[19 W. R., Cr 38]

**35** — **Criminal Procedure Code 1872 s. 263—Differing from verdict of acquittal by jury**—Where the Sessions Judge did not consider a confession to have been secured by legal pressure the High Court, upon a reference under s. 263 of the Code of Criminal Procedure, had to have been properly admitted and finding it to be full and clear and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retract on it in the Court of Sessions, and his being found not guilty by the jury. **REG v. BALVANT v. PANDHARAN** 11 Bom. 137

**36** — **Criminal Procedure Code 1872 s. 263—Trial on different charges—The charge on some charges on which the jury and the Sessions Judge agreed—Reference to the High Court**—In a case in which the accused were charged with murder (s. 302 Penal Code), culpable homicide not amounting to murder (s. 304) and voluntarily causing grievous hurt (s. 325), the Sessions Judge at the trial added a further charge of house-break by night in order to the commission of an offence (s. 44). The jury unanimously acquitted the prisoners of the three original charges, and a majority of the jury (four out of five) acquitted them also of the last charge. The Sessions Judge agreed with the verdict of the jury as regards the three original charges, and recorded a formal order acquitting them, and discharging the prisoners on these three charges. He differed from the majority as to the fourth charge and referred the case to the High Court under s. 263 of the Criminal Procedure Code. Held that where (as in this case) the Sessions Judge had approved of a verdict on certain charges, and finally acquitted and discharged the accused as to those charges, the High Court could not under s. 263 revert on the facts on these very charges. That section seems to contemplate only a case in which without recording any order of acquittal or conviction the Sessions Judge refers the whole case. As to the



**VERDICT OF JURY—continued.****2. POWER TO INTERFERE WITH VERDICTS**  
—continued.

was nothing in this case to show on what grounds the majority of the jury acquitted the prisoners on the additional charge, and as the Sessions Judge agreed with the unanimous verdict as to the three original charges, the High Court presumed that the reason which weighed with the majority of the jury in finding the prisoners not guilty on the additional charge must have weighed with the whole jury in finding them not guilty on all the three other charges, and accordingly the Court could not set aside the verdict of the majority on the last count, without practically finding directly in the teeth of the verdict of the unanimous jury on the first three counts. *QUEEN v. UDYA CHANGA* . . . 20 W. R., Cr., 73

37. ———— *Verdict in accordance with charge—Verdict disagreed with by Judge—Penal Code, ss. 302, 304, 325—Reference under s. 307, Act X of 1882.*—A prisoner was charged under ss. 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in his charge to the jury directed them that, in the event of their finding the charges under ss. 302 and 304 unsustainable, they might find the prisoner guilty under s. 325. The jury unanimously acquitted the prisoner on the charge framed under s. 302, and a majority of them acquitted him on the charge framed under s. 304; but a majority of them found him guilty on the charge framed under s. 325. The Judge disagreed with their finding as regarded the charge framed under s. 304, and referred the case to the High Court under s. 307 of the Criminal Procedure Code. The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence and having expressed his opinion to the jury that they might find the prisoner guilty under s. 325. *QUEEN-EMPRESS v. JACQUIET* . . . I. L. R., 11 Cal., 85

38. ———— *Criminal Procedure Code, 1892, s. 269—Jury wrongly treated as assessors by Judge—Unanimous opinion of jury treated as assessors accepted as formal verdict.*—*L* and *N* were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of s. 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting *L* and *N* of dacoity, acquitted them of murder. Held that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect. *QUEEN-EMPRESS v. LAKSHMANA* . . . I. L. R., 9 Mad., 42

39. ———— *Criminal Procedure Code, s. 307—Powers of High Court on reference under s. 307—Criminal Procedure Code, ss. 418, 423 (d).*—No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the

**VERDICT OF JURY—continued.****2. POWER TO INTERFERE WITH VERDICTS**  
—continued.

verdict of the jury and causing judgment of acquittal to be recorded or by setting aside the verdict of acquittal and causing conviction and sentence to be entered against the accused. The provisions of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power under s. 307 to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, i.e., misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law. *QUEEN-EMPRESS v. MCCARTHY*

[I. L. R., 9 All., 420]

40. ———— *Sessions Judge, Opinion of—Criminal Procedure Code, s. 307—High Court, Power of.*—In the exercise of its powers under s. 307 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but in doing so the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight. *Reg. v. Khanderav Bajirav*, I. L. R., 1 Bom., 10; *Queen v. Mahan Kumar*, 1 C. L. R., 275; *The Empress v. Dhunum Kaze*, I. L. R., 9 Cal., 53; *Queen-Emress v. Maria Dayal*, I. L. R., 10 Bom., 497; *The Queen v. Ram Churn Ghose*, 20 W. R., Cr., 33; *The Queen v. Sham Baghi*, 13 B. L. R., Ap., 19; 20 W. R., Cr., 78; *The Queen v. Hurro Manjhee*, 14 B. L. R., Ap., 2; 21 W. R., Cr., 4; *The Queen v. Wazir Mandul*, 25 W. R., Cr., 25; *The Queen v. Nobin Chunder Banerjee*, 10 B. L. R., Ap., 20; 20 W. R., Cr., 70, referred to. *QUEEN-EMPRESS v. ITWARI SAHO*

[I. L. R., 15 Cal., 289]

41. ———— *Criminal Procedure Code, ss. 307, 418—Perversity of verdict—Procedure when Sessions Judge disagrees with verdict—Misdirection.*—A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which it was open to the jury to believe. The accused appealed to the High Court on the ground (*inter alia*) that the Sessions Judge "ought to have referred the case to the High Court under the Criminal Procedure Code, s. 307." Held that since there had been no misdirection by the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered. *QUEEN-EMPRESS v. CHINNA TEYAN*

[I. L. R., 14 Mad., 36]

42. ———— *Criminal misappropriation—Charge of misappropriation of specific sums of money—Form of charge—Evidence of general deficiency—Criminal breach of trust—Penal Code, s. 409—Practice—New trial.*—The

**VERDICT OF JURY—cont. sued****2. LOWER TO INTERFERE WITH VERDICTS**  
—cont. sued

accused was charged with abetting the offence of criminal breach of trust committed by the name of the Small Cause Court at Poona. The accused was a clerk in the native office and it was his duty to keep the accounts of moneys received in the office from judgment debtors, and of moneys paid out to decree-holders. He was charged with abetting the misapplication of the sums of Rs 250 on the 19th November 1885 and Rs 100 on the 23rd November 1885 and Rs 10 on the 26th June 1886. As to the first sum it was alleged that an instalment of Rs 250 due under a decree had been paid to the native office by a judgment-debtor on the 19th November 1885, but the accused had entered in the office day book only Rs 10 thereby enabling the balance of Rs 240 to be misappropriated. It appeared however that a sum of Rs 10, being the instalment due to the decree holder under the above decree had been duly received out to him on the 4th December 1885. As to the second sum of Rs 100 it was alleged that a sum of Rs 100 had been paid in but only Rs 15 had been credited by the accused the balance being misappropriated. It appeared however in this case also that the full amount of the instalment of Rs 100 had been duly paid out to the decree holder a few days after its receipt. As to the third sum it was alleged that the total receipts entered in the book on the 26th June 1886 were Rs 100 but the figure entered as the total was only Rs 40 and that the balance of Rs 60 had been misappropriated. The jury found the accused guilty on all three charges. On appeal by him, it was contended that there was no evidence of the misappropriation of the specific sums in respect of which he was charged. There was evidence of a general larceny but there was no evidence that these specific sums formed part of that deficiency. On the contrary the evidence showed that the instalments paid into the office had been duly paid out to the persons to whom they were payable. *Held* that, the jury having had the facts brought to their notice, their verdict was final and the High Court would not interfere with the verdict. The provisions of s. 167 of the Evidence Act (I of 1872) apply to criminal trials by jury. When part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to the High Court on appeal either to uphold the verdict upon the remaining evidence on the record under s. 167 of the Indian Evidence Act (I of 1872) or to quash the verdict and order a retrial. The law as settled in England by the *Queen v. Glyn* L. R. 19 Q. B. D. 537 and as stated by the Privy Council in *Maclean v. Attorney General of New South Wales* L. R. (1894) 4 C. 37 (69 Q.) with reference to the grant up of new trials where evidence has been improperly admitted, does not apply to India. *Wesford Khan v. Queen-Empress* I. L. R. 21 Cal., 455 not followed. *QUEEN-EMPERESS v. RAMCHANDRA GOVIND HARSHE* I. L. R. 19 Bom., 749

**VERDICT OF JURY—cont. sued****2. LOWER TO INTERFERE WITH VERDICTS**  
—cont. sued.

*procedural on—Loss of self control—Criminal Procedure Code (1882) s. 30—High Court's power of interfering with the verdict of a jury—The accused was tried for murder. The first verdict of the jury was guilty of murder under grave and sudden provocation. The Sessions Judge told the jury that it was their duty after considering the question of provocation to return a simple verdict of guilty or not guilty. The jury therefore brought in a second verdict of not guilty. The Judge, considering the verdict to be perverse, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882). *Held* that the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong. A verdict ought to be considered a proper and not a perverse verdict if it is one which reasonable men might find on the facts in evidence. *Queen-Empress v. Dada Das* I. L. R. 10 Bom. 457 and *Queen-Empress v. Maqana* I. L. R. 14 Bom. 110 followed. *QUEEN-EMPERESS v. DEVI GOVINDJI* [I. L. R., 20 Bom., 215]*

44. ——— Criminal Procedure Code (1882) ss. 297 and 423, cl. (d)—*Verdict on a jury—Allowing verdict before accused is called on for defence—To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is a misdirection, though the Judge omits to charge the jury at all. In such a case cl. (d) of s. 423 of the Criminal Procedure Code does not stand in the way of the Appellate Court's interfering with the verdict of the jury. *QUEEN-EMPERESS v. IMAM ALI KHAN* as in *NATHU KHAN* I. L. R., 23 Cal., 253*

45. ——— Criminal Procedure Code 1882 ss. 303 367 429—*Power of Judge to put questions to jury under s. 303 after verdict delivered—Reference to High Court under s. 307—Power of High Court to interfere with verdict—Judges of High Court differing in opinion—Reference to third Judge—Letters Patent 1865, cl. 36—Practice—Procedure—A prisoner was tried for murder and acquitted by a majority of the jury. The Sessions Judge disagreed with the verdict and submitted the case to the High Court under s. 30 of the Criminal Procedure Code (Act X of 1882). The Judges of the High Court (JARDIN and CANNON) differed in opinion on the case as laid before a third Judge (SARGENT C.J.) under s. 429 who held that the verdict of the jury should be set aside and that the prisoner was guilty of murder. *Per SARGENT C.J.*—It is the uniform practice of the High Court in cases referred under s. 307 of the Criminal Procedure Code (Act X of 1882) not to interfere with the verdict of a jury except when it is clearly and manifestly wrong. There is no true analogy between the discretionary power conferred on the High Court under this section and that which in the Courts of law in England has been exercised in interfering with the finding of a jury in civil actions by directing a new trial on the ground of the verdict*

43. ——— Special verdicts—*Murder—Culpable homicide—Grave and sudden*

**VERDICT OF JURY—continued.****2. POWER TO INTERFERE WITH VERDICTS—continued.**

being against the weight of evidence. The practice, therefore, of the latter Courts, although very properly regarded as a guide, cannot be resorted to as affording a fixed rule in the exercise of the powers conferred on the High Court by s. 307. Where a prisoner was charged with murder by administering dhatura poison to the deceased, the majority of the jury found him not guilty. After the delivery of the verdict, the Sessions Judge questioned the jury, who, in reply to specific questions on the points, stated through their foreman that the majority had doubts (1) whether the deceased had fetched dhatura from a certain field; (2) whether there was dhatura poison in the stomach of the deceased; (3) whether the death of the deceased was caused by dhatura poison. The Sessions Judge differed so completely with the jury on the evidence that he submitted the case to the High Court under s. 307 of the Criminal Procedure Code. *Per JARDINE, J.*—The verdict of acquittal should be upheld. It was not manifestly wrong nor absolutely unreasonable. It was a verdict that reasonable but cautious men might find. The Sessions Judge ought not to have put to the jury, after verdict delivered, the questions which he did put as to their findings on particular points. In so doing the Sessions Judge exceeded the limits of questioning defined in s. 303 of the Criminal Procedure Code. There was no incompleteness nor ambiguity in the verdict and no misconception of any question of law. *Per CANDY, J.*—Admitting in the present case that the Sessions Judge was wrong in putting any questions to the jury after the verdict was delivered, disregarding the answers to the questions and dealing solely with the evidence and probabilities, there seemed to be no reasonable doubt of the guilt of the accused. The High Court, in the exercise of its powers under s. 307 of the Criminal Procedure Code, is bound to act upon its own view of the evidence. On a reference by a Sessions Judge, the whole case is opened up. When the verdict of the jury is erroneous, the High Court must put it aside and exercise the functions of both Judge and jury, giving due weight to the opinion of the Judge as well as to the verdict of the jury. When a case like the present depends upon the inferences to be drawn from two or three facts, neither principle nor statute forbids the Sessions Judge from asking the jury to state a plain concise finding on those facts. Where the Judges of the High Court differed in opinion in a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code, the Court (*JARDINE and CANDY, JJ.*) directed that the case should be laid before a third Judge of the High Court, being of opinion that the Criminal Procedure Code overrules the provisions of cl. 36 of the Letters Patent, 1865. *QUEEN-EMPRESS v. DADA ANA*

[I. L. R., 15 Bom., 452]

46. ————— *Criminal Procedure Code (Act X of 1882), s. 423—Setting aside verdict of the jury—Power of Appellate Court to deal with the case.*—If the verdict of the jury is set aside on any of the grounds mentioned in cl. (d) of

**VERDICT OF JURY—concluded.****2. POWER TO INTERFERE WITH VERDICTS—concluded.**

s. 423 of the Criminal Procedure Code (Act X of 1882), then, there is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section. The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial. *Wafadar Khan v. Queen-Empress, I. L. R., 21 Calc., 955*, dissented from. The course adopted in *Queen-Empress v. O'Hara, I. L. R., 17 Calc. 643*; *Regina v. Naoroji Dadabhai, 9 Bom., H. C., 353*; and *Queen-Empress v. Haribole Chunder Ghose, I. L. R., 1 Calc., 207*, followed. *TAJU PRAMANIK v. QUEEN-EMPRESS* . . . I. L. R., 25 Calc., 711

**VESTED INTERESTS.**

*See CASES UNDER HINDU LAW—WILL—CONSTRUCTION OF WILLS—VESTED AND CONTINGENT INTERESTS.*

*See SUCCESSION ACT, s. 98.*  
[I. L. R., 4 Calc., 304]

*See CASES UNDER WILL—CONSTRUCTION.*

**VESTING ORDER.**

*See CASES UNDER INSOLVENCY—CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE.*

*See INSOLVENCY—PROPERTY ACQUIRED AFTER VESTING ORDER.*  
[I. L. R., 17 Mad., 21  
I. L. R., 18 Mad., 24  
I. L. R., 19 Bom., 232  
2 C. W. N., 372]

*See CASES UNDER INSOLVENT ACT, s. 7.*

**VICE-ADMIRALTY REGULATIONS OF 1832.**

*See JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY JURISDICTION.*  
[I. L. R., 17 Calc., 337]

*See LETTERS PATENT, HIGH COURT, 1865, cl. 15.* . . . I. L. R., 17 Calc., 68

**VICINAGE.**

*See CASES UNDER MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—CO-SHARERS.*

**VILLAGE ACCOUNTANT.**

*See CRIMINAL PROCEDURE CODES, s. 45 (1872, s. 90).* . . . I. L. R., 1 Mad., 268

**VILLAGE CATTLE.**

See PASTURAGE, RIGHT TO

( I. L. R., 2 Bom., 110 )

**VILLAGE CHOWKIDAR.**

See BENGAL REGULATION XX of 1814.

s. 21

18 W.

No. 208

see VILLAGE CHOWKIDARS ACT

**VILLAGE CHOWKIDARS ACT  
(BENGAL ACT VI OF 1870).**

see CASES

I. L. R. 22 Calc. 680

s. 8 Order imposing fine by Sub-d

*Magistrate's Order imposing fine by Sub-d*  
*Magistrate's Order imposing fine by Sub-d*  
 The High Court—Magistrate's Order imposing fine by Sub-d  
 Where the collecting number of punishment is contained  
 under the provisions of the Village Chowkidars Act  
 (Bengal Act VI of 1870) was found by the Sub-d  
 a coal Officer of the village of the Act for  
 having disobeyed his orders and failed to attend  
 to the duties of the village from the month of  
 Basall though the Act was not introduced into  
 the village until the month of Kartik following—  
 Held that the fine has not been imposed by a Magistrate  
 under the provisions of the Act of the District Council  
 it was imposed in respect of a offence as defined  
 by s. 4, cl. (p) of the Criminal Procedure Code and by  
 virtue of s. 4 of Bengal Act VI of 1870 the provisions  
 of s. 63 to 65 of the Criminal Code and s. 61 of the  
 Criminal Procedure Code were applicable to the fine.  
 The order of the Sub-district Officer was in a  
 nature a judicial order and was therefore subject to  
 revision by the High Court. The order was bad be-  
 cause (1) there was no trial (2) no act punishable  
 with fine under s. 4 of the Act (Bengal Act VI of  
 1870) had been committed and (3) because the Dis-  
 trict Magistrate only had the power to impose the  
 fine. QUEEN EMPRESS v. ASHWINI KUMAR GHOSH  
 (I. L. R. 23 Calc., 421)

ss. 28, 27 and 34.

See PENAL CODE s. 183.

( I. L. R., 25 Calc. 274 )

ss. 48 and 64 Chowkidars chakran lands  
 and Settlement of—Power of Collector—Power of  
 Commission under a Settlement Collector's order—Under  
 s. 48 of Bengal Act VI of 1870 a Collector can only  
 settle lands with the zamindar within whose estate the  
 lands lie. s. 64 of that Act does not empower the  
 Commission to set aside an order passed by the  
 Collector under s. 48. BHOJO CHAND MAHATTA  
 BARADER v. KRISHNA MOHINI DAS

( I. L. R., 21 Calc., 628 )

s. 61—Chowkidars chakran lands  
 for recovery of by patta dar and zamindar with  
 whom the same had been settled under Bengal Act  
 VI of 1870—Landlord and tenant—Where a  
 patta dar sought to have transferred to him certain  
 Chowkidars chakran lands, which the Government  
 had settled with the zamindar under Bengal Act VI  
 of 1870 and where it was found that the lands were

**VILLAGE CHOWKIDARS ACT  
(BENGAL ACT VI OF 1870)—concluded.**

part of plaintiff's patta and that the zamindar had  
 sublet the same to a tenant. Held that the patta  
 was entitled to possession, but not to the possession  
 of the lands. That the tenant with whom the lands  
 had been settled by the zamindar was entitled to  
 retain actual possession of the lands. That the  
 zamindar was bound to pay to the zamindar such  
 rents for these lands as corresponded to the proportion  
 between the gross collections and patta rent formerly  
 payable by him. HARI NARAIN MAHOMMED  
 MUKUND LAL MUNDAL 4 C. W. N., 814

— ss. 58, 61—Decision of Commission—

*Village chowkidars—Chowkidars chakran lands—*  
*Criminal Act.*—The words "final and conclusive" used in  
 s. 61 of Bengal Act VI of 1870 must be taken to be used  
 in their ordinary and literal sense. Where, therefore,  
 a commission has been appointed under s. 58 for the  
 purpose therein mentioned, and such commission has  
 ascertained and determined that certain lands are  
 chowkidars chakran lands in the absence of fraud or  
 non-compliance by the commissioners with the provisions  
 of the Act, their decision is conclusive and not  
 subject to any appeal on the fact that the lands are what  
 they have found them to be. NARAYAN MOHINI  
 JEE v. SECRETARY OF STATE FOR INDIA

( I. L. R., 11 Calc., 639 )

**VILLAGE CHOWKIDARS ACT  
AMENDMENT ACT (BENGAL ACT  
I OF 1892).**

see CONFESION—CONFESIONS TO POLICE  
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**VILLAGE COURTS.**

See SMALL CAUSE COURT APPEALS—  
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 ( I. L. R., 13 Mad., 145 )

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see MUNSIF I. L. R., 7 Mad., 220  
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 I. L. R., 15 Mad., 131  
 I. L. R., 20 Mad., 91  
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**VILLAGE MUNSIF'S PEON**

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See HEREDITARY OFFICES ACT s. 4.  
 ( I. L. R., 21 Bom., 73 )

**VOLUNTARY ASSIGNMENT.**

See CASES UNDER INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

**VOLUNTARY CONVEYANCE.**

See CONTRACT ACT, s. 25.

[I. L. R., 2 All., 891]

See CASES UNDER DEBTOR AND CREDITOR.

See CASES UNDER INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

See INSOLVENT ACT, s. 26.

[I. L. R., 3 Calc., 434]

Subsequent sale for value—*Avoidance of gift or settlement voluntarily made*—Stat. 27 Eliz., c. 4.—Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement, the Stat. 27 Eliz., c. 4, putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser: words showing an intention on the part of the person who made the voluntary gift to convey to the purchaser all the interest or estate that he had are sufficient to avoid such gift. *JUDAH v. ABDOL KURREEM* . . . 22 W. R., 80

**VOLUNTARY PAYMENT.**

See CASES UNDER CONTRACT ACT, ss. 69 AND 70.

See CONTRACT ACT, s. 72.

[I. L. R., 7 Calc., 573]

See CASES UNDER CONTRIBUTION, SUIT FOR—VOLUNTARY PAYMENTS.

See MONEY HAD AND RECEIVED.

[8 B. L. R., 418

W. R., 1864, 205

3 N. W., 162

5 N. W., 1

See MONEY PAID . . . 7 N. W., 154

[10 W. R., 400]

See MONEY PAID FOR BENEFIT OF ANOTHER.

[I. L. R., 21 Calc., 142

L. R., 20 I. A., 180]

See MONEY PAID UNDER PROCESS OF DECREE . . . I. L. R., 7 Mad., 586

See CASES UNDER PAYMENT INTO COURT.

See RES JUDICATA—ADJUDICATIONS.

[13 B. L. R., 146]

See CASES UNDER SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE.

See CASES UNDER SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

**VOLUNTARY PAYMENT—continued.**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . . . 11 B. L. R., 121  
[15 B. L. R., 208]

See VENDOR AND PURCHASER—PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER . . . 2 B. L. R., A. C., 86  
[11 B. L. R., 121  
15 B. L. R., 208  
18 W. R., 503  
17 W. R., 480  
8 B. L. R., Ap., 55]

1. ——— Money paid, but not due, and paid under compulsion—*Contract Act (IX of 1872), ss. 15, 72*.—In execution of a decree, the plaintiff purchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim which was disallowed, as he had not then obtained, and consequently could not produce, the sale-certificate. In order to prevent the sale, he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court, to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back. *Held*, following *Dooli Chand v. Ram Kishen Sing*, L. R., 8 I. A., 93: I. L. R., 7 Calc., 648, that it was not a voluntary payment; and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry*, 12 Moore's I. A., 65: 10 W. R., P. C., 29, referred to. *Asibun v. Ram Proshad Das*, 1 Shome, 25, doubted. *JUGDEO NARAIN SINGH v. RAJA SINGH*

[I. L. R., 15 Calc., 856]

2. ——— Money paid under protest—*Right of suit—Contract of indemnity—Contract Act, ss. 124, 141, 142*.—The Thakor of Lindi possesses several talukdari villages in the Ahmedabad District, for which he pays a lump jumma to Government. One of these villages was Akru. Disputes arose between the Thakor and the grassias of Akru as to the ownership of the village. The Thakor filed a suit against the grassias, which was ultimately compromised, and a consent-decree was passed in 1883, providing (*inter alia*) that the Thakor should assign to the grassias a moiety of the village; that the grassias should hold the same free from all liability to pay the jumma, and that the Thakor should alone be responsible for all Government demands. In accordance with this decree, a moiety of the village was made over to the grassias. The Collector demanded jumma-bandi for this moiety. The Thakor intervened, and objected to the demand, on the ground that he paid a lump jumma for the whole of his taluk, including the moiety of the village assigned to the grassias. Government, however, passed a resolution declaring that half of the village belonged to the grassias; that from them the Government had a right to levy the jumma; that the Thakor might, if he

**VOLUNTARY PAYMENT—cont. next**

chose pay the same on behalf of the grantees and that, if it was not paid, it would be recovered by attachment and sale of the grantees' half share. The Thakur thereupon paid the jumma on behalf of the grantees for two years and then filed a suit against Government to recover back the payments he had made and for a declaration that Government had no right to levy any assessment on any portion of the village beyond the lump jumma fixed for his talukh. This suit was dismissed on the preliminary ground that the Thakur had no cause of action against Government in respect of any of the payments he had made to Government on account of the grantees, the Court being of opinion that the payments he had made to Government on account of the grantees were voluntary and that he had no interest whatever in the grantees' half share of the village. *Held* the grantees could sue the Government for the recovery of the lump jumma. Under the consent-decree the Thakur was directed to pay the lump jumma to the grantees from all encroachments of Government lands. The payments of jumma he made on account of the grantees were therefore not voluntary, but made under protest, and as such were recoverable by suit. **JAGATSINGHJI PATESINGHI v. SECRETARY OF STATE FOR INDIA**

[L. L. R., 14 Bom., 290]

3. Money paid for benefit of another—*Contract Act (IX of 1872) ss. 69 and 70—Money paid to protect property from sale in execution of a decree for arrears of rent.*—Certain immovable property was inherited by the mother of the plaintiff from her husband, and during her lifetime she alienated it by deed of sale to the defendant. He died in April 1890 and the estate then devolved upon the plaintiff as only daughter (there being no male issue). In 1890 the property in possession of the defendant was, at the suit of a person who was the landlord, ordered to be sold together with other properties of the defendant for arrears of rent, due in the lifetime of S and to prevent the sale the plaintiff paid the amount of the decree. In a suit for possession of the property and for a refund of the sum paid by the plaintiff to stop the sale the defendants claimed an absolute interest in the property but the Courts below found that the alienations by S to the defendants were not made for legal necessity and were therefore invalid. *Held* that the payment made by the plaintiff was not a voluntary payment, but was one which she was entitled to recover from the defendants. It being a question at the time whether the property belonged to the plaintiff or to the defendants, the payment to stop the sale was one in which the plaintiff was interested sufficiently to bring the case within s. 69 of the Contract Act. S. 70 was also applicable, as the payment relieved the defendant from liability to their landlord, and was made for the defendants, and not gratuitously and the defendants enjoyed the benefit of such payment. The principle laid down in the cases of *Dul's Case* and *Yamshi Singh* is applied. **L. L. R., 7 Cal., 648; L. R., 8 I. A., 93; Smith v. Dronath Mookerjee, L. L. R., 12 Cal., 213; and Jagdeo Narra v. Singh, L. R., 3 Cal., 656** were held to govern this case. **BAMA SUDHANI DAS v. ADHAR CHANDER SIKHAN**

[L. L. R., 23 Cal., 28]

**VOLUNTARY PAYMENT—cont. next.**

4. Payment made to save the patni talukh from sale—*Contract Act (IX of 1872) s. 69—Arrears of rent—Payment made by a mortgagor.*—The plaintiff who was the mortgagor of a certain patni talukh, obtained a consent decree for Rs. 5,000 on his mortgage-deed on the 15th August 1878. In the *adjudication* it was stipulated that, if the decretal amount was not paid within a certain time, it was to be increased to Rs. 2,000. On the 15th March 1881 the plaintiff applied for execution of that decree and claimed the arrears of rent as admitted by the mortgagee. The subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and on the 31st September 1881 the order of the subordinate Judge was reversed, and an inquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August 1882 the subordinate Judge held that the plaintiff had been guilty of misconduct, and that the decree had been fairly satisfied. The plaintiff appealed from this order to the High Court, and on the 4th January 1883 the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime on the 15th May 1882 the plaintiff had paid a certain sum of money to protect the patni talukh from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid—*Held* that the payment was not a voluntary payment, and that the plaintiff was not treated in the payment of the money and therefore he was entitled to recover it. **BIXOU BASHINT DAS v. HARENDRA LAL ROY**

[L. L. R., 25 Cal., 305  
2 C. W. N., 150]

5. Payment by a purchaser of a patni talukh during the pendency of an appeal for setting aside the patni sale—*Person interested in the payment of the patni rent—Patni Regulation (VIII of 1819) s. 15—A payment of rent made by the purchaser of a patni talukh after the decision of the first Court in a suit brought by the defaulting patnidars for the setting aside of the patni sale, by which it was held that the sale was invalid, and during the pendency of an appeal preferred, not by the plaintiff the auction purchaser but by the samandar at whose instance the said sale had been brought about, is not a voluntary payment, so much as he (the plaintiff) is a person interested in the payment of the money within the meaning of s. 69 of the Contract Act.* **Sudhesh v. Das v. Harendra Lal Roy** **L. L. R., 25 Cal., 305** followed. The remedy which the plaintiff in this case had, after the reversal of the sale to be reimbursed by the defendant under s. 69 of the Contract Act was held not to be curtailed by the provisions of s. 14 of Regulation VIII of 1819. **RADHA MADHUS CHANDRA v. ABHI RAM CHAND** **L. L. R., 26 Cal., 826**

6. Payment of decrees for rent by purchaser at sale for arrears of rent—*Contract Act (IX of 1872) ss. 69, 70—Suit to recover money so due.*—Rent is by operation of law the first charge on a lease and a person who purchases the same at any execution sale must, in the absence of anything to denote the contrary, be taken to

**VOLUNTARY PAYMENT—concluded.**

purchase it, charged with the rent which is due in respect of it at the time of its purchase, and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase. So where a plaintiff, in execution of a mortgage-decree, purchased the tenure mortgaged, and then paid the money due under a decree obtained by the landlord against the tenure-holder for arrears of rent for the period anterior to the confirmation of sale,—*Held* that the plaintiff was not entitled to recover the money paid by him for satisfying the rent decree. *MOHARABEE DASYA v. HARENDEA LAL ROY* . . . 1 C. W. N., 458

**VOLUNTARY SETTLEMENT.**

*See* ONUS OF PROOF—DECREES AND DEEDS,  
SUITS TO ENFORCE OR SET ASIDE  
[I. L. R., 15 Bom., 549]

Breach of Covenants in—

*See* DAMAGES—SUITS FOR DAMAGES—  
BREACH OF CONTRACT.  
[I. L. R., 2 Bom., 273]

**VOLUNTEERS.**

*See* ARMY ACT, s. 19.  
[I. L. R., 22 All., 323]

**VOTERS, LIST OF—**

*See* CALCUTTA MUNICIPAL CONSOLIDATION  
ACT, s. 31 . . I. L. R., 22 Calc., 717

**W****WAGERING CONTRACT.**

*See* CASES UNDER CONTRACT—WAGERING  
CONTRACTS.

*See* EVIDENCE—PAROL EVIDENCE—VARY-  
ING OR CONTRADICTING WRITTEN IN-  
STRUMENTS . . I. L. R., 9 Calc., 791  
[I. L. R., 12 Bom., 585  
I. L. R., 17 Mad., 480]

*See* ATTACHMENT—SUBJECTS OF ATTACH-  
MENT—WAGES . . I B. L. R., s. N., 15  
[I. L. R., 5 Bom., 132]

*See* CASES UNDER MASTER AND SERVANT.

— of labourers.

*See* BENGAL ACT VI OF 1865.  
[3 B. L. R., A. Cr., 39]

**WAGES—concluded.**

Suit for—

*See* SMALL CAUSE COURT, MOFUSSIL—  
JURISDICTION—WAGES.

[9 B. L. R., Ap., 91]

*See* SMALL CAUSE COURT, RANGOON.  
[I. L. R., 10 Calc., 878]

**WAGING WAR.**

*See* JURISDICTION OF CRIMINAL COURT—  
OFFENCES COMMITTED ONLY PARTLY IN  
ONE DISTRICT—ABETMENT OF WAGING  
WAR . . . 9 B. L. R., Ap., 36

*See* SENTENCE—TRANSPORTATION.  
[3 W. R., Cr., 16]

**WAGING WAR AGAINST THE QUEEN.**

Conspiracy to wage war—Trea-  
son—Misprison of treason—Limitation of period  
for prosecution—Penal Code, s. 121—7 Will. III,  
c. 3, s. 5.—The offence of engaging in a conspiracy to  
wage war, and that of abetting the waging of war,  
against the Queen, under s. 121 of the Penal Code,  
are offences under the Penal Code only, and are not  
treason or misprison of treason; and therefore the  
provisions of the Stat. 7 Will. III, c. 3, s. 5,  
as to placing a limitation on the period for prosecu-  
tion are not applicable. *QUEEN v. AMIRUDDIN*  
[7 B. L. R., 63; 15 W. R., Cr., 25]

**WAIVER.**

*See* CASES UNDER ACQUIESCENCE.

*See* ARBITRATION—AWARDS—VALIDITY  
OF AWARDS AND GROUND FOR SETTING  
THEM ASIDE . . I. L. R., 21 Calc., 590

*See* CASES UNDER BOND.

*See* ESTOPPEL—ESTOPPEL BY CONDUCT.  
7 Mad., 263  
[8 Mad., 14  
I. L. R., 18 Calc., 341  
I. L. R., 15 Mad., 82  
I. L. R., 14 Bom., 558]

*See* FOREIGN COURT, JUDGMENT OF.  
[I. L. R., 2 Mad., 400, 407  
I. L. R., 15 Mad., 82]

*See* GUARDIAN—DUTIES AND POWERS OF  
GUARDIANS . . I. L. R., 18 Calc., 99  
[I. L. R., 17 I. A., 80]

*See* INSURANCE—LIFE INSURANCE.  
[I. L. R., 23 Calc., 320]

*See* CASES UNDER LIMITATION ACT, 1877,  
\* ART. 75.

*See* CASES UNDER LIMITATION ACT, 1877,  
ART. 179—ORDER FOR PAYMENT AT SPE-  
CIFIED DATES.

*See* MALABAR LAW—MORTGAGE.  
[I. L. R., 13 Mad., 490  
I. L. R., 15 Mad., 480]





**WAIVER—continued.**

8. ———— *Effect of waiver—Landlord and tenant—Waiver of right of forfeiture for non-payment of rent.*—A landlord who has waived his right to sue for the cancellation of a lease on the raiyat's failure to pay six successive instalments is not barred by limitation from suing for cancellation on further breaches of the covenant. **DULLI CHAND v. MEHER CHAND SAROO** . . . . . **8 W. R., 138**

9. ———— *Waiver of vendor binding on purchaser—Sale for arrears of rent.*—The Government, as auction-purchaser of the zamindari right of a pergunnah, having waived all right to cancel the tenures of the talukhdars, and having admitted them to settlement and otherwise recognized their rights, it was held that the defendant, a purchaser, could not put in force against the talukhdars any rights which his vendor had waived. **ONHOX CHURN ROY v. ASANOULLAH** . . . . . **[2 W. R., Act X, 81]**

10. ———— *Waiver of rights under mortgage—Resumption by Government of mortgaged land under Land Acquisition Act, and re-sale to mortgagor—Omission of mortgagee to claim compensation.*—Government having under the Land Acquisition Act taken possession of portion of certain land which had been mortgaged by the owner subsequently, while the mortgage was still in force, re-sold the portion taken, to the mortgagor, who sold it to a third person *bona fide* for value. In a suit by the mortgagee (who had taken no steps to obtain any portion of the money paid by the Government for the land) praying for the sale under the mortgage of the land resumed by Government, — *Held* that the plaintiff as mortgagee had waived his rights under the mortgage, and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance. *Quære*—Whether the mortgage claim might not, but for the waiver, have re-attached, on the lands resumed by the Government again coming into the possession of the mortgagor. **RAM AWTAI SINGH v. TULSI RAM** . . . . . **5 C. L. R., 227**

11. ———— *Waiver of grounds of enhancement—Reliance on one ground only—Presumption.*—In a suit for enhancement of rent upon different grounds, the fact that at the hearing the plaintiff relies on one of the grounds only, and that in the judgment of the first Court the whole case was rested on that ground only, is not a safe warrant for the inference that the other grounds were waived. **BONOMALEE CHURN MITTEE v. SHORROO HOOTAIR** . . . . . **[14 W. R., 60]**

12. ———— *Objection as to absence of demand for enhanced rent—Objection as to want of parties—Objection taken for first time on appeal.*—Where in a suit for rent at an enhanced rate no objection as to the absence of legal demand for enhanced rent was taken, — *Held* that the suit was properly tried by the Court of first instance on the merits. The lower Appellate Court having dismissed the suit on the ground that the inamdar was not a party to the suit, a point on which no issue was raised, although it had been taken in the written statement and which was not made a ground of appeal. *Held*

**WAIVER—continued.**

that the point must be considered to have been abandoned at the trial; it was therefore not open to the lower Appellate Court to dismiss the suit on that ground. **GOVINDRAY KRISHNAV RAIBAGKAR v. BALU BIN MONAPA** . . . . . **I. L. R., 16 Bom., 586.**

13. ———— *Waiver of right to execute decree—Agreement to give time to debtor—New contract.*—The granting of a judgment-debtor the indulgence of a temporary stay of the warrant of execution issued to enforce the decree does not prejudice the judgment-creditor's right to execution at a subsequent time. **BUTCHENNER v. RAYUDU** . . . . . **[5 Mad., 285.]**

14. ———— *Waiver where decree-holder was allowed to perform act under decree in case judgment-debtor failed to do so.*—*H C* obtained a decree against *G R* for the reconstruction in the family house, within one month, of a verandah which had been improperly pulled down by the latter; on failure of *G R* to rebuild it in the specified time, the decree-holder was to be allowed to rebuild it himself at the cost of *G R*. About a month after the reconstruction was begun, but after the lapse of the month allowed to the judgment-debtor, *H C* applied for an injunction to stop the work as not being according to the decree, and for permission to rebuild it himself. *Held*, notwithstanding *G R* had made alterations and contravened the decretal order, the judgment-creditors' conduct in looking on without remonstrance for nearly a month while the judgment-debtor incurred considerable expense amounted to a waiver of his right to take matters into his own hands. **GOREE KISHEN GOSSAIN v. HEM CHUNDER GOSSAIN** . . . . . **[16 W. R., 38.]**

15. ———— *Waiver of right to interest on arrears of rent—Receipt of arrears of rent for long time without interest.*—By the terms of a kabuliati, rent not paid when due was to bear interest. The zamindar received rent for a period of ten years without making any demand of interest in respect of arrears, and without claiming to apply any portion of the payments towards the discharge of interest. Having subsequently brought a suit for interest, the Courts below were of opinion that the zamindar had waived his claim to interest and dismissed his suit. *Held* that there were facts justifying such an inference, and that their finding could not be reviewed in special appeal. **DINDOYAL-PORAMANICK v. PRAN KISHEN PAUL CHOWDERY** . . . . . **[Marsh., 394: W. R., F. B., 117: 2 Hay, 423.]**

16. ———— *Omission to enforce interest under kabuliati—Variation in contract.*—In order to establish variation in a written contract, it must be distinctly pleaded and proved when and how the variation took place, the mere fact of a kabuliati not having been enforced in the most stringent manner does not take away from the lessor the right to enforce it. **PEARRE MOHUN MOOKERJEE v. BROJO MOHUN BOSE** . . . . . **21 W. R., 36**

**PEARRE MOHUN MOOKERJEE v. BROJO MOHUN BOSE** . . . . . **22 W. R., 423.**

17. ———— *Omission to claim interest—Pleading.*—Both parties stipulated

**WAIVER—continued**

for payment of rent on certain dates, and, if not so paid, of a certain rate of interest until paid. The rent not having been paid at the time agreed on.—*Held* that the landlord's omission to claim interest, instalment by instalment for the fraction of time that the rent was not paid after it became due did not justify the plea that the interest stipulated for was not due or warrant the belief that the plaintiff had waived his claim to interest. **RUTTY HART BOSE v GUNGA DUTTA BHASIA**

[W R., F B., 13 1 Ind. Jur., O S., 6 Marsh., 40

18. — **Waiver of objection to service of notice of enhancement** *On motion to appeal from decision finding not to be properly served*—*Question of law and fact*—Plaintiff sued to recover rents at enhanced rates after notice and got a decree. Defendants appealed on the merits, tacitly accepting the finding of the lower Court that notice had been duly served. On appeal the Superior Judge of his own motion took up the question of notice and decided that it had not been duly served and reversed the decree of the lower Court. *Held* that the Superior Judge was wrong for saying that the defendants had not appealed from the finding of the first Court which declared that there had been good service; it might fairly be presumed that they had due notice of the claim to enhance until evidence sufficient to rebut that presumption should be shown. An objection that notice of enhancement has not been properly served is not an objection purely of law but a mixed objection of law and fact which may be impliedly waived by the conduct of the parties. **Chander Monee Doss v Dhurumedher Lakshy** 7 W R 2, cited and distinguished. **CHANDER BROODER v MUNDY MOHUN CRUTCHFORD**

[2 C L R., 297

19. — **Agreement come to under mistaken belief**—*Agreement to accept provision as satisfaction of claim to maintenance*—*Mistaken belief*—*Effect of*—*Suit by son for partition*—*Relinquishment of claim*—The plaintiff's father a member of an undivided Hindu family signed an agreement by which he agreed to accept a provision in satisfaction of his claim for maintenance. The agreement was signed by reason of a mistaken belief entertained by the plaintiff's father and the other members of the family that there existed an established custom in the family which rendered the property indivisible. *Held* in a suit by the plaintiff for a partition of the family property liable to partition that the agreement having been come to under a mutual mistake, it was no bar to the plaintiff maintaining the suit, for it would not have prejudiced the right of the plaintiff's father if he had chosen to insist upon a partition. **SOORAMANIA TELAYAR v SOKKA TELAYAR**

5 Mad., 437

20. — **Agreement to accept portion of property for maintenance**—*Suit for full share of property on partition*—In a suit to recover a share of family property the Civil Judge found that the plaintiff in 1856 waived his right to a share of the family property by accepting a small portion and dismissed the suit. The plaintiff shared

**WAIVER—continued**

with other members of the family the benefit of that by established family usage the property was impartible and passed at each succession to the eldest of the co-heirs according to the ordinary law, the other co-heirs being entitled only to a portion for maintenance. Under that belief the plaintiff accepted the allotment made to him in 1856 by the then eldest co-heir of a smaller portion of the property than he would be entitled to on a partition as a sufficient provision for his maintenance. The plaintiff's younger brother instituted a suit in 1861 and succeeded in getting, the alleged custom, and obtained a decree for his full share. *Held* (reversing the decision of the Civil Judge) that the plaintiff was entitled to the full share for, it not appearing from the arrangement of 1856 that the parties intended the allotment to be in satisfaction and discharge of every right of the plaintiff as a coparcener. **SUBBIAH PILLAY v ARYA NAIDU** 5 Mad., 444

21. — **Waiver by renunciation of rights**—*Renunciation of rights*—*Law of renunciation*—*Privileges of office*—It is not law that every right may be renounced. The general rule is power of renunciation but there are two marked classes of exceptions. There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law, nor of things inherent in man as man. A man may renounce a concrete right, but not one resulting from a natural condition. *Example*—A karnatan cannot part, by contract, so as to be unable to resume them with the privileges and duties which attach to his position as a karnatan. **CHANDRANATH alias GOVINDEN NAIR v ISMAIL** 6 Mad., 143

**APPUNJI v AYANPALLI DEANATHA THEVAR NAIR** KARNATAN DEANATHA APPUNJI v VETTHADATHA DEANATHA 6 Mad., 401

22. — **Effect of signing document in which there is an omission**—*Omission in wajib-ul-ur of interest in property*—*Imperfect as settlement proceedings*—The mere signature by an agent of a wajib-ul-ur from which the record of an important interest in property was omitted, cannot be construed as a waiver of such right or claim. Still less can the imperfection or inaccuracy of settlement proceedings operate to extinguish or disallow existing rights. **IMAMBUNDER v BHUGWAN DASS**

[1 N W., 41 Ed 1873, 33

23. — **Effect of acceptance of mortgage-money on right of purchase**—*Consent in favour of purchase by mortgagee*—A mortgagee in favour of purchase by mortgagee—A mortgagee in favour of purchase by mortgagee providing that B should be entitled to purchase the land if it were not redeemed by 12th July 1843. In 1845 B accepted from A one pegoda in part payment of the mortgage-money. *Held* that this was a waiver by B of his right to purchase. **VENKATACHARI v ASTACHARI** 1 Mad., 69

24. — **Refusal to receive rent in kind**—*Effect of refusal on right to sue for rent*—A refusal by a landlord to accept rent in kind when it is tendered, on the ground that he is suing for a money rent, is a waiver of his right to sue his tenant (on the dismissal of his suit for a money rent) for the value

**WAIVER—continued.**

of the rent in kind. *NARAIN GERR v. GOUR SUBUN Doss* . . . . . 23 W. R., 368

25. ——— **Withdrawal of objection to sale in execution of decree—Effect of, on subsequent right to sue to set it aside.**—The plaintiff purchased certain property from the first and second defendants. The property was subsequently put up for sale by order of the Civil Court in execution of a decree against the first and second defendants, and was purchased by the third defendant. When the property was about to be sold under the decree, the plaintiff presented to the Court a petition objecting to the sale, but his vakil withdrew the petition with his consent before the sale. In a suit by the plaintiff for the recovery of the land, —*Held* that the plaintiff was not precluded from recovering the land by reason of his having withdrawn the petition, as he could not thereby be considered to have waived his right to sue. *KUMARASAMY REDDI v. PANNA SOONA MOOROGAPPA CHETTY* . . . . . 7 Mad., 359

26. ——— **Relinquishment by Hindu widow—Relinquishment of title to property by widow—Petition.**—A mere petition by a widow to the effect that she has relinquished her title in certain property in favour of parties suing the lessees of the property for possession is not a legal relinquishment of her share therein. *OOMA CHURN KOONDOO v. BROOBN MOHUN PAL* . . . . . 10 W. R., 98

27. ——— **Agent's right to execute decree obtained by him as agent—Civil Procedure Code, 1882, s. 37—Recognized agent—Execution of decree.**—*P* filed a suit in the second class Subordinate Judge's Court at Mahad. As *P* resided at Thana, outside the jurisdiction of the Court of Mahad, she authorized her agent, under a general power-of-attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in *P*'s favour. The agent then sought to execute the decree. The Court of Mahad passed an order upon his dakhast granting only partial execution. Against this order the agent filed an appeal in the District Court at Thana. Then, for the first time, the judgment-debtors challenged the agent's right to represent *P* who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed. *Held* that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent *P* at any stage of the litigation prior to the final decree. That objection must therefore be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation. *PARVATHAI v. VINAYAK PANDURANG*

[I. L. R., 12 Bom., 68]

28. ——— **Remission of part performance of contract—Sum accepted on account of interest.**—A hypothecation-bond provided for payment of interest on the principal sum at the rate of 9 per cent. and contained a further provision that, on default being made in payment of interest accruing due, interest should be paid from the date of the

**WAIVER—continued.**

bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum, a title more than the arrears calculated at 9 per cent. In a suit by the creditor, —*Held* that the plaintiff had not waived any right under the bond by accepting the payment on account, of interest. *NANJAPPA v. NANJAPPA*

[I. L. R., 12 Mad., 161]

29. ——— **Decree payable by instalments—Execution of decree—Default—Limitation.**—A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years: and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887 he made another application for execution in which he relied on the same default. *Held* that the default, if it was one, had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal*, I. L. R., 2 All., 557, and *Asmutullah Dalal v. Kally Churn Mitter*, I. L. R., 7 Cal., 56, distinguished. *BUDDHU LAL v. REKHA DAS* . . . . . I. L. R., 11 All., 482

30. ——— **Decree payable by instalments, and in default, execution for whole amount to issue—Default in payment of instalments—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments.**—By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of Rs1,800 by yearly instalments of Rs50 payable on 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgaged property. The defendants failed to pay the first instalment, which fell due on the 30th April 1888, and the plaintiff applied for execution and obtained an order for the sale of the property. In order to prevent the sale, the defendants, on the 13th November 1888, paid Rs60 out of Court, and the application for execution thereupon was allowed to drop. The defendants subsequently made the following payments, viz., Rs15 on the 5th June 1889, Rs25 on the 12th June 1889, Rs15 on the 1st January 1890, and Rs50 in the Nazir's office on the 2nd June 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April 1890. On the 6th June 1890 the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court, —*Held* that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and

**WAIVER—concluded.**

even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver. **BALAJI GANESH v. SAKHARAM PARASH RAM** I. L. R. 17 Bom., 555

31. — Omission to take objection that pottahs and muchalkas had not been exchanged before suit—*Sut to reco er customary dues payable on account of a chattram.*—In a suit by the District Board in charge of a chattram to recover a certain sum as the arrears of various miera, being customary dues payable by the defendants for the benefit of the chattram on account of lands held by them, the defendants raised no objection on the ground that there had been no exchange of pottahs and muchalkas, but among other defences they relied upon a plea of limitation. *Held* (1) that the defendants should be considered to have admitted tacitly that the exchange of pottahs and muchalkas has been dispensed with. **VENKATAVARA A c D. DISTRICT BOARD OF TAXJOOR** [I. L. R. 18 Mad., 300]

**WAJIB-UL-URZ**

*See* COLLECTOR I. L. R. 15 All., 410

*See* EVIDENCE CIVIL CASES—MISCELLANEOUS DOCUMENTS—WAJIB-UL-URZ. [I. L. R. 3 All., 878  
I. L. R. 15 All., 147]

*See* MAHOMEDAN LAW—PRE-EMPTION—CENOVICHES I. L. R., 9 All., 513

*See* MAHOMEDAN LAW—PRE-EMPTION—MISCELLANEOUS CASES. [I. L. R., 12 All., 234]

*See* MAHOMEDAN LAW—PRE-EMPTION—PRE-EMPTION AS TO PORTION OF PROPERTY I. L. R., 10 All., 182  
[I. L. R., 11 All., 108  
I. L. R. 21 All., 119]

*See* MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—CO-SHARERS. [I. L. R., 9 All., 480  
I. L. R., 10 All., 472]

*See* MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—WAIVER OF RIGHT OR REFUSAL TO PURCHASE. [I. L. R. 11 All., 108]

*See* CASES UNDER PRE-EMPTION

*See* WASTE LANDS I. L. R., 19 All., 172

in — Testamentary bequest contained

*See* HINDU LAW—WILL—CONSTRUCTION OF WILLS—EFFECTS ABSOLUTE OR LIMITED I. L. R., 19 All., 18

**WAQF**

*See* ACT XX OF 1863, s

[I. L. R. 17 Cal., 187  
I. L. R. 13 Cal., 324]

*See* CASES UNDER MAHOMEDAN LAW—ENDOWMENT

**WARRANT**

*See* INSOLVENT ACT s. 50

[I. L. R., 17 Cal., 209]

— Arrest or search without—

*See* ESCAPE FROM CUSTODY

[24 W. R., Cr., 45]

I. L. R., 19 Mad., 310

*See* OPIUM ACT s. 9

[I. L. R., 24 Cal., 691]

*See* PRIVATE DEFENCE, RIGHT OF

[7 Bom. Cr. 50]

I. L. R., 19 Mad., 349

— Service of—

*See* PENAL CODE, s. 190.

[I. L. R., 23 Cal., 598 759]

I. L. R., 23 Cal., 888

I. L. R., 24 Cal., 320

1. — Warrants made by Lieutenant Governor of Bengal—*Seal of Court.*—The Court will order a seal to be impressed on any warrant made by the authority of the Lieutenant Governor of Bengal, even if not actually signed by him. **ANONIMOUS** I. Ind. Jur., N. S., 108

2. — Search warrant—*Criminal Procedure Code 1861 ss. 114, 115—Requisit of warrant.*—It is essential to the legal validity of a search warrant, under s. 114 of the Code of Criminal Procedure that the production of some specified and particular thing is desired, that the Magistrate alone shall determine that such production is necessary; and that a specified house or place only is to be searched. The warrant must, under s. 115 of that Code, be directed to some other person only when a police officer is not forthcoming. **QUEEN v. HOSAIN ALI CHOWDHRY** 8 W. R., Cr., 74

3. — Criminal Procedure Code s. 96—*Magistrate Jurisdiction of.*—The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion that the nature of the property so buried had an important and material bearing on the case for the prosecution. *Held* the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible since there was a complaint before him only affirmed as prescribed by the Criminal Procedure Code; and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused. **QUEEN EMPRESS v. MANANT OF TIRUPATI** [I. L. R. 13 Mad., 18]

4. — Criminal Procedure Code (Act X of 1862) s. 90—*Issue of search warrant in the absence of any regular trial or other proceeding pending before Magistrate.*—Some treasure belonging to the Native State of Radhanpur was missing. The Administrator of

**WARRANT—concluded.**

Radhanpur sent a telegram to the District Superintendent of Police at Ahmedabad, stating that part of the missing treasure was in the possession of the accused, who was a resident of Ahmedabad, and asking that this house should be searched. In consequence of his telegram, the City Police Inspector applied for a search-warrant to the City Magistrate of Ahmedabad. Thereupon the Magistrate issued a search-warrant under s. 96 of the Code of Criminal Procedure. In execution of this warrant, the house of the accused was searched and the police seized and took away certain property belonging to the accused, to his wife, and to his servant. The accused was subsequently arrested under a warrant issued by the Political Superintendent of Palanpur under s. 11 of the Extradition Act (XXI of 1879), but he was admitted to bail by the District Magistrate of Ahmedabad. On the 12th June 1897 the District Magistrate passed an order refusing to deliver up the property seized by the police to the Political Superintendent of Palanpur, but allowing the police to retain the property for some time, as it was possible that a prosecution would be instituted in British India in respect of the stolen treasure. The Magistrate directed that, if no prosecution were instituted within two months, the property should be restored to the persons from whose possession it was taken. The District Magistrate subsequently reversed this order as being erroneous, and passed a fresh order on the 3rd August 1897, directing the property to be delivered up to the Political Superintendent of Palanpur. *Held* that the City Magistrate had no authority to issue a search-warrant under s. 96 of the Code of Criminal Procedure, as at the time of issuing the search-warrant there was no investigation, inquiry, trial, or other proceeding under the Code pending before the Magistrate, for the purposes of which the production of the articles seized was necessary or desirable. *Held* also that the search-warrant being illegal and *ultra vires*, the subsequent orders relating to the detention and delivery of the property seized were also illegal and unjustifiable. *IN RE HARILAL BUCH* [I. L. R., 22 Bom., 949]

**WARRANT-CASE.**

*See* PARDANASHIN WOMEN.

[I. L. R., 21 Calc., 588]

**WARRANT OF ARREST.**

Col.

1. CIVIL CASES . . . . . 9450

2. CRIMINAL CASES . . . . . 9453

*See* ASSAULT ON PUBLIC SERVANT.

[I. L. R., 26 Calc., 630]

*See* JURISDICTION OF CRIMINAL COURT—  
GENERAL JURISDICTION.

[I. L. R., 25 Calc., 20]

[I. L. R., 24 I. A., 137]

*See* MALICIOUS PROSECUTION.

[I. L. R., 19 Bom., 485]

**WARRANT OF ARREST—continued.**

*See* PENAL CODE, s. 332.

[I. L. R., 18 All., 246]

*See* WITNESS—CIVIL CASES—DEFAULTING WITNESSES.

13 W. R., 324

[9 W. R., 359]

5 Mad., 104

I. L. R., 17 All., 277

*See* WRONGFUL CONFINEMENT.

[I. L. R., 19 Bom., 72]

— Execution of—

*See* WITNESS—CRIMINAL CASES—SUMMONING WITNESSES.

[I. L. R., 24 Calc., 320]

— Illegal issue of—

*See* PENAL CODE, s. 186.

[I. L. R., 24 Calc., 320]

— not in legal form.

*See* PENAL CODE, s. 186.

[I. L. R., 23 Calc., 896]

*See* PENAL CODE, s. 332.

[I. L. R., 18 All., 246]

— of Governor General in Council.

*See* BENGAL REGULATION III of 1818.

[6 B. L. R., 392, 459]

9 B. L. R., 36

*See* HABEAS CORPUS.

[6 B. L. R., 392, 459]

**1. CIVIL CASES.**

1. — Absence of warrant—*Discharge from custody of Sheriff*.—The Court will discharge a prisoner from custody when the jailor holds no warrant for his detention, although he has been properly in the custody of the Sheriff. *IN THE MATTER OF SHAH SAHIB*. 1 Ind. Jur., N. S., 19

2. — Informality of warrant—*Application for discharge—Civil Procedure Code, 1859, s. 273—Delay in bringing up prisoner*.—B M and several other prisoners in the custody of the Sheriff of Calcutta for debt, without having been brought up to have an order for their allowance made, on being produced for that purpose by the Sheriff, applied for their discharge under s. 273 of Act VIII of 1859. Preliminary objections were taken to the validity of the warrants on which the Sheriff arrested them, on the grounds that the time for execution was not specified in them; and that, even had they been originally valid, their authority had expired, owing to the delay in bringing up the prisoners. Both objections were overruled. *Held* that a mere informality in a warrant, such as the omission of the time for execution, only renders it irregular, and does not invalidate it; that advantage having been taken of such irregularity to prejudice the prisoner, affords grounds for an application to the Court to set the warrant aside; and that a mere delay in bringing the prisoner before the Court after his arrest, if not for a

WARRANT OF ARREST—*continued*1 CIVIL CASES—*continued*

considerable period does not render his detention illegal. *IN RE BROHASAATH MELLICK*

[Bourke O. C. 93]

3 ——— Form of warrant—*Sufficiency of warrant*—Where a person had been taken in execution under a *co sa* directed to the Sheriff under the old procedure it was held to be sufficient to empower the jailor to detain him. The words "ordinary civil jurisdiction" are only used to distinguish the writ from the criminal jurisdiction. *IN RE ANWAR BISVAS*  
1 Ind. Jur., N S 108

4. Writ of *Calculta Small Cause Court, Form of—Act XII of 1855—F's as subsistence-money*—A writ of the Calcutta Small Cause Court commanding its Bailiff to take the body of A and have him before the Court on the day of—to satisfy B in the sum of—dit and costs ordered and paid by the said Court on the day of—to be paid to the said B with costs of execution and by return thereof to take and convey the said A to the common jail of the said Court, there to be detained in safe custody for—weeks or until he shall perform the said order of the Court is in point of form a sufficient warrant to the jailor to receive and detain A in the said Court. *Act XII of 1855*—It was not necessary in the case of commitment of a debtor to prison by the Calcutta Court of Small Causes to bring him in the first instance before the Court as under the provision of Act VIII of 1859 no habeas subsistence-money fixed. *IN THE MATTER OF MEER NAWAB*

[1 Ind. Jur., N S, 315]

5. Warrant directed to Nazir—*Arrest of judgment-debtor—Indorsement to prison—C's Procure Code 1852 s 343—Indorsement of part of order of arrest by Nazir*—Where a warrant issued by a Subordinate Court directing the Nazir to arrest a judgment-debtor in execution of a decree was entrusted by the Nazir to a subordinate for execution by causing his name upon it—*Held* that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorizing a deputy to execute a warrant of arrest for him, and that his indorsement must be regarded as *pro vi facie* evidence of the authority of the person to whom the warrant is delivered to execute it. *Held* also that it is most desirable when the Nazirs of the subordinate Courts delegate the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty bearing in mind, as far as circumstances permit, the position and estate of the party to be arrested, so as to avoid, through the medium of Court process, subjecting any such party to personal injury or offence. *Held* further that it is important that the person chosen should be made acquainted with the contents of the warrant so that he may be able to inform the judgment-debtor at what time and for what amount he is being taken into custody. Where a warrant for the arrest of the judgment-debtor had been executed

WARRANT OF ARREST—*continued*1 CIVIL CASES—*continued*

and an indorsement thereon, professedly under s. 343 of the Civil Procedure Code was irregularly made by the Nazir he not having been "the officer entrusted with the execution of the warrant."—*Held* that such irregularity did not invalidate the arrest. *ABDEL KARIEM BILKIN* I. L. R., 8 All., 385

8 ——— Irregularity in warrant—*Warrant of arrest in execution of a decree only in a case called by proper officer—Civil Procedure Code 1852, ss 2 241*—A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code was initiated by the Munshi of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer and was tried and convicted under s. 343 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initiated only by a bad and the officer could not legally execute it, and consequently no offence under s. 343 of the Penal Code had been committed. *Held* that this contention could not be allowed, and although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant. *QUEEN EMPRESS v. JANKI PRA SARD* I. L. R., 8 All., 293

7 ——— Validity of warrant—*Liability of Nazir—Escape of judgment-debtor*—The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the Nazir on the 16th December and was to be in force till the 4th January 1877. On the 22nd December 1876 the Nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The Nazir then returned the warrant to the subordinate Judge who had issued it. On the 31st December the subordinate Judge again sent it to the Nazir's office, where it was duly received by the Nazir's karkun (defendant No. 1). This fact was not reported by the karkun to the Nazir (defendant No. 2) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the Nazir and his karkun for allowing his judgment-debtor to escape. *Held* that the Nazir ought not to have sent the warrant back to the subordinate Judge and that there was no necessity for a fresh order on it until the time for which it had to run had expired. *Held* also that, according to Act VIII of 1859 as it stood at the end of 1876 and until October 1877 the basis for the maintenance of a debtor could not become payable until he was arrested and brought before the Court.

## WARRANT OF ARREST—continued.

## 1. CIVIL CASES—concluded.

and the latter made the order for his committal to the civil jail. *KASTURCHAND v. RAYJI SADASHIV* [I. L. R., 4 Bom., 65

8. ——— Warrant not exhausted if on one occasion the serving officer is unable to find the judgment-debtor—*Execution of decree—Limitation—Civil Procedure Code (1882), s. 230.*—The holders of a decree for money, dated the 2nd of December 1865, after various infructuous applications for execution, applied on the 4th of August 1897 for a warrant for the arrest of the judgment-debtor. That application was granted, but the peons sent to arrest the judgment-debtor reported that he had concealed himself, and the Court in consequence struck off the application for execution. On the 29th of November 1897 the decree-holders again applied for the arrest of the judgment-debtor, but that application also was struck off without the arrest having been made. Against the order striking off this latter application the decree-holders appealed to the High Court, where, on objection made that the decree could no longer be executed, having regard to s. 230 of the Code of Civil Procedure, it was held that the warrant of arrest issued on the decree-holders' application of the 4th of August 1897 still subsisted and ought to be executed. *Anwar Ali Khan v. Phul Chand, Weekly Notes, All., 1898, 137*, followed. *JIT MAL* c. *JWALA PRASAD* . I. L. R., 21 All., 155

## 2. CRIMINAL CASES.

9. ——— Arrest in pending case—*Power of Magistrate—Criminal Procedure Code, 1861, s. 68.*—S. 68 of the Code of Criminal Procedure gave a Magistrate jurisdiction on proper evidence to issue a warrant for the arrest of persons in a pending case. *IN THE MATTER OF SIDESHUKY CHOWDHRAIN* [16 W. R., Cr., 50

10. ——— Warrant on non-appearance to summons—*Lessee of tolls—Disobedience of summons to appear—Undertaking not to sue.*—A, the lessee of a toll, was in arrears to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (A) for not paying the sum of Rs 262 for arrears of rent, and A was summoned to appear before the Magistrate to answer the charge. A did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day the Magistrate therein stated. On the following day the Magistrate passed the following order: "Whereas the debtor, defendant, has not appeared in person, the summons has not been obeyed; therefore it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. Held that all the proceedings taken by the Magistrate were irregular and must be set aside, the defendant undertaking not to take legal proceedings for anything done under the order or warrant. *IN THE MATTER OF BANKA BHABH GHOSH* [2 B. L. R., A. Cr., 17: 11 W. R., Cr., 26

## WARRANT OF ARREST—continued.

## 2. CRIMINAL CASES—continued.

11. ——— Issue of warrant—*Complaint on oath—Report of police officer—Criminal Procedure Code, 1869, ss. 68 and 155.*—In cases in which the police cannot arrest without a warrant, a warrant cannot legally be issued by a Magistrate except on a complaint made on oath (or under s. 68 of the Criminal Procedure Code), whether such Magistrate is authorized to entertain cases either on complaint directly to himself or on the report of a police officer. *REG. v. JAFAR ALI* . 8 Bom., Cr., 118.

12. ——— Arrest on report of policeman for offence for which arrest without warrant might be made.—Where a policeman in whose sight a theft was committed arrested the thief, and being himself unable to take or send the accused to a Magistrate, sent a report, on which the Magistrate issued a warrant.—Held that, under these circumstances, the accused was legally brought before the Magistrate. *REG. v. MAHIPYA TALAD BOMXA MAHAR* . 5 Bom., Cr., 99.

13. ——— Validity of warrant—*Criminal Procedure Code (X of 1872), s. 157.*—Magistrate out of jurisdiction—*Extradition.*—It was not essential to the validity of a warrant issued under s. 157 of Act X of 1872 that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He might issue such a warrant from a place in foreign territory. *REG. v. LOCHA KALA* [I. L. R., 1 Bom., 340

14. ——— Procedure on warrant—*Act XII of 1867.*—When a prisoner was arrested by the Sheriff under a writ of *ca. sa.*, it was necessary to bring him before the Court without delay, under s. 14 of Act XII of 1867. *IN RE RAMCOOMAR DUTT* . 2 Ind. Jur., N. S., 340

15. ——— Operation of warrant—*Detention of prisoner.*—The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. *MUTHOORA NATH CHUCKERBUTTY v. HEERA LALL DOSS* . 17 W. R., Cr., 55.

A Magistrate therefore is not at liberty to retain an accused person in custody, except upon a proper remand made after taking sufficient evidence given on oath or solemn affirmation. *IN THE MATTER OF ZEHURUDDIN HOSSEIN* . 25 W. R., Cr., 8.

16. ——— Warrant issued to unofficial person—*Criminal Procedure Code (Act X of 1872), s. 161—Act XXV of 1861, s. 77.*—Under s. 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent police officers, and unless the urgency is imminent. The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate, and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence there can be no grounds. *IN THE MATTER OF THE PETITION OF SURENDRONATH ROY, QUEEN, v. SURENDRONATH ROY* [5 B. L. R., 274: 13 W. R., Cr., 27

**WARRANT OF ARREST—continued****2 CRIMINAL CASES—continued**

17 — *Criminal Procedure Code (Act XXV of 1861), s. 68—Act V of 1872 ss. 142 and 150—Detention of accused—A warrant issued under s. 68 which was a warrant of arrest as described under s. 76 (Form B), is only for the purpose of bringing an accused person before the Magistrate. It was not a warrant for commitment and did not authorize the detention of a person longer than is necessary for his production before the Magistrate. To detain him further there must be a fresh warrant under s. 222 charging the prisoner with some offence on evidence taken on oath or affirmation and in the presence of the accused. IN THE MATTER OF MAHESH CHANDRA BAKERJEE, QUEEN v. PURNA CHANDRA BAKERJEE, QUEEN v. HALI SIKHAR.*

[4 B. L. R., Ap. 1 13 W. R., Cr. 1

18 — *Detention of accused—Order sanctioning detention for indefinite period—Remand of accused—Held that the order of a Magistrate sanctioning the detention by the police of an accused person for an indefinite period is illegal. At the expiration of twenty-four hours from the time of arrest, the accused must be brought before a Magistrate who could then remand for a period not exceeding fifteen days under s. 221 of the Criminal Procedure Code 1861. No remand without a hearing can last for a longer period. REG v. SUREYA VALAD DHAKU.*

5 Bom. Cr. 31

19 — *Form of warrant—Omission to seal warrant—Criminal Procedure Code 1869, s. 76—Requisites of good warrant—A warrant issued under s. 76 of the Code of Criminal Procedure should be stated should describe the person to be apprehended under it with reasonable particularity, so that there may be no difficulty in establishing his identity and should be subscribed with the name and full official title of the Magistrate issuing it. Where a warrant was defective in all the above particulars, the prisoner apprehended under it was released by the High Court. IN RE HASTINGS.*

9 Bom., 154

20 — *Form of endorsement on warrant—In endorsement on a warrant under s. 79 of the Code of Criminal Procedure should be regularly made by name to a certain person in order to authorize him to make the arrest. DURGA TEWARI v. RAHMAN BEKSH.*

4 C. W. N., 85

21 — *Act XIII of 1856 s. 58—Error in warrant not affecting conviction—A warrant issued under s. 58 of Act XIII of 1856 should be addressed to some one or more inspectors, and not generally to "all constables and peace officers. Where a warrant in the latter form was executed under the direction of an inspector, it was held that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction under s. 67, of persons apprehended in pursuance of the warrant so executed. REG v. NANA MORCIL.*

IN RE MADHAV MORAR.

[8 Bom., Cr. 1

22 — *Warrant not conforming to specification of offence—A warrant which*

**WARRANT OF ARREST—continued.****2 CRIMINAL CASES—continued.**

did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed. IN RE BIDHMOOKEE DEBI.

6 B. L. R., Ap. 129

S. C. BIDHMOOKEE DEBI v. SERSAID HALDAR.

15 W. R., Cr. 4

23 — *Informality in warrant—Criminal Procedure Code, 1869, s. 401—Power of High Court—Irregularity in process of arrest and attachment—The High Court was not empowered to interfere under the provisions of s. 401 of the Criminal Procedure Code 1869 until there has been a judicial proceeding by a Magistrate. A person complaining of irregularity of process issued for his arrest and for the attachment of his property, before applying to the High Court under s. 401 of the Criminal Procedure Code, should make application to the Magistrate issuing such process for his discharge and the release of his property, on the ground of the informality of the warrants. QUIEN v. BISHESHUR PERSHAD.*

[2 N. W., 441. Agra, F. B., Ed. 1874, 236

24. — *Mode of arrest in foreign territory or out of jurisdiction—A warrant of arrest for contempt of Court—The High Court of Bombay will not send a special bailiff into the territories of the Cankwar of Baroda to arrest a defendant who has been guilty of a contempt of Court, but the Court will send a special bailiff for such purpose beyond the local limits of the High Court to a place within the Presidency of Bombay. HANMALLAS DAS KULHANDAR v. UTAMCHAND MANIKCHAND.*

[7 Bom., O. C. 172

25. — *Warrant to arrest and imprison—Form of warrant—Service of warrant—Irregularity—Defect in warrant—Foreigners Arrested—Act III of 1864 s. 3—Criminal Procedure Code s. 491—On the 3rd July 1864 certain foreigners resident in Bombay have been arrested by the police and sent to jail under warrant issued under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule nisi under s. 491 of the Criminal Procedure Code (Act X of 1852) and under Stat. 31 Car. II c. 2 (Habeas Corpus Act) calling on the Superintendent of the Jail to show cause why they should not be set at liberty. A separate warrant was issued in the case of each of the foreigners in question; and all were in the same form. The warrant directed the person whose name appeared in it forthwith to "remove himself from British India by sea, and it further contained the following words: "All officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said ( ) in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom." Each warrant was signed by the Secretary to Government and was directed to the Commissioner of Police and to the Superintendent of the Jail. Held that the warrants were not valid warrants for the following*



WARRANT OF ARREST—concluded.

2. CRIMINAL CASES—concluded.

reasons: (1) they were irregular in that they contained an order to the person named in them to do a certain thing with a further conditional order for his imprisonment in the event of his not doing it. There ought to have been a separate order to each prisoner to remove himself from British India, which order should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail. (2) The persons named in them were not indicated with sufficient certainty and particularity. The warrants contained no description of the persons against whom they purported to be directed, and did not give their place of residence. (3) By reason of the direction contained in them that the persons named in them were to remove themselves from British India by sea to the places mentioned in the warrant. The particular route to be specified under s. 3 of Act III of 1861 is intended to be a route in British India, and not a route beyond the high seas. The Government has no jurisdiction to direct a person's movements at sea beyond the limits of three miles from the shore. (4) *Per STARRING, J.*—The warrants were also defective, inasmuch as they bore no seal. *ALTER CAUFMAN v. GOVERNMENT OF BOMBAY*

[I. L. R., 18 Bom., 636]

28. ———— *Warrants issued under Act XIII of 1859—Execution outside jurisdiction—Criminal Procedure Code (1882), s. 83—Magistrate, Jurisdiction of—Breach of contract of service.*—S. 83 of the Criminal Procedure Code applies to warrants issued under s. 1 of Act XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them. *QUEEN-EMPRESS v. KATTAYAN*

[I. L. R., 20 Mad., 235]

*QUEEN-EMPRESS v. MUTHAYYA*

[I. L. R., 20 Mad., 457]

*GAURI SHANKAR v. MATA PRASAD*

[I. L. R., 20 All., 124]

WARRANT OF ATTORNEY.

1. ———— *Extent and operation of warrant—Civil Procedure Code, 1859, ss. 17 and 49—Acceptance of service and appearance—Act XX of 1862, s. 7.*—A warrant of attorney to the attorney of a defendant to receive a declaration or plaint, etc., in any action or suit to be brought for the recovery of certain moneys, and to confess the same action or suit, or else to suffer or consent to a judgment or decree in the said action or suit by default, or in any other way to pass or be pronounced against the defendant, empowered the attorney to accept service and appear for the defendant within the meaning of ss. 17 and 49 of Act VIII of 1859. *Held* that s. 7 of Act XX of 1862 referred only to warrants of attorney for the entering up of judgments in the High Court which were in existence

WARRANT OF ATTORNEY—concluded.

before the 1st July 1862. *KHALUT CHUNDER GHOSH v. SARODASOONDREY DOSSEE*

[Bourke, O. C., 244]

2. ———— *Limitation Act, 1859—Entering up judgment.*—The statute of limitation is no answer to a rule nisi to enter up judgment on a warrant of attorney. *SOOJAN MULL v. HYDER JUNG BAHADOOR*

1 Ind. Jur., O. S., 58

WARRANT OF COMMITMENT.

——— *Signature of Magistrate—Criminal Procedure Code, 1872, s. 303.*—The signature of a Magistrate to a warrant of commitment under s. 303 of the Code of Criminal Procedure, 1872, should not be affixed by a stamp. *SUBRAMANAYA v. QUEEN*

I. L. R., 6 Mad., 386

WARRANT OF EXECUTION.

1. ———— *Executing a warrant for attachment of property—Penal Code (Act XLV of 1860), ss. 353, 147, 114—Assaulting a public servant in the discharge of his duty—Contents of the warrant—Form of the warrant—Non-production of evidence as to terms of warrant—Validity of warrant, and of conviction had upon it.*—A warrant for the attachment of whatever property of a judgment-debtor which the officer executing it might find on search, which did not describe the area of the search and was different from the form prescribed by the Code of Civil Procedure, Ex. IV, No. 136, was not a valid warrant. In the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence a conviction for resisting or obstructing a public officer in the discharge of his duty, viz., the execution of a distress-warrant for attachment of property, cannot stand. *CHUNDER COOMAR SEN v. QUEEN-EMPRESS*

3 C. W. N., 605

*TAFAZZUL AHMED CHOWDHRY v. QUEEN-EMPRESS*

[I. L. R., 28 Calc., 630]

2. ———— *Extension of time for operation of warrant—Act X of 1859, s. 83—Jurisdiction.*—Where a warrant of execution under Act X of 1859, s. 83, was extended for four days after a particular day, when the original warrant was not sixty days old, in order that more moveable property might be pointed out, — *Held* that, until the time so extended had elapsed, an order for sale of immoveable property was without jurisdiction. *NABI BAX v. DIDAR BAX SHAH*

[3 B. L. R., A. C., 10; 11 W. R., 326]

3. ———— *Return of warrant—Public servant—Resistance to public servant—Penal Code, s. 183—Civil Procedure Code, 1882, s. 251.*—A person was convicted under s. 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held* that the conviction was bad. *IN THE MATTER OF*

**WARRANT OF EXECUTION—concluded**

THE PETITION OF ANAND LALL BERA. ANAND LALL BERA & FMPRESS

[I L R. 10 Calc 18 13 C L R. 209

4. — Irregularity in warrant—*Civil Procedure Code 1859 s 222—C & L Procedure Code 1877 1882 s 201*—An execut on sale of the right title and interest in land was effected by the Court on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge but by the Munshim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment debtors were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed. The High Court having held that with reference to s. 222 of Act VIII of 1859 the first sale had been rightly effected, an appeal to the Judicial Committee was dismissed with costs. *RAM DASAL & MAHTAB SINGH* I L R. 7 All. 506

**WARRANTY, BREACH OF—**

S & CHARTER PARTS 8 B L R. 544

See CONTRACT BREACH OF CONTRACT

[14 B L R. 180 23 W R. 136

I L R. 13 Calc. 237

I L R. 13 I. A. 80

See CONTRACT ACT s 73

[I L R. 4 Calc. 801

See RIGHT OF SUIT—MISREPRESENTATION

[I L R. 24 Bom. 166

See CASES UNDER VENDOR AND PURCHASER—BREACH OF WARRANTY

**WARRANTY OF TITLE.**

See CASES UNDER SALE IN EXECUTION OF DECREE—PURCHASERS TITLE OF—GENERALLY

See SALE IN EXECUTION OF DECREE

SETTING ASIDE SALE RIGHTS OF PURCHASERS

I L R. 2 Bom. 258

[I L R. 17 Mad. 228

See CASES UNDER VENDOR AND PURCHASER—BREACH OF WARRANTY

See CASES UNDER VENDOR AND PURCHASER—CAVEAT EMPTOR.

**WASHERMAN**

See MADRAS TOWNS IMPROVEMENT ACT

1861 s 1 I L R. 1 Mad. 174

See WILL—CONSTRUCTION

[8 B L R. Ap. 4

**WASTE.**

See CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY WIDOW—SETTLING

SIDE ALIENATIONS AND WASTE

**WASTE—concluded.**

See HINDU LAW—REVERSIONERS—POWERS OF REVERSIONERS TO RESTRAIN WASTE, ETC.—WHO MAY SUE.

[I L R. 8 Calc. 198

8 Moore's L A. 433

I L R. 9 Calc. 817

Marsh. 622

See LANDLORD AND TENANT—FORTHWITH BREACH OF CONDITION

[I L R. 10 Mad. 351

I L R. 23 Mad. 39

See LIMITATION ACT, 1877 ART. 12.

(1859 s 1 CL 10) 7 B L R. 131

by mortgages in possession

See MORTGAGE—ACCOUNTS

[I L R. 15 Mad. 290

1. — Limitation—*A legal on of waste—Prayer for protection from contemplated waste—Held per PHILLIPS J* that where a suit was one to prevent contemplated waste it was not barred by lapse of time *GROSE & AMBARTANATH DAS* [4 B L R. O C 1 12 W R. O C. 13

BISWANATH CHUNDER & AMBARTANATH DAS

[7 B L R. 131

2. — Liability for waste—*Held* as widow liable for waste committed by husband as agent for a stranger—In a suit against a widow jointly and not in her representative capacity to recover plaintiff's share of property alleged to have been in her possession the suit being one wherein defendant was charged with devastation on respect of such property only—*Held* that defendant was not liable in that suit to be made answerable out of her husband's assets for any devastation which he had committed. *STAVES & DIAS* [10 W R. 444

**WASTE LANDS.**

See LANDLORD AND TENANT—MISMANAGERS

[I L R. 1 Mad. 200

See ONUS OF PROOF—LIMITATION AND

ADVERSE POSSESSION

[I L R. 9 Mad. 175

See SETTLEMENT—EVIDENCE OF SETTLEMENT

I L R. 28 Calc. 782

See SETTLEMENT—RIGHT TO SETTLEMENT

[4 Mad. 429

See SETTLEMENT—SUBJECTS OF SETTLEMENT

1 Mad. 12, 407

See VALUATION OF SUIT—SUITS—WASTE

LANDS SUIT FOR 7 W R. 318

Grant of—

See MORTGAGE FORM OF MORTGAGES.

[I L R. 21 Calc. 863

I L R. 21 I. A. 88

made cultivable.

See ONUS OF PROOF—LIMITATION AND

ADVERSE POSSESSION

[I L R. 24 Calc. 256

**WASTE LANDS—continued.****Right of village to pasturage on—**

See JURISDICTION OF CIVIL COURT—  
RENT AND REVENUE SUITS, BOMBAY.

[I. L. R., 21 Bom., 684]

1. ——— **Presumption from land lying waste—Evidence as to possession.**—The fact of land lying waste does not of itself show that no one is in possession. **MAHOMED ALI v. SHURUM ALI**

[8 W. R., 422]

2. ——— **Ownership of waste land—Presumption as to possession.**—Where land is waste and there is no visible sign of occupation, the possession must be taken to go with the right, and the right is *prima facie* in the zamindar of the estate to which the waste land belongs. **WOODWANT MAHTOON v. HUNOOMAN PERSHAD SINGH**

[22 W. R., 419]

3. ——— **Ownership of waste land not belonging to any private person.**—Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. **PROSUNO COOMAR ROY v. SECRETARY OF STATE FOR INDIA IN COUNCIL**

I. L. R., 28 Calc., 792  
[3 C. W. N., 695]

4. ——— **Possession of waste land—Limitation—Presumption—Proof of title.**—There may be such possession of waste lands as to protect a suit from being barred by limitation; and where the question of possession is doubtful, a presumption will arise in favour of the party who proves title. **MAHOMED BASSIR v. KUREEM BURSH**

[11 W. R., 268]

5. ——— **Possession, Presumption of, from evidence of title.**—In disputes as to the right to possession of waste and jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have title has also possession. **RAM BANDHU v. KUSH BHATTU**

[5 C. L. R., 481]

6. ——— **Title to uncultivated or jungle lands—Adverse possession—Limitation—Acts of ownership.**—If, adverse possession for a sufficiently long time is proved, the title of a person to uncultivated or jungle land may be barred by limitation in the same manner and to the same extent as in the case of cultivated land; the evidence of possession being the exercise of such acts of ownership as would ordinarily be exercised over property of that nature. **MITTERJEET SINGH v. RADHA PERSHAD SINGH**

23 W. R., 368

See **WATSON v. GOVERNMENT**

[B. L. R., Sup. Vol., 182; 3 W. R., 73]

7. ——— **Right to use of waste land—Permissive use of, by tenants—Right of landlord to erect building on—Works of permanent character executed by licensee—Easements Act (V of 1882), ss. 60, 61.**—In a suit by a zamindar to have his right declared to build a house on some waste land in the mouzah, the defendants, who were tenants in the

**WASTE LANDS—continued.**

mouzah, resisted the claim, on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung. Held that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the well, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed. **LAND MORTGAGE BANK OF INDIA v. MOTI**

[I. L. R., 8 All., 64]

8. ——— **Rights of zamindar in respect of waste lands—Provisions of wajib-ul-urz as to rights of pasturage.**—Held that a general provision contained in a wajib-ul-urz that village cattle might graze on the waste land of the village could not be construed, in the absence of any definite covenant to that effect, as depriving the zamindar of his right to reclaim such waste lands. **RAM SARAN SINGH v. BIRJU SINGH**

[I. L. R., 19 All., 172]

9. ——— **Act XXIII of 1863, s. 5—Suit to contest sale.**—Where the Collector failed to give notice of his intention to dispose of the estates, it was not incumbent on the plaintiff to contest the sale within the period prescribed by s. 5, Act XXIII of 1863. **HIMMUT SINGH v. COLLECTOR OF Bijnour**

[2 Agra, 258]

10. ——— **Act to reclaim waste lands—Suit to contest award by Board of Revenue—Extension of time—Institution of suit.**—The Court cannot extend the period of thirty days allowed by s. 5, Act XXIII of 1863, for preferring a suit to contest an award by the Board of Revenue. The filing of a vakalatnama is not an institution of such a suit. **TARANATH DUTT v. COLLECTOR OF SYHET**

[5 W. R., Waste Land Court Ref., 1]

11. ——— **ss. 8, 18—Suit for possession—Statute, Interpretation of.**—Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act. **Quere**—Whether the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government, and by understanding the claims and objections mentioned

**WASTE LANDS—cont. aled.**

in the Act as claims in respect of Government land, and object as with the same limitation. **HEIRO CHUNDER DASS v STEEL** I. L. R., 13 Cal., 279

13. — a. 18—*Suit for compensation on for land wrongly sold as waste*—A purchaser of land sold as waste land under Act XXIII of 1903 cannot be compelled to grant a pottah to a person alleging himself to have been in occupation of the land before the sale. If the claimant has omitted to come in due time to stay the sale, and the land has actually been sold, his only remedy is by a suit under s. 8 for compensation, making the Collector a defendant. **MAHON POLAN v MOSEY**

[7 W. R., 474]

**WATER.**

— Liability for damage done by—

See EMBANKMENTS.

[I. L. R., 3 Cal., 776]

— Rights concerning—

See CASES UNDER INSCRIPTION—FACIAL CASE OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY—WATER.

See CASES UNDER PRESCRIPTION—EASEMENTS—RIGHTS CONCERNING WATER.

See CASES UNDER RIGHT TO USE OF WATER.

Right to use of—

S v EASEMENT I. L. R., 18 Mad., 320

See MADRAS FOREST ACT s. 10.

[I. L. R., 20 Mad., 279]

**WATER-CESS.**

C s CESS I. L. R., 10 Mad., 232

See MADRAS IRRIGATION CESS ACT s. 1.

[I. L. R., 13 Mad., 407]

I. L. R., 19 Mad., 21

**WATER-COURSE.**

— Obstruction of—

See EASEMENT I. L. R., 23 Bom., 508

See SMALL CAUSE COURT MORTGAGE—JURISDICTION—DAMAGES

[I. L. R., 18 Mad., 23]

I. L. R., 20 Bom., 283

— Right to use of—

See CASES UNDER PRESCRIPTION—EASEMENTS—RIGHTS CONCERNING WATER.

See CASES UNDER RIGHT TO USE OF WATER.

**WATER-SUPPLY.**

— Causing diminution of—

See MISDEMEANOR I. L. R., 1 Mad., 263

[I. L. R., 10 Bom., 183]

**WEIGHTS AND MEASURES.**

— Fraudulent use of—*Penal Code s. 466—Fraudulent intent on*—The mere possession of weights in excess of the authorized standard and not support a conviction under s. 466 of the Penal Code; a fraudulent intent must be charged and proved. **REG. v DAMO DRAH DALVI**

[1 Bom., 181]

GOVERNMENT v KANGALAK MUDR

[18 W. R., Cr., 7]

**WELL.**

— Right to use—

See PRESCRIPTION—EASEMENTS—RIGHTS CONCERNING WATER.

[I. L. R., 20 Mad., 329]

**WHARFAGE.**

See BILL OF LADING.

[I. L. R., 4 Cal., 736]

I. L. R., 5 Cal., 47

I. L. R., 7 Bom., 353

See INTERPLEADER BILL

[I. L. R., 18 Bom., 231]

**WHARFINGER.**

See BILL OF LADING

[I. L. R., 4 Cal., 736]

**WHIPPING.**

See CASES UNDER SENTENCE—WHIPPING

1. — Juvenile offenders—*Act VI of 1864, s. 2*—s. 3 of Act VI of 1864 (the Whipping Act) applies to juvenile as well as to adult offenders. **REG. v HUSA VALAD LAKSHMAN**

[7 Bom., Cr., 70]

2. — First conviction of adults—*Substituted punishment*—In the case of adults on a first conviction, or in the case of juvenile offenders whether for a first offence or otherwise, whipping can only be in lieu of, and not added to, any other punishment. **QUEEN v ARDOOL**

[W. R., 1864, Cr., 38]

QUEEN v KASTIRAM 1 W. R., Cr., 24

QUEEN v TOXAKOCH 2 W. R., Cr., 63

QUEEN v AMARTY 4 W. R., Cr., 30

3. — Whipping in lieu of fine or other punishment under the Penal Code (Act XLV of 1860)—When an accused person is sentenced to whipping and s. 2 of the Whipping Act (VI of 1864), the punishment of fine or imprisonment or both cannot be legally inflicted under the Penal Code in addition to the whipping. The word "punishment" in s. 2 of the Act means the total of punishments available under the Penal Code. **QUEEN v EMPRESS v DAGADU** I. L. R., 18 Bom., 357

4. — Act VI of 1864—Under Act VI of 1864 (the Whipping Act), a juvenile

**WHIPPING—continued.**

offender means a person under the age of sixteen years. *REG. v. MUHAMMAD ALI YALAD ABDUL ALI* [8 Bom., Cr., 9]

5. ——— *Act VI of 1864, ss. 5, 10—Criminal Procedure Code, s. 392.*—By the term "juvenile offender" in s. 5, Act VI of 1864 (Whipping Act), is meant an offender under the age of sixteen years. *Reg. v. Muhammad Ali*, 8 Bom., Cr., 9, referred to. *EMPRESS v. DIN ALI* [I. L. R., 6 All., 482]

6. ——— *Sentence of whipping when allowable—Act VI of 1864, s. 4—Offence after previous conviction.*—The punishment of whipping under s. 4, Act VI of 1864, can only be inflicted on a second conviction of a person who, having served a sentence of imprisonment, again commits a crime. *QUEEN v. UDAI PATNAIK*

[4 B. L. R., A. Cr., 5; 12 W. R., Cr., 68]

7. ——— *Offence after previous conviction—Previous conviction not shown.*—On a reference by a Sessions Judge under s. 434 of the Criminal Procedure Code, a sentence of whipping in addition to one of rigorous imprisonment in the case of an offence specified in s. 2 of Act VI of 1864 was annulled, as the offence was not committed after previous conviction. *REG. v. SURYA BIN KRISHNA MANDAYKAR* . . . 3 Bom., Cr., 38

*REG. v. BABJI YALAD BAPU* . . . 4 Bom., Cr., 5

8. ——— *Act VI of 1864, s. 3—Second conviction for offence committed before first conviction.*—S. 3 of Act VI of 1864 (the Whipping Act) does not apply to cases in which the second conviction is for an offence committed previously to the first conviction. *REG. v. KUSA YALAD LAKSHMAN* . . . 7 Bom., Cr., 70

9. ——— *Previous conviction.*—A sentence of whipping founded on a previous conviction of the prisoner is only warranted where the subsequent conviction is for the same specific offence as that in respect of which the previous conviction applied. *ANONYMOUS* . 5 Mad., Ap., 1

*ANONYMOUS* . . . 5 Mad., Ap., 39

10. ——— *Theft in dwelling-house—Act VI of 1864, s. 3—Previous conviction of theft.*—A prisoner convicted of "theft in a dwelling-house" who has previously been convicted of "simple theft" is not thereby rendered liable to whipping, under Act VI of 1864, s. 3. *REG. v. CHANGIA YALAD SHUMIA* . . . 7 Bom., Cr., 68

11. ——— *Act VI of 1864, s. 7—Conviction of dishonestly receiving stolen property—Previous conviction for theft.*—P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the expiration of the term of imprisonment, to furnish security for good behaviour. *Held* that the offence of theft not being the same offence as that of dishonestly receiving

**WHIPPING—continued.**

stolen property, the punishment of whipping was illegal. *EMPRESS v. PARTAB*

[I. L. R., 1 All., 686]

12. ——— *Conviction of separate offences—"House-breaking to commit theft," and "theft"—Whipping Act, VI of 1864, s. 2.*—Where a prisoner convicted of "house-breaking in order to commit theft," and of "theft," both offences being portions of one continuous criminal act, was sentenced on the first head of charge to one year's rigorous imprisonment, under s. 457 of the Penal Code, and on the second head of charge to receive twenty stripes, under s. 2 of the Whipping Act (VI of 1864), the separate sentences (though not illegal) were disapproved of, as contrary to the spirit and intention of the Whipping Act. *REG. v. GENU BIN AKU* . . . 5 Bom., Cr., 83

13. ——— *Act VI of 1864, s. 7—Conviction of theft.*—A sentence of whipping cannot, with reference to Act VI of 1864, s. 7, be passed on a conviction for theft under s. 379, Penal Code, as the former section only provides for sentences of imprisonment for a term not exceeding three years. *QUEEN v. ESAN CHUNDER DEY* [21 W. R., Cr., 40]

14. ——— *Attempt at house-breaking with view to theft.*—In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal. *REG. v. YELLA YALAD PARSHIA* . . . 3 Bom., Cr., 37

15. ——— *Substitution of whipping for other punishment—Sentence—Theft.*—Whipping may be substituted for any other punishment for the offence of theft in a dwelling-house. *QUEEN v. JUNGHOO KHAN* . . . 3 W. R., Cr., 36

16. ——— *Act VI of 1864, s. 7—Whipping in addition to other sentences.*—A sentence of whipping passed on a person who is already under sentence of death, or transportation, or penal servitude, or imprisonment for more than five years, is illegal. If the sentence of whipping precede, instead of follow, the other sentence, the passing of the latter sentence renders the infliction of the whipping illegal. *ANONYMOUS*

[I. L. R., 1 Mad., 58]

17. ——— *Act VI of 1864—Power of Magistrate.*—When a Magistrate, in exercise of the powers conferred by s. 46 of the Criminal Procedure Code, 1861, passed a cumulative sentence against a person convicted at one and the same time of two or more offences punishable under the Penal Code, *Held per PRACOCK, C.J., and PHEAR and SETON-KARR, JJ.*, that he could not, in addition to the penalties prescribed by the Penal Code, sentence the prisoner to whipping under Act VI of 1864; nor could he exceed twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code, 1861. *Held further per SETON-KARR, J.*, that in the case of hardened offenders, a Magistrate can award whipping in addition to

**WHIPPING—contd.**

the maximum of imprisonment which he is competent to award. *Held per* MACPHERSON and JACKSON JJ. that the Magistrate may in such case in addition to awarding double the punishment which may be awarded for a single offence award the punishment of whipping, but only one whipping can be awarded. *Nasser Chaudhri*

[B L R., Sup. Vol. 951 9 W R., Cr., 41

FUTTER BAWA & BEHRA JHONIA & BEHRA  
[14 W R., Cr., 7

18 ——— *Act VI of 1864—*

*Penal Code s 323 342 37 Criminal Procedure Code (Act V of 1861) s 46 Cumulative sentences*—Where the prisoner was convicted by the Magistrate of three distinct and separate offences, he was sentenced to a month's imprisonment for the offence of wrongful confinement under s 317 s 323 and the imprisonment for the offence of unlawfully causing grievous hurt under s 302 and whipping of twenty strokes for the offence of theft under s 38 of the Penal Code. *Held per* HENRY and PHILLIPS JJ. that the sentence was lawful. Where a prisoner convicted at the same time of two or more offences punishable under the Penal Code—*Held per* HENRY and PHILLIPS JJ. dissenting that it is lawful for the court in addition to the penalty prescribed by the Penal Code to sentence the prisoner to whipping. *Nasser Chaudhri B L R., Sup. Vol. 951 not followed. MANIAR DIXIT & GADHARA DRA. HAMADAR*

[7 B L R., F R. 165 15 W R., Cr., 89

19 ——— *Magistrate of*

*second class under Criminal Procedure Code 1882—Criminal Procedure Code (Act V of 1882) s 2 and 52*—A person appointed a Magistrate of the second class under Act V of 1882 is incompetent, once the coming into force of Act X of 1882, to pass a sentence of whipping unless he is specially empowered so to do according to the provisions of s 54 of the latter Act. *EMERSON & BHAGYANTARAJI*

[L L R., 7 Bom., 303

20. ——— *Whipping and*

*detention in imprisonment—Criminal Procedure Code 1882 s 305 310.* In passing a sentence of whipping, in addition to six months imprisonment, a Deputy Magistrate ordered that the prisoner should be brought before him at the termination of the imprisonment, and that the sentence of whipping should then be carried out. On the recommendation of the Sessions Judge (who referred to ss. 305 and 310 Act X of 1882) the High Court cancelled the sentence of whipping as being improper and incapable of being carried out. *Held per* CHANDER BEHAL & JAFFER ALI

20 W R., Cr., 72

21. ——— *Grounds for sentence of*

*whipping—Statement of grounds in judgment*—When a sentence of whipping is imposed the grounds that punishment should be stated on the judgment. *WATAPITA & QUIEN*

I L R., 5 Mad 168

— *Cause* — *Prisoner convicted*

*feet*—As a rule before referring to the punishment, there ought to be on the record of the previous

**WHIPPING—concluded**

conviction relied on. The conviction and identity of the prisoner ought to be proved in the regular way as mere kycut is no evidence whatever. *QUIEN & QUIEN NUSAYO*

15 W R., Cr., 62

23. ——— *Mode of infliction of sentence of whipping—Stay of sentence, Grounds for—Act VI of 1864 ss 11 and 12.*—Meaning of the words execution shall be stayed. In Act VI of 1864, ss. 11 and 12 together mean that a man sentenced to whipping is not to be whipped unless in a fit state to bear it; the whipping should not be commenced, but if it be commenced, it is not to be continued longer than the man is fit to bear it; and then the sentence has been satisfied, for it cannot be executed by instalments. *ANONIMOUS*

[3 Mad., Ap., 1

24. ——— *Time after sentence within which whipping may be given—Act VI of 1864 s 9*—A sentence of flogging cannot be carried out after the expiry of the limit of time fixed from the date of sentence provided in s 9 of Act VI of 1864. *ANONIMOUS*

6 Mad., Ap., 38

This ruling was held to be applicable to s 30 of the Code of Criminal Procedure 1882. *ANONIMOUS*

7 Mad., Ap., 30

**WHIPPING ACT (VI OF 1864).**

See CASES UNDER WHIPPING.

**WIDOW**

See CO-WIDOWS.

See DOMICILE I L R., 19 Bom., 687

See HINDU WIDOW

See LIMITATION ACT 1877 ART 170.

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[5 W R., 221

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## WIFE.

See CASES UNDER HINDU LAW—CONTRACT  
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See HINDU LAW—HUSBAND AND WIFE.  
[I. L. R., 13 All., 138

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—RIGHT TO PARTITION—WIFE.

See CASES UNDER HINDU LAW—PARTITION  
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See HUSBAND AND WIFE.

See LUNATIC . I. L. R., 15 All., 29  
[I. L. R., 23 Bom., 653

See CASES UNDER RESTITUTION OF CONJUGAL RIGHTS.

See WILL—CONSTRUCTION.

[4 B. L. R., O. C., 53

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[I. L. R., 18 Bom., 468

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[I. L. R., 1 Bom., 164

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[I. L. R., 12 Bom., 110

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[13 B. L. R., 160

————— Evidence of—

See EVIDENCE—CRIMINAL CASES—HUSBAND AND WIFE.

[B. L. R., Sup. Vol., Ap., 11  
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————— Maintenance of—

See CASES UNDER HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIFE.

See CASES UNDER MAINTENANCE, ORDER  
OF CRIMINAL COURT AS TO.

————— Relinquishment of—

See BIGAMY . I. L. R., 19 Calc., 627

————— Removal of husband's property  
by—

See THEFT . 6 Bom., Cr., 9

[8 Bom., Cr., 11

1 Mad., Ap., 23

I. L. R., 17 Mad., 401

## WILD ANIMALS.

1. ———— Animals *feræ naturæ*—Escape of wild animals kept in confinement—Return or pursuit of such animals.—Wild animals are no

## WILD ANIMALS—concluded.

longer the property of a man than while they continue in his keeping or actual possession; but if they regain their natural liberty, his property ceases until they have a mind to return, which is only to be known by their usual custom of returning or are instantly pursued by their owner, for during such pursuit his property remains. CHYTON CHURN DOSS v. COLLECTOR OF SYLHET . 21 W. R., 75

2. ———— Capture of wild elephant—Right of owner of land where captured—Right of finder.—A wild elephant, having fallen into a pit made by K N in his own land, was sec. red, removed, and tamed by U M, without the leave of K N. Held that K N was the captor, and that U M acquired no property in the elephant. MAKATH UNNI MOYI v. MALABAR KANDAPUNNI NAIR

[I. L. R., 4 Mad., 268

3. ———— Escaped elephant—Ownership—Recapture.—A tame female elephant escaped from her master's field in company with a herd of wild elephants and resumed her natural wild habits. The owner-plaintiff abandoned his search after two months, and then offered a reward of R200 to any person who should recapture her. At the end of four months she was recaptured by the defendant, who was compelled to tame her in the same way as if she had been an ordinary wild elephant. Plaintiff offered the reward of R200 to the defendant and demanded the elephant, but the demand was refused. Held that under the circumstances the plaintiff had lost all claim to the animal. PEAL v. CAMPBELL

[3 C. L. R., 515

## WILL.

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See LIMITATION ACT 18 6. 10.

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See LIMITATION ACT 18 6. 10.

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## Construction of Suit for—

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## Decision as to construction of—

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I. L. R., 21 Bom., 683

## Execution of Question of—

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## WILL—cont. need.

## Revocation of—

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## Statement in—

See EVIDENCE—CIVIL CASES—RECITALS IN DOCUMENTS  
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## Suit by person claiming under—

See CIVIL PROCEDURE CODE, 155. 2. 60.  
(I. L. R., 6 Bom., 73)

## 1 EXECUTION

1. ——— Succession Act, s. 50—*Signature of testator—Nature of execution as required.*  
To entitle the executor to prove, the signature of the testator must be that of a conscious person, and not the result of mere mechanical execution of the hand. KALSH TARA DOSSIA v. NARAYAN KUMAR  
21 W R., 842. ——— *Extent of will by impression of seal & the name—Succession Act s. 50.* A testator who for a number of years was, as he was unable to write in the habit of using a name stamp, which used to be attached by a servant to any document or paper he wanted to sign, executed a will and under his direction a servant affixed the impression of his name stamp on the said document. It is that the execution of the will in this case was proper and came strictly within the meaning of the words used in s. 50 of the Indian Succession Act. NARAYAN CHANDER HANDESHWAR v. SARINCHON DEXTA  
I. L. R., 25 Calc., 911  
(3 C. W. N., 6-2)3. ——— *Want of proof of due execution and of knowledge by testator of contents of will.* Where the defendant claimed the property in dispute under the will of a Hindu widow but kept back the evidence which would have clearly established that the mark put on the will, to be made by the widow was really made by her or at her death and that at the time of the execution the nature and contents of the documents were well known to her the Court refused to set upon it. HANUJ HANUJANDAS v. PRANTALAYDAS PARENTDAS  
(I. L. R., 16 Bom., 229)4. ——— *Probate and administration—Evidence as to the execution of a will by a person who is alleged to be a madman.* On a question of fact raised in 1887 whether an alleged testator had or had not been able to execute his will as he was said to have done during his last illness, the judgment of the District Court in the affirmative was reversed. The judgment of the High Court which would have set aside the probate granted in 1887 was reversed upon the consideration of conflicting evidence as to the mental capacity of



Will—continued.

### 1. EXECUTION—continued.

the testator, and as to the genuineness of his signature. **ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI** . . . I. L. R., 21 Cal., 1

5. ————— *Evidence as to execution—Duty of Judge.*—The question whether an alleged Hindu will was genuine or not was raised by the relations of the deceased, on an application, under the Probate and Administration Act (V of 1881), for administration with the will annexed, filed by the proponent. It was held upon evidence, which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that the will was genuine, and that the High Court was not justified in reversing a decree to that effect. It was also held that it is the duty of a Judge in such cases patiently to investigate the actual facts, placing himself as it were in the position of the alleged testator with all his actual surroundings; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought. **DOWLAT KOER v. RAMPHUL DAS** . . . I. L. R., 25 Cal., 459

[L. R., 25 I. A., 21  
2 C. W. N., 177

6. ————— *Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision of such cases—Presumption—Duty of Appellate Court in deciding on evidence of witnesses.*—In all cases in which the evidence is conflicting, it is the duty of a Court of appeal to have great regard to the opinion formed by the Judge, in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to: for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, viz., power of observation, power of judgment, accuracy of expression, and general intelligence, which are of special importance in cases where the execution of a will is disputed on the ground that at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed." "Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will.

Will—continued.

### 1. EXECUTION—continued.

Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done, the Appellate Court, after considering the whole evidence, held, contrary to the decision of the lower Court, that the will was not proved and refused probate. **WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI**

[I. L. R., 21 Cal., 279.

On appeal to the Privy Council: On the weight of the evidence the Judicial Committee decided that the proponent had not discharged the burden of proving him to have been capable. The present case did not resemble one where a testator, near death, might, with the requisite degree of knowledge, have executed a disposition of his property for which, previously and while his mind was still in vigor, he might have given instructions. **RASH MOHINI DASSI v. URMESH CHUNDER BISWAS** . . . I. L. R., 25 Cal., 824

[L. R., 25 I. A., 109  
2 C. W. N., 321

7. ————— *Proof of execution of will—Probabilities—Evidence.*—The fact of the execution of a will was disputed by a testator's relations. They impugned the will mainly on the theory of the improbability of its having been executed by him under the circumstances existing at the time, and in the presence of the witnesses alleged to have attested it. They admitted his intention to execute such a will, but contended that, having long deferred the execution, he had died without having effected it. To outweigh the strong and satisfactory evidence upon which the affirmative of due execution rested, it would have been necessary that the improbabilities should have been cogent and clearly made out. But in their Lordships' opinion, it was neither the one nor the other, and was based on an exaggerated view. The suggested inferences against the will were not borne out; and on the other hand, the testimony in support of it was good. The judgment of the High Court, maintaining the will, was affirmed. **CHOTAY NARAIN SINGH v. RATAN KOER** . . . I. L. R., 22 Cal., 519

[L. R., 22 I. A., 12.

8. ————— *Suit by testator's son contesting validity of will—Alleged testamentary incapacity.*—Although the mental faculties of a person suffering from partial paralysis may have been affected by his physical weakness, he may still be capable of devising and of executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement. In one sense the testator may not have been in the state which the witnesses described as "his.

WILL—continued.

1. EXECUTION—cont. *used*

full senses. He was feeble in body. The vigour of his mind was impaired and his utterance was defective. On the other hand there was nothing in the evidence which could reasonably lead to the inference that he was incapable of understanding such business as fell to his lot or of regulating the succession to his property. At the hearing of the suit, it was alleged that he was subject to insane delusions, as to which however the Courts below concurred in finding that they had not been shown to have existed. The statements made by him alleged to have been the result of delusion had not been shown to be altogether without foundation. As to his third legal opinion on was that in order to constitute an insane delusion affecting the question of testamentary capacity it should have been shown not only that it was unfounded but also that it was so destitute of foundation that no one save an insane person would have entertained it. The judgment at this testator had not testamentary capacity appeared to them to have had the same basis of speculative theory derived from medical books and judicial dicta in other cases and it has been founded on the facts proved in this. *SAJJID ALI v. ISHAQ ALI*

[I. L. R. 23 Cal. 1  
L. R., 22 I. A., 174]

9

## Incapacity from

*illness—Influence not amounting to coercion in influence.*—A Khoja Mahomedan resident in Bombay made his will in 1886, appointing his wife, and his eldest son by a former wife to execute it. The testator died on the 6th February 1891 having at different times in the interval made four codicils. The widow applied for probate of all the above, propounded a fifth codicil alleging it to have been made by her husband on the 11th February 1891. The son put in one for probate to be delivered to him and to the widow but only of the will and of the first two codicils. The three later codicils as having been made under undue influence exercised by the wife. He disputed the last codicil not only on the ground of undue influence if the codicil had been in fact executed but because at the time of the alleged execution his father was blind and unconscious and unable to understand what he was doing. The High Court, in its original testamentary jurisdiction, refused probate of the three disputed codicils, granting probate of the will and of the first two codicils only. The Appellate High Court granted probate of the will and of the five codicils, finding that no undue influence had been exercised, and that the fifth had been executed by the testator with knowledge and comprehension of its contents and of his free volition. The Judicial Committee affirmed the judgment of the Appellate Court as to the absence of undue influence. In their opinion if there was no evidence and there was not, to show coercion in the special matter of the codicils, general assertions of the wife commanding character and of the husband's weakness, and of their differences went for little. But in regard to the fifth codicil they affirmed the judgment of the original Court finding the evidence to have left upon the inference that

WILL—continued

## 1 EXECUTION—concluded.

the testator had been at the time when it was alleged by the widow that he had made this codicil too exhausted and ill for such a testamentary act. *SALA MAHOMED JAFFERBAI v. DAME JANBAI*

[I. L. R., 12 Bom., 17  
L. R., 24 I. A., 148  
I. C. W. N., 481]

## 2. ATTESTATION

10 ———— Directions as to attestation — *Succession Act s. 50—Probate.*—An unprivileged will will not be recognized by the Court and admitted to probate unless executed in accordance with the directions contained in Part VIII, Act X of 1865, such direct as being imperative and not merely declaratory. *Held* that the words "in the presence of the testator, in cl. 3 of s. 50 of the Succession Act, may receive the same construction that has been put upon them in the English Courts, but cannot receive larger interpretation. *ESAIAS S. GABRIEL*

[3 N. W., 33]

11. ———— Presence of witnesses — *Succession Act (X of 1865) s. 50*—Where the testator does not himself sign the will, but some other person signs it in his presence and by his direct on, then besides this other person there must be two witnesses who must sign the will in the presence of the testator. *In the goods of Koyamney Desai* I. L. R. 1 Cal., 150 and *Harris v. Harris* 10 Cal., 17 cited. *In the matter of the petition of Hemlota Dabre* [I. L. R., 9 Cal., 229]

S. C. GRISH CHANDER BANERJEE v. HEMLOTA DABRE  
[I. C. L. R., 359]

12. ———— Attesting witness — *Succession Act s. 50—Signature made for testator by party afterwards attesting.*—The person making the signature of a will for the testator is not competent as an attesting witness of its execution under the provisions of the Succession Act. *In the goods of Bailey* 1 Curt., 918 and *Smith v. Harris* 1 Rob. 262 cited. *IN THE GOODS OF NANABHAI SHANTJI MESTRI. AVABAI v. PESTANJI NANABHAI*

[11 Bom., 67]

13. ———— Mode of attestation — *Execution of will—Wills Act XXV of 1833 s. 7—s. 7 of the Wills Act, XXV of 1833 enacts "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned: (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator but no form of attestation shall be necessary." A testator signed his will in the presence of a witness who subscribed it in his presence, and some time afterwards, upon the arrival of another witness, the testator in the*

**WILL—continued.****2. ATTESTATION—continued.**

joint presence of the former witness and the other subscribing witness, acknowledged his subscription at the foot of the will. The second witness then subscribed the will, and the first witness in his and the testator's presence acknowledged his subscription, but did not re-subscribe. *Held* by the Judicial Committee (affirming the decision of the Supreme Court at Calcutta) that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the testator and jointly subscribe it in his presence. **CASEMENT v. FULTON**

[3 Moore's L. A., 395]

**14. — Acknowledgment of signature by testator.**—It is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it, or observe any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it. **MANICKBAI v. HONMASJI BOMANJI** . I. L. R., 1 Bom., 547

**15. — Sufficiency of attestation—Succession Act (X of 1865), s. 50—Probate—Hindu Wills Act (XXI of 1870), s. 2.**—By the Succession Act, s. 50, no particular form of attestation is necessary: therefore, where, to a document purporting to be her last will and testament, the name of the testatrix was written by A, and the testatrix then in his presence affixed her mark, and A in her presence wrote beneath it "by the pen of A," and the testatrix was then identified to the Registrar, who was present, by B, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her, — *Held* a sufficient attestation; and probate was granted. **IN THE GOODS OF ROYMOONEY DOSSEE** . I. L. R., 1 Cal., 150

**16. — Succession Act (X of 1865), s. 50, cl. 3—Initials of witness.**—*Semble*—If the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is a sufficient compliance with the terms of s. 50 of the Succession Act. **AMMAYEE v. YALUMALAI**

[I. L. R., 15 Mad., 281]

**17. — Will not attested by two witnesses—Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2, cls. (a) and (b).**—The Hindu Wills Act (XXI of 1870) applies s. 50 of the Indian Succession Act (X of 1865) to those wills only that are mentioned in s. 2, cls. (a) and (b), of the former Act. A will which was not such a will as there mentioned was held to be valid, though not attested by two witnesses. **IN RE BARUJI v. JAGANNATH**

[I. L. R., 20 Bom., 674]

**18. — Pardanashin lady**—*"In the presence of"*—**Succession Act (X of 1865), s. 50.**—After execution of her will by a testatrix, a pardanashin lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix

**WILL—continued.****2. ATTESTATION—continued.**

sitting behind one fold of a door which was closed, the other fold being open, and the Registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the Registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the Registrar, and the person who identified her, at the same time. *Held* that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865). **HORENDRANARAIN ACHARJI CHOWDHRY v. CHANDRAKANTA LAHIRI**

[I. L. R., 16 Cal., 19]

**19. — Succession Act (X of 1865), s. 50—Proof of due attestation of will—Strict proof of due attestation whether necessary.**—S, the widow of J, the testator, applied for probate of his will. The writer of the will deposed that he had signed the will before the testator signed, and that the testator signed immediately after him, and that none of the witnesses signed in his presence. D, one of the witnesses, said that he signed the will after the testator had personally acknowledged his signature to it, and that, when he signed, other witnesses' names were on the will. Of the other witnesses, three were proved to have been dead, and the remaining witness was not examined, but his signature as well as the signatures of the witnesses who were dead were proved. There was no direct evidence that the testator had acknowledged his signature to these witnesses, or that the will was otherwise properly attested by a second witness. *Held* that strict affirmative proof of due attestation is not absolutely necessary in cases of this class; and if the circumstances are such as to warrant the Court in reasonably concluding from those circumstances that the will has been duly attested, probate may be granted. That upon the whole evidence it could reasonably be concluded that the will had been duly attested in accordance with law. **RIGHT v. SANDERSON, L. R., 9 P. D., 149, referred.** **SIDO SUNDARI DEBI v. HEMANGINI DEBI**

[4 C. W. N., 204]

**20. — Grant of probate—Signature—1 Vict., c. 26 (Wills Act), s. 9—Succession Act (X of 1865), s. 50.**—To the will of A, a British-born subject and a member of the Bengal Civil Service, who died in India possessed of personal property only, a native servant of the testator, purporting to attest the will, appended words in the Persian character signifying "this is A's signature." *Held*, on an application for probate, that this was not a sufficient subscription of the will. *Semble*—A signature by mark would be a sufficient signature to a will by a witness under the Succession Act. **IN THE GOODS OF WYNNE** . 13 B. L. R., 392

**21. — Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.**—S. 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names after the testator or testatrix shall have executed the will. **Bissonath Dinda**

## WILL—continued

## 2 ATTESTATION—continued

*v. Doyaram Jaha, I L R, 5 Cal 733, and Fernandez v Alces I L R 3 Bom 352 followed.* If a testatrix admits a signature on a will to be hers before a Registrar of Assurances and is identified before him by one of the witnesses to the signature and both the Registrar and the identifier sign the names as witnesses to the admission made.—*Held* that such an attestation would be sufficient to satisfy s 50 of Act X of 1865. *In the goods of Rosmoney Dossee I L R 1 Cal 150 followed.* IN THE MATTER OF THE PETITION OF HURRO SUNDARI DABIA, HURRO SUNDARI DABIA v CHANDER HANT BHATTACHARJEE

[I L R, 8 Cal, 17 8 C L R, 303

22 ——— *Attesting witness when he should sign—Succession Act (X of 1865) s 50*—The signatures of two or more attesting witnesses to a will required by s 50 of the Succession Act (X of 1865) must be attached to the will after and not before the testatrix's signing or affixing a mark to it. *Quare*—Whether a will can be properly attested by a markman. *Bissoo Nath D NDA v Doyaram Jaha*

[I L R, 5 Cal, 728 5 C L R, 565

23 ——— *Succession Act (X of 1865) s 50—Witness—Signature—Mark*—The direct on contained in s 50 cl 3 of the Succession Act (X of 1865) as to the signature of witnesses attesting an unprivileged will is not satisfied by the witnesses affixing their marks. It is necessary for the validity of a will that the actual signature as distinguished from a mere mark of at least two witnesses should appear on the face of the will. *Fernandez v Alces*

[I L R, 3 Bom, 382

24. ——— *Will attested by markman—Witness—Signature—Mark—Succession Act (X of 1865) s 50*—The direct on contained in s 50 cl 3 of the Succession Act, as to each of the witnesses signing the will is not satisfied by the witness affixing their marks and it is necessary for the validity of a will that the signatures distinguished from a mere mark of at least two witnesses should appear on the will. *Fernandez v Alces I L R 3 Bom 352 followed.* *In the goods of Wynne Jo B L R 392, d assented from.* If a testator on presenting his will for registration admits a signature on the will to be his before a Registrar and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator such attestation is sufficient to satisfy the requirement of cl 3 of s 50 of Act X of 1865. *In the matter of Hurro Sundari Dabia I L R 6 Cal, 17 followed.* *Mitter Gopal Narayan v Nagendra Nath Mitter*

I L R, 11 Cal, 429

25. ——— *Acknowledgment of signature by testator—Attestation—Witness—Succession Act (X of 1865) s 50*—The signature of a testator at the commencement of his will, when the witnesses attested it, and his admission to the attesting witnesses that the paper which they attest

## WILL—continued

## 2 ATTESTATION—concluded.

is his last will, constitute sufficient acknowledgment of his signature to his will, even though the witnesses do not see him sign it, or observe any signature to the paper which they attest. The registration of his will by a testator and his signature to the certificate of admission on execution testified by the signatures of the Sub-Registrar and of a witness, is sufficient attestation on to satisfy the requirements of s 50 of Act X of 1865. *Manickbhai v Hormazji Bomanji I L R 1 Bom, 547* *Hurro Sundari Dabia v Chander Kant Bhattacharjee, I L R, 6 Cal, 17* and *Vijay Gopal Sircar v Nagendra Nath Mitter Motowadar, I L R, 11 Cal, 429* referred to and followed. *AMARENDRA NATH CHATTERJEE v HARI NATH CHATTERJEE I L R, 27 Cal, 189*

26 ——— *Unattested alterations in a Hindu will—Letters of administration—Succession Act (X of 1865), s 53*—In a will properly attested some subsequent alterations were made by the testator in the presence of the Registrar but these alterations were unattested. *Held* that under s 53 of the Indian Succession Act, made applicable to the Hindus by the Hindu Wills Act, the alterations should have been attested, as the will itself by two persons signing in the presence of the testator, and so letters of administration should issue not with the copy of the will but with the copy of the will without the alterations. *Raghoebar Dial v Ram Rakhman Lall I C W N, 428*

27 ——— *Repudiation of signature by attesting witness*—The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence. If he does repudiate it uncontradicted, the mere fact of there being two witnesses purporting to have witnessed the testator's signature is not a compliance with s 50 of the Succession Act. *Muco Hishore Dass v Jor Doorga Dossee I C W N, 189*

28 ——— *Forged attestations, Effect of—Effect on title given under power no portion of will—C under a power given to her by the will of L, her husband, a Hindu sold certain land to R. After the sale certain forged attestations were added to the will. In a suit brought by the heir of L to recover the property sold by C to R, R relied on the will which was procured by other defendants in the suit. Held that R's title could not be affected by the forgery.* *PANAMMA v RAMACHANDRA*

[I L R, 7 Mad, 303

## 3. FORM OF WILL.

29 ——— *Buddhist will—Probate—Succession Act (X of 1865) s 331*—Probate may be granted of the will of a Buddhist made after the 1st January 1860. It is not necessary that the will of a Buddhist should be executed according to the formalities prescribed by the Succession Act. IN THE MATTER OF KONYA DINZ

[3 R L R, A. C., 79:10 W R, 417

WILL—continued.

## 3. FORM OF WILL—continued.

## 30. ——— Testamentary document—

*Will to have effect on contingency—Probate.*—*A*, being ill and away from home, wrote to his brother *B* certain directions as to the management of his property, and concluded: "Brother, if I die of this sickness and *C* survive me, then whatever property I have you will give one-half to *C*," etc. In another and subsequent letter he wrote to *B*: "I don't think that the illness I am now suffering from will terminate fatally; but in case I should die, then you will give to *C* one-half of my Company's papers," etc. "I appoint you turney (executor) in all matters relating to *C*," etc. *A* recovered from the fever, but died suddenly a year later, without having made any other testamentary disposition of his property. In a suit brought by *B* as executor of *A*, according to the tenor of these documents against the widow of *A*, for the purpose of having probate of them granted to him as of the will of the deceased, —*Held* (reversing the judgment of *MAORHERSON, J.*) that the documents were only intended to have a testamentary effect in the event of *A*'s having died of the sickness he was suffering from at the time of writing, and therefore probate which had been granted by the Court at the original hearing was ordered to be brought in and cancelled. *KAMEENEE DOSSEE v. BISSONATH GHOSH*. 2 Ind. Jur., N. S., 8

31. ——— Imperfect form of will—*Will unexecuted by testator—Blank spaces in body of will—Application for probate.*—A testator died leaving as his will a printed form of will imperfectly filled in, and having omitted to insert his name and description at the head of the document, and to append his signature thereto. He had, however, written his name in the attestation clause and completed the disposition clause bequeathing all his property to his wife and appointing her sole executrix. *Held* that this was sufficient, and the will should be admitted to probate. *In the goods of Pasmore, L. R., 1 P. & D., 653*, referred to. *IN THE GOODS OF PORTHOUSE*

[I. L. R., 24 Calc., 784]

32. ——— Document intended to take effect partly in the lifetime of the executant and partly after the executant's death—*Probate and Administration Act (V of 1881), s. 3.*—There is no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will. *Cross v. Cross, 8 Q. B., 714; 15 L. J. N. S., Q. B., 217*, referred to. *CHAND MAL v. LACHHMI NARAIN*

[I. L. R., 22 All., 162]

33. ——— Codicil—*Probate, Application for—Document referring to will.*—After letters of administration with the will annexed had been granted, the administrator found a book containing memoranda in the testator's handwriting, made after the date of the will, and directing certain dispositions of his property. One entry referred in express terms to the will. The testator was a domiciled Scotchman. *Held*, on a petition by the administrator, asking that the memoranda might be admitted to probate, that the memoranda were not testamentary documents,

WILL—continued.

## 3. FORM OF WILL—concluded.

and the petition was therefore dismissed. *IN THE GOODS OF WEMYSS*. I. L. R., 4 Calc., 721

## 1. NUNCUPATIVE WILL.

34. ——— Validity of nuncupative will—*Roman Catholics of Portuguese extraction—Intestate succession.*—*Quare*—Whether a Roman Catholic of Portuguese extraction can, under the law current amongst members of that church in Chittagong, take under a nuncupative will; and if not, to what is a wife entitled under the law regulating succession of intestates amongst members of that church? *REBEIRO v. REBEIRO*. 3 W. R., 83

35. ——— Nuncupative will of a Mahomedan—*Probate and Administration Act (V of 1881), ss. 3, 24, 25, 26, 62—Succession Act (X of 1865), s. 244 and Ch. IX.*—Probate may be granted of a nuncupative will. *IN THE MATTER OF THE WILL OF MAHOMED ABBA. IN RE MARIAMBAI*. I. L. R., 24 Bom., 8

## 5. VALIDITY OF WILL.

36. ——— Military testamentary document—*Application for probate—Lapse of time—Invalidity of will.*—A military testament valid in its inception may be deprived of its privilege by lapse of time. *IN RE GODBY*. 1 Hyde, 196

37. ——— Will of Cutchi Memon—*Will disposing of ancestral property.*—Wills made by members of the Cutchi Memon community, whereby the testators disposed of property which was proved to be ancestral, held to be invalid. *MAHOMED SIDICK v. AHMED. ABDULA HAJI ABDSTAR v. AHMED*. I. L. R., 10 Bom., 1

38. ——— Will of East Indian testatrix out of civil jurisdiction of High Court—*English law.*—The provisions of the English law as to the administration of and succession to the estate of a British subject dying testate apply to the will of an East Indian testatrix (the illegitimate daughter of a Mahomedan woman) who resided and died without the limits of the ordinary civil jurisdiction of the High Court. *HOGG v. GREENWAY. GREENWAY v. HOGG*

[Cor., 97: Bourke, A. O. C., 111]

39. ——— Question of due execution and validity of will—*Disposition of immoveable property in British India.*—The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India. *BHAURAO DADAJIRAO v. LAKSHMIBAI*

[I. L. R., 20 Bom., 607]

40. ——— Will procured by importunity of wife—*Succession Act, s. 48—Undue influence.*—The wife of the testator persuaded him to execute a will in supersession of a former will less favourable to her, but the influence which she exerted



## 9. CONSTRUCTION.

48. ——— Construction of will—*Powers to construe will without administration suit—Chancery practice.*—A testator by his will devised certain house property, first for the celebration of pujahs and the worship of an idol, and then that his children with their families should be allowed to live there. One of the sons used the premises for the purpose of his business as a kaviraj, which was objected to by the other sons as being contrary to the terms of the will. One of the defendants also contended that, before the Court could construe the terms of the will to ascertain the meaning of the testator, it was necessary to bring a proper administration suit. *Held* that, considering the character of the consequential relief sought, the Court could construe the will without an administration suit. That questions between trustees and beneficiaries and between trustees and strangers requiring the construction of provisions in a trust deed have been determined without the Court being asked to undertake the entire administration of the trust. *In re Weall, L. R., 42 Ch. D., 674, approved. BRUGGOTTY PROSONO SEN v. GOOROO PROSONO SEN. I. L. R., 25 Cal., 112*

49. ——— Rules of construction—*Intention of testator—Meaning of "purchase."*—The rule of construction applicable to a will is that words in general are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another can be collected. If the language of a will is perfectly unambiguous and precise, it cannot be strained for the purpose of giving effect to what possibly might have been the intention of the testator, but is not expressed or implied in the terms of the testament. *G*, by a clause in his will, gave his wife a life-interest in the house in his possession, and in those which he might afterwards "purchase." In *G*'s lifetime his younger brother died, and *G* thereby acquired a house by inheritance. *Held*, there being nothing to show that *G* had used the word "purchase" in any other than its ordinary sense, that the language of the will could not be strained in order to give effect to what possibly might have been the testator's desire had he foreseen the death of his younger brother in his own lifetime, but was not expressed or implied in the terms of the testament, and that the house did not pass under the will to the testator's widow. *GEORGE v. GEORGE*

[3 N. W., 219]

50. ——— Appointment of executors by implication.—Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named. *Held* that the plaintiffs were not appointed executors by implication. *SESHAIYIA v. CHENNAPPA. I. L. R., 20 Mad., 487*

## 9. CONSTRUCTION—continued.

51. ——— Effect of words excluding from inheritance—*Heir-at-law.*—*A*, a Parsi inhabitant of Surat, died there on the 13th February 1879, leaving him surviving the following relations, viz.: *A* daughter *J* (the respondent) by his first wife, who had predeceased him; his second wife Dhanbai, who lived apart from him; his third wife, who had been divorced by him, and whose son *A* he did not recognize as his own; and his three sisters *D*, *S*, and *G*, the first-named of whom had been married to *K* and whose son *E* was the appellant. By his will *A* expressly directed that neither his daughter *J* nor his widow Dhanbai should take any share of his property, the whole of which he bequeathed to his brother *E*, who, however, predeceased him. *Held* that the use of mere negative words, unaccompanied by any effective disposition of his property, could not exclude his daughter *J* or his widow Dhanbai from succeeding to their shares of the estate. *ERASHA KATKHUSRU v. JERBAI*

[I. L. R., 4 Bom., 537]

52. ——— Commission of manager of estate how calculated—*Intention of testator.*—Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing or varying the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the shares, was held to be settled by the indication of the latter mode of calculation in the will. *ORDE v. SKINNER I. L. R., 3 All., 91; 7 C. L. R., 295*

[L. R., 7 I. A., 197]

53. ——— Armenian will—*Devise—Absolute estate—Estate for life.*—An Armenian, by his will in the Bengali language, made a gift to his son in the following terms: "I bequeath to *A* as *silamti* my talukhs (which he named) and Rs. 6,000 in cash. He shall enjoy the profits of the aforesaid talukhs. On his demise his sons shall get. The mukhtars shall make over to the satisfaction of *A*." *Held* that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. *A* took an absolute estate under the devise. *BROUGHTON v. POGOSE*

[2 B. L. R., 74; 18 W. R., 181]

54. ——— Superstitious uses, English law against—*Application of English law to India.*—*Semble*—The English rule of law which prohibits the bequest of money for superstitious uses has no application in India. *JUDAN v. JUDAN*

[5 B. L. R., 433]

55. ——— Bequest for performance of masses—*Validity of bequest.*—A bequest in a will of a sum of money for the performance of masses in Calcutta is valid. *ANDREWS v. JOAKIM*

[2 B. L. R., O. C., 148]

WILL—cont. *used*9 CONSTRUCTION—cont. *used*

56 ———— *Validity of bequest—Gift to superstitious use*—A bequest by a Roman Catholic of Portuguese descent, born and domiciled in Calcutta, for the performance of masses, is not a gift to superstitious use. *DAS MERCKES v. COXES* 3 Hyde 85

57 ———— *Bequest for masses held void as infringing the rule against perpetuities*. *COLGAN v. ADMINISTRATOR-GENERAL OF MADRAS* L. R. 15 Mad., 424

58 ———— *Legacy to attesting witness*—*Section 65*—A legacy to the attesting witness of a will is void under s. 65 of the Succession Act, which is not the attestation of the witness is material to the validity of the will. *ADMINISTRATOR GENERAL v. LAZAR* [L. R., 4 Mad., 244]

59 ———— *Legacy to minor—Absolute gift—Discretion of executor*—Where there is an absolute bequest and power to executor to delay making or the legacy a discretion. Held that on appeal majority the legacy should at once be put in possession. *DAS SILVA v. DAS SILVA* [1 Ind. Jur., N. S., 18 Bourke O. C., 281]

60 ———— *Legacy whether to be paid out of particular fund or out of general assets*—*Demonstrative legacy*—Payment of legacies requires that the legatee has been refused by the representatives of the testatrix on the ground that she had no power to dispose of the fund out of which the will must be construed to direct the payment. Held on a consideration of the whole will, that the words of the gift were wide enough to charge them upon the whole of her movable estate; also that if the words of the will were to be taken in a more restricted sense the gift of the stipends must be regarded as a demonstrative legacy and in that view they would be payable out of the general estate, on failure of the particular fund pointed out. *MIRZA v. UMMA KHANAM MIRZA v. GUSNA KHANAM* I L. R., 19 Cal., 444 [L. R., 19 I. A., 83]

61 ———— *Devise of one kani out of an estate Right of select*—*By the devise*—The owner of land, measuring one kani and three-quarters, died leaving a will by which he devised one kani thereof to the plaintiff who now sued to recover one kani selected by him out of the land in question. Held that plaintiff had the right to make his selection and was entitled to a decree. *NAWATANA SAMI GRAMMAL v. BHERIAHATHI GRAMMAL* [L. R., 18 Mad., 480]

62 ———— *Domestic servant—Legacy, sent for—Salary*—The testator a Hindu made a will in the English form and language in which he bequeathed (also said) as follows: To each of my domestic servants in Calcutta who shall have been in my service ten years and upwards at the time of my death Rs 100 for every rupee of monthly salary drawn by them from me respectably. The plaintiff had been in the service of the testator for about forty

WILL—cont. *used*9 CONSTRUCTION—cont. *used*

years as serving on-board a steamer which the testator kept on the river and in which he used to visit his zamindaris and perform other journeys by water. The plaintiff was in the habit of daily visiting the testator's residence and there every day and so that might be given him. If the steamer was not needed, the plaintiff used to attend at the testator's residence from early in the morning to about one in the afternoon returning to take his meals and sleep on board the steamer. Held that he was entitled to take under the legacy as a domestic servant of the testator. *DHANNO SINGH v. URSADRA MOHAN TAJORA* 8 B. L. R., 244

63 ———— *Husband and wife—Testator*—Held on the evidence that the plaintiff had failed to prove he was a domestic servant of the testator so as to entitle him to take a legacy under this clause. *BHIM DAS v. URSADRA MOHAN TAJORA* [9 B. L. R., 40, 41]

64 ———— *Husband and wife—Testator*—*Sole use and benefit*—A testator made the following bequest in his will: I give devise and bequeath to my dearly beloved wife all the stock in trade, furniture, moveables, coaches, horse-drawn carriage, thereto, stones, marbles, tools, implements, and materials connected with my trade and business, and all my right and interest therein; and after payment of my debts and other expenses, I give devise and bequeath the rest and residue of my outstandings and collections for her sole use and benefit, with liberty to consume and carry on such trade and business. The testator's widow married a second husband and they carried on the business of the deceased together. They afterwards separated, and she brought a suit against her husband for a declaration of her right under the will, and for an account from her husband of the profits of the business during their marriage. Held (reversing the decision of the Court below) that, on the true construction of the will, the stock in trade etc., was not bequeathed to the wife for her sole and separate use independent of any future husband; her husband did not become a trustee for her in respect of such stock in trade or the profits of the business, and he was not bound to render an account. *ORD v. ORD* [4 B. L. R., O. C., 63]

65 ———— *Dedication to religious purposes—Rule against perpetuities*—If there is a valid dedication of premises for religious purposes, this is not invalid merely because it transgresses against the rule forbidding the creation of perpetuities. *BAUGORUTTI PROSOYOBEN v. GOOROO PROSOYOBEN* I. L. R., 25 Cal., 113

66 ———— *Charitable bequest—Bequest for spiritual benefit—Uncertainty—Superstitious use*—A Jewish merchant domiciled in Calcutta, and possessed of both real and personal property died, leaving a will by which, after appointing his mother E. E. J. and his brother J. E. J. executrix and executor thereof and in making various bequests and provisions, he made the following bequest of the residue of his property: "And



WILL—continued.

## 9. CONSTRUCTION—continued.

what may remain after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brothers, *S E J* and *J E J*, for the purpose of defraying therewith the expenses for the year, and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment." *Held*, assuming that the High Court should act in conformity with the English Court of Chancery in carrying out charitable bequests, that, as far as the bequest related to giving of alms for the testator's spiritual benefit, it was void for uncertainty. The "defraying expenses and making charitable distribution" were limited by the bequest to the year within which the testator died. *JUDAH v. JUDAH* . . . 5 B. L. R., 433

67. ———— 43 Eliz., c. 4—*Mortmain, Statutes of*—Hospital—Clause prohibiting alienation.—A testator left his personal property to trustees in trust to pay thereout certain annuities to his son and daughter, and, after bequeathing some pecuniary legacies, devised certain immovable property to the trustees in perpetuity in trust for the support of hospitals in the North-West Provinces, with directions that the surplus income (if any) from his personality during the lives of his children, and on the death of either of them his or her annuity, and on the death of both of them the whole income of the personality, should be applied in support of the hospitals. The will also contained a provision that the property should never be sold. In a suit for the construction, and for declaration of the trusts, of the will, it appeared that the income of the personality was not more than sufficient, after payment of the legacies, to pay the annuities to the testator's children, and that the immovable property was greatly in need of repairs and did not produce enough for the support of the hospitals, or to enable the trusts of the will relating thereto to be carried out. *Held* that the devise for the support of the hospitals was a valid devise, and one to which the Court would give effect, as being a charitable trust within the scope of 43 Eliz., c. 4. The statutes of Mortmain not applying to India, the Court will carry out such a trust when the subject is immovable property, just as it would if it had been personal property. *Held* also that, if the prohibition against sale were a valid one, the Court could not order a sale merely because it would be advantageous to the charity that the property should be sold, but held that the prohibition against sale was void as being repugnant to the devise, and, notwithstanding such prohibition, the trustees had power to sell, or otherwise alienate, the property for the purpose of maintaining the hospitals. *BROUGHTON v. MEROER* [14 B. L. R., 442]

68. ———— *Void bequests—Uncertainty*—"Surplus"—General residuary bequest.—A testator by his will directed as follows: "I do hereby direct my trustee to feed the really needy and poor at Gopcnathjee out of a separate expense out of my estate, to be contributed to the worship of Lukeejonardunjee, my ancestral goddess. I do direct my trustee to spend suitable

WILL—continued.

## 9. CONSTRUCTION—continued.

sums for the annual sradhs or anniversaries of my father, mother, and grandfather, as well as of myself after my demise, for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, Pundits holding tolls for learning in the country at the time of the Doorga Pooja; to spend suitable sums for the perusal of Mohabharat and Pooran and for the prayer of God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes, as my trustee will think fit to comply." *Held* that the gifts were valid testamentary bequests, and that the words "should there be any surplus after the above expenditure" created a general residuary bequest. *Held*, on appeal (affirming the decision of the Court below), that a general residuary bequest was created by the concluding words of the clause, which would absorb any of the preceding bequests, if they should happen to be invalid. *Quære*—Whether the bequests to pundits holding tolls, and for the reading of the Mohabharat and Pooran and for prayer to God, were valid. *DWARKANATH BYSACK v. BURRODA PERSAUD BYSACK* . . . I. L. R., 4 Calc., 443

69. ———— *Cy près, Doctrine of*.—A testatrix bequeathed the interest of a Government promissory note to "The Calcutta Armenian Orphans' College Funds for the Relief and Enjoyment of the Poor Families, Widows, Orphans, and Schools of the Armenian Nation," to be received half-yearly by the wardens of the funds for the time being. Although there was a charity in Madras, called "The Armenian Orphans' College," there was none in Calcutta or elsewhere answering the description of the Calcutta Armenian Orphans' College, but there were two, and only two, charitable institutions in Calcutta which provided for the relief and enjoyment of the poor families, widows, orphans, and schools of the Armenian nation. Of these, one, the Church of St. Nazareth, distributed money amongst, and gave relief to, the poor families, widows, and orphans of the Armenian community; and the other, the Armenian Philanthropic Academy, educated gratuitously the poor and orphans of the same community. The note was invested by order of the Court, and there had been a large accumulation of interest thereon. The governors of the two institutions concurred in asking that each should receive a moiety of the accrued and future interest of the fund. *Held* that the *cy près* doctrine applied; that the accumulated interest should remain invested; but that the accruing interest on the accumulated fund should be paid half-yearly, one moiety to the wardens of St. Nazareth's Church, and the other to the managers of the Armenian Philanthropic Academy. *LONGBOROUGH v. SATOOR* . . . 1 Mad., 429

## WILL—contd

## 9 CONSTRUCTION—contd

70. — Failure of object—*Cy pres* performance.—*Construct on of will*.—The doctrine of *cy pres* as applied to charities rests on the view that charity in the abstract is the substance of the gift, and the particular disposition merely the mode so that, in the eve of the Court, the gift, notwithstanding the particular disposition may not be capable of execution in substance as a legacy which never fails and cannot lapse. It cannot be laid down as a general principle that the *cy pres* doctrine is displaced where the residuary bequest is to a charity or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. On the failure of a specific charitable bequest, jurisdiction arises to act on the *cy pres* doctrine, whether the residue be given to a charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. In applying the *cy pres* doctrine regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of miseries in a particular locality may guide the Court in framing a *cy pres* scheme to benefit that locality. Unless the *cy pres* scheme framed by the lower Court be plainly wrong a Court of Appeal should not interfere with it. **MALHOTA & BROUGHTON** ADVOCATE GENERAL OF BENGAL.

[I. L. R., 1 Calc., 303 28 W. R., 1  
I. R., 3 I. A., 32]

71. — Charitable gift—*Cy pres* doctrine.—*Lapse of construction of will*.—A testator directed his executor to set apart a sum of ₹7,000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of Armenian or other Christian religion. The testator died in 1878. In 1884 the St. Paul's School, Calcutta, was removed to Darjeeling. In the St. Paul's School, Calcutta, the fees for day scholars and day boarders were ₹8 and ₹10 respectively. In the St. Paul's School, Darjeeling, there were no day scholars nor any day boarders and the cost of a regular boarder would be about ₹20 per annum. Held that the gift did not lapse being a general charitable bequest, and that under the circumstances it must be executed *cy pres*. **MALHOTA & BROUGHTON**

[I. L. R., 11 Calc., 591]

72. — Doctrine of—*Lapse of legacy*.—*Costs*.—Under the will of A, who appointed the Administrator-General of Bengal his executor B had a life-interest in the residue of his testator's estate. B brought a suit against the Administrator-General to have it declared that a pecuniary legacy given under the will had lapsed and fallen into the residue. Prior to the

## WILL—contd

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hearing it was agreed between B and the Administrator-General that the costs of the suit should come out of the testator's estate. This agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed and this decision was affirmed on appeal. On the question of costs.—Held that the estate of the testator not being before the Court, the agreement as to costs could not be carried out and that the plaintiff must pay the costs of all parties to the suit. **MALHOTA & BROUGHTON** I. L. R., 13 Calc., 193

73. — Appointment of trustees.—*Failure to carry out wishes of testator*.—Where a testator had made a bequest for charitable purposes and had made no express provision for the management of the charitable trust so created, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily into its own hands.—Held that, in the absence of misconduct, the widow and not the Collector was the proper person to be appointed trustee. **HORI DAS DASTI SECRETARY OF STATE FOR INDIA IN COUNCIL**  
[I. L. R., 5 Calc., 228 4 C. L. R., 77]

74. — Bequest to charity.—*Public charity Trusts Act of 1850*.—*Paras religious ceremonies as lay ra or parva*.—*Paras religious gharbar and dola*.—*Civil Procedure Code (Act XIV of 1853) s. 527*.—A Parsi by his will directed that the income arising from a one-third share of a bungalow in Bombay to which he was entitled, should be devoted in perpetuity to "the performance of the lay ra or parva ceremonies and the consecration of the nura, dola and the recitation of the yazashni and the annual gharbar and dola ceremonies." He further directed that the said share should not be sold or mortgaged. Evidence was given, which showed that the above-mentioned religious ceremonies were performed among Parsis rather with a view to the private advantage of individuals than for the public benefit. Held that the trusts of the will were void, and that the direction that the property should not be sold was invalid. **LINGA SWAMI DAS & BAPUJI BASTI LINGUWALA** I. L. R., 11 Bom., 441

75. — Bequest to a person with a direction that it should be used for good works (*sarā kām*).—*Direction void as being vague and indefinite*.—*Succession Act (X of 1865) s. 125*.—A testator left a legacy to his wife in the following terms:—₹2,000 to be credited in our shop in the name of my wife Lal Bapi. Interest at 6 per cent to be paid to her every year. If in her lifetime she demands the money to use in good work (*sarā kām*) it should be given to her but if she has not taken it in her lifetime, Jammal and Bhagabhai are to dispose of it according to their own pleasure after death. Held that this was not a bequest in favour of good works (*sarā kām*) but a bequest to the testator's wife, with a direction to use it in good works (*sarā kām*) and as that direction was

**WILL—continued.****9. CONSTRUCTION—continued.**

void for uncertainty, she was entitled to the money as if the will had contained no such direction. **BAI BARI v. JAMNADAS HATHISANG**

[I. L. R., 22 Bom., 774]

**76. ——— Children—Domicile—Rules for interpretation—Accretions to property from rents.**—Where a testator has an ascertained domicile, the construction of his will must depend on the law of that domicile; but if no particular law is applicable, the will is to be interpreted by principles of natural justice. In such cases, in applying the rules of Hindu, Mahomedan, or English law to the wills of Hindus, Mahomedans, or East Indian Christians respectively, their particular habits and modes of life may be looked to as a guide to the interpretation. From the context of the will and surrounding circumstances, "children" may be interpreted as illegitimate children. Where by the will the income of estates was left to devisees for life, with a gift over of the corpus on their death, and a portion of the income, instead of being divided among the tenants-for-life, was applied to the purchase of other estates, —*Held* those estates did not pass to the remaindermen, but formed the absolute property of the tenants-for-life, and passed to their devisees. **BARLOW v. ORDE** . . . 5 B. L. R., 1; 13 W. R., F. C., 41

[13 Moore's I. A., 277]

**77. ——— Contingent gift—Puttro poutradi, Meaning of—Absolute estate.**—A Hindu, *B L M*, died in 1874, leaving a widow, *KK D*, a daughter's daughter, *H D D*, and a brother, *R L M*, with whom he was on bad terms. By his will, which was made on the 9th of August 1870, and at a time when there was no reason to abandon all expectation of his leaving male issue of his own, *B L M* directed that, in the event of his dying without leaving a son, grandson, or son's grandson, his widow, *KK D*, should take the whole of his estate according to the shastras, and enjoy the profits thereof for her life, and that on her death, in the event of a daughter or daughters having been born to him, then she or they, and on the death of her or them, then her or their son or sons (the testator's daughter's sons) should in like manner take and become the owner or owners of the estate according to the shastras, and that in the event of there being no daughter or daughter's son of the testator living at the time of the death of his widow, then his granddaughter (daughter's daughter), *H D D*, should take the whole estate absolutely from generation to generation (*puttro poutradi*); and that, in the event of no son or daughter being born to the testator after the execution of his will, and of his granddaughter (daughter's daughter), *H D D*, dying childless, or being a barren or childless widow, or otherwise disqualified, then the whole of his property should go to the Government, to be employed by it for charitable and philanthropic purposes. The main object of the testator *B L M* in making this disposition of his property was admittedly to exclude *R L M* from the inheritance. *Held* that *H D D*, if she survived the testator's widow *KK D*, and was not then a barren or childless

**WILL—continued.****9. CONSTRUCTION—continued.**

widow or otherwise disqualified, would take, not a life-interest but an absolute estate, to the exclusion of *R L M*. *Held* also that the words "puttro poutradi" had generally the effect of defining the estate given as an estate of inheritance, and did not by themselves necessarily denote that the estate given was to be one descendible to heirs male only. *Held* also that in case of *H D D* not surviving *KK D*, or of her being at the time of the death of *KK D* for any reason disqualified from taking the estate, then upon the death of *KK D* the gift to the Government of the reversion to the exclusion of *R L M* would take effect, and was a good and valid gift. **HORI DASI DABI v. SECRETARY OF STATE FOR INDIA IN COUNCIL**

[I. L. R., 5 Calc., 228; 4 C. L. R., 77]

**78. ——— Gift to children on their attaining 21.**—Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of 21," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. In the case of words of contingency occurring in the description of the class of persons to take a mere gift over is not sufficient to change their meaning. **BALLIN v. BALLIN**

[I. L. R., 7 Calc., 218; 8 C. L. R., 28]

**79. ——— Period of distribution—Survivorship.**—A, a Hindu, made the following provisions by his will: "I have two sons living, *B* and *C*; they, and an infant son of my eldest son, the late *D*, and my wife *E* (four persons), shall succeed to the whole of my estate: these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share: if there be a daughter or granddaughter in the female line surviving, such survivor shall receive a share of the property; the expense of the marriage of such female child only shall be defrayed out of the estate," and also provided that, "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided." All the persons named survived the testator. *Held* that they took absolute interests in the shares named, and that the estate became divisible on the infant son of *D* attaining majority. **ELLOKASSEE DOSSEE v. DURPONABAIN BYSACK** . . . I. L. R., 5 Calc., 59

**80. ——— Vesting of estate in executor—Directions to executors, Effect of.** A testatrix, after appointing certain persons to be executors, of her will in respect of the whole of her property, directed that they should "take possession of the whole of her property, and keep the same under

## WILL—continued

## 9 CONSTRUCTION—continued

their protection," that they should pay out of her estate the charges of interment, etc. that they should repair four houses annually out of the income thereof, having let them out to hire, and after paying taxes and ground rent divide the proceeds every three months between the testatrix's two sons, that the executors should not give the rents to the creditor because the bequest of the income to the sons was "not an entire gift to them but a mere provision for their support. The will proceeded as follows: Should my son M happen to die before the decease of his wife then I give the share of M to his widow H M etc. and after the death of H M should my son M not have left any legitimate male child, then I give the above share to my son J etc. After the death of M (and his wife) should he have left legitimate male children such male children shall in the same manner receive the income once in every three months till they attain the age of 21 years, and then the amount of their share shall be divided into equal portions, and each of them having become the owner of his portion shall receive the same from my executors but if H M die before M and M be without having had legitimate male children then I give and bequeath the shares of my son M to my son J as a provision for his support etc. If my sons M and J die without having male issue and if their wives that is to say, H M and J die without having male issue begetten by my sons then I give my garden, etc. actually and entirely to the sons and daughter of my daughter G begetten by her first husband G A, that is to say, J M H and V or in case of their death to their sons and daughters lawfully begetten, or to such of them as shall survive at the time. My said garden shall be divided into equal shares, and each of them having received his share in equal proportion as a legacy from me shall enjoy the same." M and H M his wife, died without having left any children, J died in the lifetime of M A and one of the sons of G died without leaving children in the lifetime of H M. *Held* finally, that the direction to the executors to use the property indefinitely and out of the income to make repairs, pay taxes and ground-rent and apply the rent to the maintenance of the sons, was sufficient to vest the legal estate in the trustees. Secondly, that such estate was an estate in fee. Thirdly, that the children of G took equitable estates in remainder in fee, defeasible in case of their death in the lifetime of the first taker for life, in which event there was substituted a devise to their children in fee. Fourthly, that the children of G took as tenants in common, and not as joint tenants and therefore that as there was no dealing from which cross remainder between the children of G could be implied, the share of J reverted to the heir-at-law of the testatrix. Fifthly, that wherever any estate in fee is devised to a trustee in trust without any limitation of the estate of the trustee the latter takes the beneficial estate in fee. *SHIRKINS v. ADMINISTRATORS GENERAL*.

1 Ind. Jur., O. B., 60

81. —A testator, after providing for payment of debt  
Gift to children.

## WILL—continued

## 9 CONSTRUCTION—continued.

etc., directed that the whole of his property should be disposed of and the proceeds placed in the Oriental Bank with power to the executors to invest the same in mortgages, and to leave existing mortgages untouched. The will then contained this direction: "That a monthly stipend of £15 be paid to my daughter E S for her own benefit, and £20 for the benefit of E S for her two children (during their minority) and in the event of the demise of any of the said children occurring, the sum of £10 to cease rateably as being the allowance for each child, that on each of the children attaining their age of majority, I request that my executors pay to each of them severally and proportionably the full amount of interest accruing from my estate (the existing provision for my two daughters to continue during their natural life), and after their demise the said interest in like manner to revert to their heir or heirs in succession." *Held*, firstly, that a direction to pay a monthly stipend to E S and M D respectively was simply a charge upon the testator's estate to pay the said stipends to E S and M D for their respective lives. Secondly, that E S and M D were severally entitled during the lifetime and minority of their children to a monthly stipend of £10 in respect of each child, such payment to cease upon the death of each child or on its attaining majority, till which latter event the said children took no interest under the will. Thirdly, each child upon attaining its majority took a share of the residue, proportioned to the number of children then living, and a contingent proportionate interest in the shares of each of the other children which would become vested on the death of each one dying under twenty. Fourthly, the limitation of the gift "during their natural life and after their demise, the said interest in like manner to revert to their heir or heirs in succession," did not prevent the children from taking their several shares absolutely under the will. *Seibell*. The rule in *Weld's case* 6 Rep., 17, is not applicable to personally. *AGNEW v. MATTHEWS*.

[1 Ind. Jur., O. B., 74; 1 Med., 17]

## 82.

Gift over—No mention of time for the occurrence of specified uncertain event—Succession Act (X of 1865), s. 111, s. 112 (d) and (e), Application of—A testator by his will bequeathed to one K a legacy with the proviso that if "after the expiration of nine years from my death K should die without son or grandson, then M shall get his (K's) property." The uncertain event, namely, the death of K without son or grandson, did not happen before the expiry of nine years from the testator's death, that is, before the period of distribution. *Held* that where a will fixes the nearest limit of time beyond which the specified uncertain event is to happen, but does not fix either any definite point of time at which or any further limit of time within which that event is to happen, it does not amount to the mentioning of a time for the occurrence of that specified uncertain event. That s. 111 of the Succession Act lays down a hard and fast rule regulating the

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## 9. CONSTRUCTION—continued.

validity of certain classes of contingent bequests, which must be applied wherever applicable without speculating on the intention of the testator. *Noren; dra Nath Sirkar v. Kamalbhashini Dasi, I. L. R., 23 Calc., 563*, followed. That this case came under s. 111 of the Succession Act, and the gift over, that is, the legacy to *M*, could not take effect, as the specified uncertain event contemplated did not happen before the period of distribution, and that *K* took an absolute indefeasible estate in the legacy. *Edwards v. Edwards, 15 Bear., 357; Tagore v. Tagore, 18 W. R., 359; and Soorjee Money Dasse v. Denobundoo Mullick, 9 Moore's I. A., 123*, referred to. That the language of the wills. (*d*) and (*e*) does not control the hard and fast rule laid down by s. 111. *MONOHAR MUKERJEE v. KASISWAR MUKERJEE. MOHENDRO NATH MUKERJEE v. KASISWAR MUKERJEE. 3 C. W. N., 478*

83. ———— *Gift over on failure of prior devise.*—A testator made the following disposition by his will: "I appoint my brother *N* sole executor of my estate and effects after my decease, who shall pay all my debts and collect all outstanding. My wife is supposed to be in the family way; should she bring forth a male, in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed from my estate. I also wish that she should receive a legacy of a Government 4 per cent. promissory note for Rs. 2,000 on her attaining proper age. In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother. My wife is to receive a Government 4 per cent. promissory note for Rs. 1,000 as a legacy, and is to be maintained from my estate if she continues to live in our family dwelling-house under my brother's protection." The child with which the widow was *enroute* turned out to be a daughter. *Held* that the clause in italics was one purporting to give the property, and not only the management of it, to *N*, the power of management having already been given him in appointing him executor; that the provisions for maintenance of the widow, and for the marriage expenses of the daughter, tended to show (putting aside the legacies) that the widow and daughter were not to take the larger estate which they would have successively taken as heiresses, and that the wife of the testator having borne to him a son, and the apparent intention of the testator having been to give the estate to *N*, if the son did not take, or if the estate to the son failed by reason of his not attaining proper age, the gift over to *N*, on the principle laid down in *Jones v. Westcomb, 1 Eq. Cas., Abr., 245*, took effect on failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift. *OKHOYMONEX DASER v. NIVONEX MULLICK. I. L. R., 15 Calc., 282*

84. ———— *Vesting—Period of distribution—Gift of dividends.*—*S*, a Portuguese inhabitant of Bombay, by his will dated 19th

## WILL—continued.

## 9. CONSTRUCTION—continued.

March 1866, devised all his estate, real and personal, to his executors in trust to realize the same, and invest the proceeds thereof in the public funds, and directed as follows: "(1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attains the age of twenty-one years, when his or their share shall be paid unto him or them; (2) I desire further that whatever may be remaining, of the moneys collected by my executors, after all my sons shall have attained the age of twenty-one years, and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time; (3) in case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them." *Held* that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by such gift his share of the corpus became vested in each son when he attained that age. *Held* further that the provisions of the third clause, which related to the distribution, did not divest the shares so vested. Clear words must be used to divest an estate once vested. *Held* also that only such of the daughters as were surviving at the period of distribution specified in the second clause of the will were entitled to a share in the estate. *DE SOUZA v. Vaz*

[I. L. R., 12 Bom., 137]

85. ———— *Vesting—Postponement of enjoyment—Accumulation until the age of thirty.*—The testator by his will constituted his two disciples, *S* and *J* (aged eighteen and eleven years respectively), his heirs, "subject to the conditions written below," and he directed that out of the net income of his estate his trustees should expend Rs. 500 every year, for the maintenance of each disciple, or pay that amount to each disciple every year, and that when *J* should attain the age of thirty years, the trustees should give to *J* the net residue of his property remaining at that time, or, in the case of *J*'s decease, should give the same to *S*. *Held* that the property vested in *J* on the testator's death, but only for a life-estate. *Held* also (reversing the decision of *JARDINE, J.*) that the directions for postponement of enjoyment after the coming of age of the devisee must be disregarded, and that (subject to the payment of Rs. 500 a year to *S*) the income of the property (including all income accrued since his majority) must be paid to *J*, the respondent retaining the corpus until *J* should attain the age of thirty years. *Gosling v. Gosling, Johns, 265*, followed. *GOSAVI SHIVGAR DAYAGAR v. RIVETT-CARNAO*

[I. L. R., 13 Bom., 463]

86. ———— *Perpetuities, Rule against—Superstitious uses—Trust for masses—Executor, Assent of—Vesting of bequest.*—An Armenian died in Madras in 1836, leaving a will

## WILL—continued

## 9 CONSTRUCTION—continued

whereby also a portion of the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory, and she also bequeathed *inter alia* Rs 42,000 to her grand-daughter for life and provided that in the event of her marriage and having children she could bequeath to them the said Rs 42,000, but in the event of her dying with issue Rs 14,000 out of the said Rs 42,000 should be subtracted and given to her husband and the remaining Rs 28,000 should be added to the first mentioned bequest and the income thereof be annually given for masses. The executor with probate gave effect to the first-mentioned legacy. It is settled that in the event of the marriage of the grand-daughter the subject of the second legacy was settled as provided in the will except as to the Rs 14,000, as to which it was declared that in the event of her being without issue of the marriage and of the wife surviving the husband and dying without marriage again, should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement as also was the executor of the testatrix who as one of the trustees of the settlement. The marriage law in that place a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office and the trust funds paid to Court with the direction that interest accru thereon be paid to the wife until further order. The husband died without issue and subsequently in 1890 the wife died not having returned. The Administrator General of Madras took out letters of administration to administer the estate left unpaid master of the testatrix and the Rs 42,000 above referred to were paid over to him. *Held* by **SHEPHERD J.** that the sum of Rs 14,000 by reason of the settlement, but not otherwise fell into the residue of the estate of the testatrix. *Held* by **COLLINS C.J.** and **HANDLEY J.** affirming **SHEPHERD J.** (1) that the sum of Rs 28,000 formed unadministered assets of the estate of the testatrix (2) that the bequest for masses was void as being in the rule against perpetuity. **COLGAN v. ADMINISTRATOR GENERAL OF MADRAS**

[I. L. R., 15 Mad., 424]

## WILL—continued

## 9 CONSTRUCTION—continued.

Fund and directed "that such trust fund shall never be removed from deposit in the said Bank of Madras at Madras so long as that Bank shall exist," and "that The Garratt Trust Fund shall be a continuing fund to all time," and that the interest therefrom should be enjoyed by certain legatees and "the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another in accordance with all legal rights." — *Held* that there was nothing illegal about the creation of this fund, except the direction that the securities representing it should never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid, but that this did not prevent the intention of the testator to create and endow the fund from being carried out, and that the legatees took an absolute interest. The testator bequeathed to my grand-children by my said late daughter E. W., also to my grandson F. W. M. and to his step-brother G. W. M. in equal shares a certain fund. *Held* that this was a bequest to the testator's grandchildren by his late daughter E. W. put as a class, but to them individually as *persona designata*. *Held* also that, under the terms of the will, the testator's said grandchildren by the late E. W. and F. W. M. and G. W. M. took vested interests in their respective shares in the said fund from the death of the testator, that the gift to them of "the benefit interest and profit" of the fund was a gift of the corpus of the fund by virtue of a 15th of the Indian Succession Act that they took as tenants-in-common not as joint tenants and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of F. W. M. in connection with his going to and returning from England the executor was not authorized to apply towards those purposes, more than F. W. M.'s one-ninth share in the said fund as it was not the intention of the testator to give F. W. M. a benefit out of that fund over and above that share and that the executor in making disbursements for the purposes specified was only empowered to trench upon the principal of that share if the income as applied under the power of disbursement for F. W. M.'s support and maintenance in England were not sufficient. *Held* also that under the terms of the devise in the third and fourth clauses of the will of a certain house and premises to F. W. M. the devise took on the testator's death a vested interest in that property liable to be devolved in the event of his dying under the age of twenty-one years. *Held* also that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator's late daughter E. W. (who was dead at the date of the will) there was an absolute gift to the children of E. W. of the testator's whole interest in that property and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grandchild attained the age of eighteen years, which must be regarded

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## Succession Act

(X of 1865) ss. 65, 100, 109—Trust fund to be called after testator's name—Perpetuity as Rule against Creation of fund and dispositions except directions for making it a perpetuity. *Held* that the *Persona designata*, Bequest to persons as—Testamentary Tenancy—Joint tenancy—Adornment out of my wife's share for a benefit lower than vested interest, liable to be devolved by conveyance subsequent—Fiduciary trust—Express as to objects of bequest—Failure of legacy—Charitable as residuary bequest—Where by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will of a fund to be called after the testator's name, the "Garratt Trust

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## 9. CONSTRUCTION—continued.

merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect; and that the children of *E W* who were living at the testator's death did not take as joint tenants, but took as *personæ designatæ*, each an equal share in the property, which vested in them on the death of the testator, and therefore the share of one of them, *E G W*, who had survived the testator, but died subsequently, having vested in *E G W*, passed to *E G W*'s representative, the ninth defendant. In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of Rs500 to "disburse various petty pensions to some poor people who have been mentioned to him" (the executor and trustee) "by me." *Held* that there was a deficiency on the face of the will as to the objects of this bequest, and by s. 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue. *Held* also that the bequest in the seventeenth clause of the will of Rs10,000 to the support of the testator's Temperance and Reading Rooms for European pensioners and the Poor Widows' Quarters attached thereto, being a bequest to charitable uses, was void under s. 105 of the Indian Succession Act, as the testator had nearer relatives than nephews, and the will was executed less than twelve months before his death. *ADMINISTRATOR-GENERAL OF MADRAS v. MONEY*

[I. L. R., 15 Mad., 448]

88. ——— Joint tenancy—*Intention of testator—Restricted enjoyment, Direction as to.*—A testator devised his estate should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that, should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stirpes*; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage, and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held* that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift. *HALIBURTON v. ADMINISTRATOR-GENERAL OF BENGAL* . I. L. R., 21 Cal., 488

WILL—continued.

## 9. CONSTRUCTION—continued.

89. ——— *Duress—Forfeiture—Condition of residence.*—A testator by his will directed that if any of the female members of his family, either from misunderstanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother. *Held* that under the circumstances the plaintiff's absence did not work a forfeiture. *Clavering v. Ellison*, 7 H. L. Cas., 707, referred to. *TIN COUHI DASSEE v. KRISHNA BHADINI* . I. L. R., 20 Cal., 15

## 90.

## Vested interest

— *Conditions repugnant—Condition restricting immediate enjoyment—Commission allowed to trustees, Calculation of.*—Where a testator who died in 1896 bequeathed the whole of his property, with the execution of an annuity to his wife of £250 per annum and some other specific legacies, to his only son, who had attained majority at the date of his father's death, but subject to the restriction that he should not be allowed to enjoy it until the end of the year 1900, and appointed two trustees to carry out his wishes,—*Held* that the son took an immediate vested interest in the estate of the testator. *Held* also that the condition restricting immediate enjoyment was a condition repugnant and was invalid. *Gosling v. Gosling, John*, 265; *Weatherall v. Thornburgh*, L. R., 8 Ch. Div., 261, followed. Where commission is allowed to trustees annually, such commission should be calculated on the income of the estate, and not on the corpus. *LLOYD v. WEBB*

[I. L. R., 24 Cal., 44]

91. ——— Absolute gift—*Repugnant gift over—Indefiniteness of gift—Reputed wife—Marriage, Proof of.*—On the construction of a will which was as follows: "I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all moneys that may accrue until her death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras." *Held* (1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage; (2) that the gift to the wife was absolute and the gift over bad for repugnancy. *ADMINISTRATOR-GENERAL OF MADRAS v. WHITE* . I. L. R., 13 Mad., 379

## 92.

## Restriction on

*legatees—Enjoyment—Residuary estate.*—Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails, and does not fall into the residue of the testator's estate. Therefore, where a testator

WILL—cont. sued

## 9 CONSTRUCTION—continued

gave legacies to certain of his grandsons and granddaughters but neverth less declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income arising therefrom to the maintenance of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime and after his death to pay such income unto the widow of such grandson and after the death of both of them to transfer the capital unto the child or children of such grandson as he or she, a son or sons should attain the age of 21 years, or being a daughter should attain that age or marry in equal shares as tenants in common and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other grandchildren.—*Held* that the gift to the grandsons were absolute and that the subsequent provisions were simply a qualification of the gift for the benefit of the legatees and that therefore, upon the death of one of the grandsons unmarried his legal representative was entitled to the legacy left to him.

ADMINISTRATOR GENERAL OF BENGAL v. APCAN

[L. L. R. 3 Cal. 553]

93 —

Proviso for cessor—*Considered*

*from C and J. m. m. Breach of condition—P. C. T. A Hindu died living an only son G. M. T. and having first made his will in the English form whereby after declaring that he had already made sufficient provision for his son G. M. T. and that G. M. T. was to take nothing under the will he gave all his property to trustees, upon trust, as to the personal estate "to collect and get in the same with certain specified exceptions, and thereon to pay his funeral expenses and debts, and such legacies as were not by the will postponed in payment" and to invest the residue and out of the annual proceeds of such investments, so far as the same would extend, to pay certain annuities and postponed legacies as they became due and to pay such surplus income as might from time to time exist to the person entitled to the beneficial enjoyment of the real property or the surplus rents or profits thereof with an ultimate trust, after all the legacies and annuities had been satisfied, for the person or persons entitled to the beneficial enjoyment of the real property. And as to the realty upon trust, until all the debt and legacies had been paid, and all the annuities had fallen in to receive the rents, and thereafter in the first instance to pay the unpaid legacies and annuities, and to pay the surplus rents to the person or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And as a first charge on the net income of the real property (after deducting the expenses of establishments) the testator directed the trustees to pay Rs 3000 or annuity to the person for the time being, entitled to the beneficial enjoyment of the real property or the surplus income thereof. He further directed that after all the annuities and legacies had fallen in and been satisfied, to convey the real estate so far as the then condition of circumstances would permit, unto and*

WILL—cont. sued

## 9 CONSTRUCTION—cont. sued

to the use of the person entitled, under the limitations contained in the will to the beneficial interest therein. The first limitation was to J. M. T. for life. At the end of the limitations of the real estate the will contained the following proviso: "Provided always and I hereby declare if any devise, or tenant-for-life shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof to be sold for arrears of Government revenue or shall after a tax, his majority cease to keep up in a due state of repair and to use as his residence in Calcutta, the said bathshahana house and premises where I now reside, and make use of and enjoy my library, books, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates etc., in my use or possession, then and immediately thereupon the devise and limitations in this will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed," as if the person committing a breach of such conditions had then died. The testator died in August 1858. In December 1863 his son G. M. T. instituted a suit for the purpose of arrears, and asking as to the trusts and limitations of the will, except so far as they were for payment of debts, legacies and annuities. This suit was dismissed on the 15 of April 1860. G. M. T. appealed, and on the 1st September 1860 the Appeal Court declared him to be absolutely entitled to the personally subject to the trusts for payment of debts, legacies, and annuities and until the death of the defendant J. M. T. the tenant-for-life, to the reversionary J. M. T. and heirs, claiming under the limitations in the will appealed to the Privy Council and G. M. T. filed a cross-appeal in which he claimed that the gift of the life-estate to J. M. T. ought to be declared void. By the order of Her Majesty in Council, which was dated the 9th August 1862 and which arrived in Calcutta on the 1st September 1862 all the limitations after the limitation to J. M. T. were declared void and inoperative and I was further declared that J. M. T. was beneficially entitled to a life-interest in the realty and also in the personally directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made and so the provisions of the will not thereby declared to be void; and also that the legacies and annuities fell in and were satisfied, to Rs 2,500 a month out of the net rents of the realty and also to the surplus rents of the same and the surplus interest of the personally; and that, upon the failure or determination of J. M. T.'s life-interest G. M. T. was entitled as heir-at-law to the real and personal property. The proviso for cessor was not among the provisions of the will which were declared void. J. M. T. was one of the trustees under the will. After the testator's death, the business of the estate continued, as theretofore, to be carried on in a portion of the bathshahana house and J. M. T. who had a family dwelling-house of his own, used, up to November 1863 to attend at the bathshahana daily for the transaction of business.



## WILL—continued.

## 9. CONSTRUCTION—continued.

In November 1869 *J M T* quarrelled with his co-trustees, and ceased to go to the baithakhana. In April 1870 he demanded from the other trustees that possession of the baithakhana should be given to him, and upon their insisting on the right to occupy the portion of the baithakhana used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favour. The trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession; and the trustees were ordered to deliver to him possession of the baithakhana, except the portion of the ground-floor occupied for the business of the estate. After obtaining his decree, *J M T* found that the baithakhana was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J M T*, in December 1871, brought a suit to compel them to effect necessary repairs; the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun, which were completed in October 1872. In a suit by *G M T* alleging that *J M T* had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the baithakhana house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage,—*Held* that the clause containing the provisions for cesser and shifting of the estate was intended to come into operation as a whole and not piecemeal, and therefore that, until *J M T* came into full beneficial enjoyment of the life-estate given him by the will, or at all events until he became entitled to the surplus rents, the time had not arrived when that clause was intended to apply. *Held* further that, assuming that such time had arrived, the action of the plaintiff, in contesting the right of *J M T*, under the will, to occupy the baithakhana house and premises, debarred him from claiming that effect should be given to the clause of forfeiture for non-residence. Even apart from any action by the plaintiff, the conduct of the trustees in disputing the right of *J M T* to possession of a portion of the baithakhana house, and refusing to repair, would suspend the operation of the forfeiture clause until October 1872, inasmuch as it prevented him until that time from obtaining such a possession as was contemplated by the forfeiture clause. The forfeiture clause was not brought into operation by the judgment and order of the Judicial Committee of 9th August 1872. *Held* on the evidence that *J M T* had complied with the conditions as to residence. *GANENDRO MOHUN TAGORE v. JUTTENDRO MOHUN TAGORE* 12 B. L. R., 1

On appeal to the Privy Council,—*Held* that, as the clause provided for the cesser and determination of the life-interest of *J M T* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened.

## WILL—continued.

## 9. CONSTRUCTION—continued.

*Held* that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J M T*'s estate perfected by a conveyance. But held on the evidence that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable. Where, in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition, exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence is a sufficient compliance with the condition. *GANENDRO MOHUN TAGORE v. JUTTENDRO MOHUN TAGORE*

[14 B. L. R., 60; 22 W. R., 377  
L. R., 1 I. A., 387]

## 94. ——— Power of appointment—

*Execution of power—Marriage settlement.*—A testator, after giving certain specific bequests, disposed of his property as follows: "I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows: First, to my dear son *A* two shares; to my two dear daughters, *B* and *C*, each one share; the interest to be paid to them quarterly or half-yearly as may be most convenient. Second, I request that these shares shall not be transferable during their lifetime. Third, at the demise of any of my children without issue, any such share to be divided in the above proportion to the survivors. Fourth, in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions." *C* married in 1874, and, by a settlement made in consideration of the marriage, her share was assumed to be assigned to trustees upon certain trusts. In 1875 *C* and her husband made the following joint will: "We do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." *C* died shortly after the execution of the above will, leaving one child. In a suit by *C*'s husband and the trustees of the settlement of 1874 for the administration of the testator's estate and for the construction of his will,—*Held* that the settlement of 1874 could not operate upon *C*'s share in consequence of the direction of the testator, that it should not be transferred in the lifetime of *C*, and that the plaintiffs took nothing under the settlement. *Held* also that the power of appointment given by the will of the testator had not been properly exercised by the joint will, and that the child of *C* took the whole of her mother's share. *FRILSEN v. SIMPSON*

[I. L. R., 4 Cal., 514]

## 95. ———

*Gift of income for life with power to appoint—Invalid power of appointment—Gift over in default of appointment—Gift of residue equally between two sons and then to next-of-kin.*—A Parsi by his will devised a certain house to his executors on trust after payment of repairs, etc., out of the income thereof to pay the



WILL—continued.

## 9. CONSTRUCTION—continued.

possession of his or her share when they shall respectively attain the age of 25 years; and whenever either of my daughters shall enter into the holy state of matrimony, I request that a proper settlement may be made upon her and her children, and in the event of either of my children departing this life without leaving husband, wife, or lineal descendants, or her share shall be divided equally amongst our other children or their lawful issue; but on no account shall any division of the principal of my estate take place till after the death of their mother. *Held* (reversing the decision of *PHEAR, J.*) that after the mother's death, each child took a vested interest on attaining the age of 25 years,—that is, at the time when possession is to be given,—and not an interest subject to be divested in the event of the child dying without husband, wife, or lawful issue. *TAYLOR v. PHILLOTT. PHILLOTT v. MORRIS* 1 Ind. Jur., N. S., 375

100.

— *Divesting clause*  
— *Gift over on legatee's death "prior to decision" of the estate—Gift not void for uncertainty—Act X of 1865 (Succession Act), ss. 75, 91, 106.*—A testator directed his trustees and executors to hold his real and personal estate upon trust, to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of 21 years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his lifetime, or at any time thereafter "prior to the said division," leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of 21 years at the testator's death died five months after him, before payment of the legacy, and left lawful issue. *Held* that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allotable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favour of the legatee's issue was not void for uncertainty, but took effect. *Johnson v. Crook, L. R., 12 Ch. D., 639; Collison v. Barber, L. R., 12 Ch. D., 834; Bubb v. Padwick, L. R., 13 Ch. D., 517. Chaston v. Seago, L. R., 18 Ch. D., 215; Spencer v. Duckworth, L. R., 18 Ch. D., 634, referred to. BACHMAN v. BACHMAN [L. R., 8 All., 583*

WILL—continued.

## 9. CONSTRUCTION—continued.

of the Court as to whether *S M* took a vested interest in the sum of R6325 under the following clause of will: "I paid to the M O Society R6,000 for *S M*, and invested R6,826 the interest on which I directed to be paid to the mother of *S M*. Now I direct my trustees after the death of the mother of *S M*, to realize the latter sum and pay it to the M O Society, for *S M*, in terms of the regulations of the Society." *Held* that the bequest was *prima facie* for the benefit of the daughter. That having regard to the regulations of the M O Society, the bequest was a gift for the benefit of the Society generally. That if the will had given the mother the interest for life, instead of saving it had been given, it would have vested. That the interest vested in *S M* at once, and formed part of her estate. *IN THE MATTER OF THE GOODS OF COLLINS*

[Bourke, O. C., 104

102.

— *Gift of life interest or corpus—Discretion of executors to hand over corpus—Costs.*—*C.*, a Portuguese inhabitant of Bombay, died in April 1884, leaving three sons, *M, S,* and *J* (defendant No. 3), and two daughters, *R* and *C*. By her will she directed that her daughter *R* should enjoy the rents and profits of certain immovable property for her life, and that after her death the said property should be sold, and the sale-proceeds (after payment of two legacies thereout) be divided equally between her two sons *S* and *J*. The seventh clause of the will was as follows: "7. I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (c) of paragraph 6 above should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and take off all his evil tendencies, and lead a steady, quiet, and orderly life, or should he, on account of illness or other reasonable cause, be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above or such part or parts thereof as to my executors may appear proper." *S* died in 1885, unmarried and intestate, leaving his two brothers, *M* and *J*, and his two sisters, *R* and *C*, him surviving. *M* died in 1889, leaving a widow and children. In 1891 *J* mortgaged all his interest under the said will to the plaintiffs to secure a loan of R16,100. In 1893 *R* died, and in 1894 *C* died. Subsequently the executors were proceeding to sell the property mentioned in the will when the plaintiffs filed this suit praying for a declaration that they had a valid charge upon *J*'s interest therein, and that his interest should be ascertained and declared, and he himself ordered to pay the amount of their claim; that the property should be sold and their claim paid out of the funds; that

101.

— *Bequest to orphan in Military Orphan Asylum—Direction to trustees.*—A special case was stated for the opinion

## WILL—cont used

## o CONSTRUCTION—cont used

the executors should be restrained from selling save subject to the right of the plaintiffs, etc. The plaintiffs and J contended that he (J) in the event that had happened, was entitled to the whole of the proceeds of the property and that the gift in the sixth clause of the will could not be cut down by the provisions of the sixth clause. *Held* (1) that the defendant J had no right in the house mentioned in the will. He was only entitled to a share of the proceeds of it had been sold. (2) That his interest in the share of the proceeds was merely a usufruct with power to appoint to his widow or issue and that he was entitled to be paid the corpus of such share out of the executors in his under certain circumstances as to their execution had over to him the said corpus. (3) That neither the plaintiffs nor J could interfere in the sale of the said property. (4) That the plaintiffs had a valid charge upon J's real estate and proceeds of the said property to the extent of their mortgage. (5) That J's test was after deducting the legacies mentioned by the will was an absolute interest in one-fourth share of the property and a life interest in his (J's) moiety in the contingency of the executors not having paid up over the corpus of the share paid over for his estate in law which was the plaintiff's had the right to the same so far as the will was concerned. (6) As to costs the plaintiffs and J should pay the own costs but the executors and defendants Nos. 4 to 12 should have their costs paid out of J's share in the moiety of the said estate and if that fund were not sufficient to pay the costs of the plaintiffs and the third defendant J's costs should be paid by the executors. *BIRCHAM AKA v. DE CARZ*

L. L. R., 19 Bom., 221

The same case on appeal, confirming the decree of the lower court, that under the above clause of the will there was a gift to the widow of J but that J was to have the power of designating how they were to take. To that extent the gift to J was qualified. Should the gift ever fail, the absolute gift to J would remain unimpaired. He was to take the costs (varying, the decree of the Court being) that the executor's costs, taxed as between attorney and client, be paid out of the estate as well as the costs of the defendants 4 to 12. Plaintiffs and J to pay their own costs respectively: plaintiffs to be a liberty to add their costs to their mortgage security. In other respects the decree of the lower Court to be affirmed with the costs of all parties, 4 to 12 whose costs may be added to the costs of the Court below. *BIRCHAM AKA v. DE CARZ*

L. L. R., 19 Bom., 770

103. *Request to executor and trustees after son of testator and a widow—Life interest in fee—Control and management of executor and trustees—A Hindu by his will bequeathed certain property to his executors and trustees upon trust for my son T and his heirs from the time of my death to allow him to occupy and use the same and to enjoy the income thereof, and after the death of my son T in trust to allow his widow to occupy and use the same and*

## WILL—continued.

## o CONSTRUCTION—continued

enjoy the income during her life; but if she died without leaving male issue him survive, then in trust after the death of the survivor of them without leaving such male issue to my son T and his heirs according to the rules of Hindu law." The sons T and P both survived the testator and P had a wife and three sons living at the time of his death. In a suit by the executors and trustees against T for construction of the will, T contended that under the above clause he was absolutely entitled to the property subject to the interest of his widow for her life. The plaintiffs contended that T had only a life interest in the property. *Held* that the defendant T took only an interest for life in the property. The words "in trust for T and his heirs, which, namely, none would give the property in fee were to be read with the words immediately following, which showed a clear intention that T should only take a life interest, to be followed by the same interest in his widow after whom the heirs of T would take as purchasers. *Held* also that the trustees were intended to take the legal estate and to have the control of the property allowing T to enjoy the income of it. *MAHARAJA TRINOVANDAS MANWALDAS*

[L. L. R., 19 Bom., 401]

104.

*Request to executor and trustees after son of testator and a widow—Interest taken under such bequest—Died in 1891 leaving a widow (defendant No. 1) and two sons, P and D (defendants Nos. 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom his widow was one) in trust to pay the rents and income thereof to his widow for life "she thereat maintain education and dress up" his children in a manner suitable to their rank in life. After his death the property was divided into two parts, one of which was to be divided among his sons equally when D should attain the age of twenty-five. He attained his majority in October 1894. At the date of suit D was eight years old and P was five years old. It was contended that the widow was only a trustee of the rents for the benefit of her sons P and D. *Held* that under the will the widow took a life interest in the rents subject to the education of maintaining education and bringing up the children. The only two surviving children (P and D) having attained majority and having received property under the will of an uncle, were now no longer in need of being maintained by the widow. The obligation imposed upon her therefore by her husband's will was discharged and she was now entitled to a life interest free from all further obligation to maintain his children. *SATRA KENNA v. DURGALAL**

[L. L. R., 23 Bom., 1]

105.

*Trust—Creation of trust—Certainly—A Hindu by a will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions: "You should be my brothers, their wives and children, according to your wishes." *Held* that no trust was created by these words. *KUMARASAMI v. SUBBARAYA**

I. L. R., 9 Mad., 325

WILL—continued.

## 9. CONSTRUCTION—continued.

106. ————— *Validity of trust*

—*Direction as to debt due from attesting witness.*—Where a testator directed that a debt due to him by an attesting witness of his will should not be claimed, demanded, or enforced, but that his wish was that the sum should be specially devoted to the education of the children of such attesting witness,—*Held* that there was no release of the debt or legacy to the attesting witness, but a valid trust in favour of the children. *ADMINISTRATOR GENERAL v. LAZAR*

[I. L. R., 4 Mad., 244]

107. ————— *Precatory trust.*

—*W R*, by his will, made the following gift to his wife, *M A R*: "I give to my dearly beloved wife the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her." *M A R*, by her will, left to their children certain portions of such property, leaving to their child *A C R*, amongst other things, certain banking shares. These shares were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held* by the High Court that she took under her husband's will a life interest only in his property with a power of appointment in favour of the children, and that the shares belonged to *A C R*, and could not be sold in execution of the decree as part of the estate of *M A R*. *RAYNOR v. MUSSOORIE BANK*

[I. L. R., 2 All., 55]

*Held* by the Privy Council, reversing the decision of the High Court, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created. In order to create a precatory trust, the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain. *MUSSOORIE BANK v. RAYNOR*

[I. L. R., 4 All., 500; L. R., 9 I. A., 70]

108. ————— *Expression of wish—Bequest.*

—A testatrix, entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that, after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S K*, whom she made her principal legatee: "I direct *S K*, under this will, to pay every month R614-7-1 (being one third of R1,938-5-4, my monthly pay allowed by the Government for notes, which are deposited) to my dependants and personal servants, as detailed below.

..... Be it known that the expenses of the inambarna, etc., will be continued for ever; and also the pay of *G K* and *M A* will be defrayed for ever, i.e., generation after generation. The rest of the servants will be paid for life only." *Held* that these words constituted a bequest, and were not merely the expression of a wish. Also that the bequest was not one of legacies payable out of a specified sum and no other; the statement that the monthly payments to be made amounted to one-third of the sum received monthly by the testatrix not

WILL—continued.

## 9. CONSTRUCTION—continued.

limiting the source of the legacies. *SULEMAN KADR v. DORAB ALI KHAN*

[I. L. R., 8 Cal., 1; L. R., 8 I. A., 117]

109. ————— *Will confirming trust-deed*

—*Construction of deed—Forfeiture.*—*S*, being desirous of securing and settling his property, executed a deed of trust whereby he conveyed and assigned all his real and personal property unto trustees, upon (among others) the following trusts: that immediately after his death the trustees should convey, assign, transfer, and make over all the premises mentioned in the deed unto such person or persons as *S* should, by his last will, attested by two witnesses, direct and appoint, and in default of such direction and appointment, unto the next heirs of *S*, their heirs and assigns, for ever, and in the meantime to pay the Government revenue out of the rents and profits of the real property, and employ the residue and accumulations as well as the produce and accumulations of the personal property "in such a manner as may procure the daily worship of the household idols" mentioned in the deed, and pay what they considered a fair and proper sum to the wives and family of *S* living at his death and residing in the family dwelling-house. By his will, dated the same day as the deed, *S* declared that he ratified and confirmed the deed, subject to such provisions as were contained in his will, which were that the trustees should not charge the fund for the maintenance of those who should not live in the family dwelling-house and for the appointment of new trustees. *Held*, first, upon the authority of *Wilson v. Pigott*, 2 Ves. Jun., that the powers of the trustees (under the deed) did not cease on the death of *S*, and that the directions in the will, although not strictly within the words, amounted to a good appointment in equity, so that instead of the trustees of the deed conveying the property on the death of *S* to his son, they should contrive to hold subject to the trusts of the deed as modified by the will. Secondly, that the words "in such a manner as may procure the daily worship," etc., meant in such manner as shall be sufficient to procure the daily worship, etc., and that the trustees were not authorized to apply such portion of the trust funds as they in their discretion might think fit, but only such portion as was reasonably sufficient for those purposes. General debts and liabilities are not charges against property forfeited upon conviction of felony. *HUNTER v. ROSENBERG v. HOGG* 1 Ind. Jur., O. S., 86

110. ————— *Gift of residue to a class—*

—*Postponement of period of distribution—Vested interests—Succession Act, ss. 98, 101, 102.*—A testator gave his residuary estate to trustees upon trust to invest and "to pay, transfer, or divide the same unto, between, or among the children of my brothers *A* and *B* respectively, to be paid, transferred to, and divided among, them in the proportions and at the times hereinafter mentioned, that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the share of each daughter to be paid to

**WILLS—concluded.****9 CONSTRUCTION—concluded**

her or them on her or the r r spect vely attaining that age or pre ously marry ng w th ben fit f sur vivor sh p betw en and among all the said sons and daughters. "The testator I f l l m sur v n h s two b o th r s and a sater C A and B both d ied before th e d d of the testator's nephews or nieces at a good 21 or married. I s ent i s t otel by the w dow and executrix of A to have t d clared that the above bequests w re vo l under ss. 101 a d O f the w re ss on Act and th t s tator d J nt state as to th e s s e of his estate and that she as executrix of A was entitled to rec ve a med i d share f the said estate and the accumulation thereof. He d that the legatee s to k vested interests subject to be d vested death before the cut ng n r s me t o ed w th l l happened that the period f d iat on on akue was postponed and that the bequest s were val d. *Demble v B of the success n Act* ppl s only to v sted sta. *MABETK v JEWESBY* [L L R. 4 Calc., 304]

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period of s bu on After l s p nement of —Lop ed bequ s s s s on d c s 98. A testator ga e h s res luary estate to trustees upon trust to invest and o pay transfer or d lide the same unto, be wren or amon the children of my brothers A and B r spect v ly to be pa d transferred to, and d v d amo g them n the proportions and at the times here natter ment on ed, that s to say the share of each and every son of my as d two brothers shall be don le that of each and every daught r and the shares of each son shall be pa d to him or them respectively upon h s or their attai n, the age of 21 years, and the shar s of each daughter to be pa d to her or them on h r o th r respect vely attain ng that age or pre ously narry ng w th ben fit of survivor shup between and among all the said sons and daughters. After the death of the t stator and before the period of distribut on arri ed a son was born to B and one of the sons of s died intes ate and unmarried. Held that the after born son of B was ent led to a double prt on as one of the male children of the testator's broth r and that the share of the son of A was d i ble a son, the surv ng male and female ch ld en n equal shares. *MABETK v JEWESBY* [L L R. 4 Calc., 304]

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Residuary estate of moveable and immoveable property *Class to age and are at re and trustees* If a testator appoints persons to be h s ex cutors and trustees, and directs them to do certa n a s which can only be done by the owne s of h s residuary estate the trustees w ll take that estate th ough there be no express de vice to th m. *THE POORASOONDY DOSSER v DEENDRONATH TAGORE* [L L R. 2 Calc., 45]

**WILLS ACT (XXV OF 1838).**

s. 3 Appl cat on of Act East Ind ass dom r d out of the jur d tson of H gh C vrt The W lls Act, XXV of 18 8 applied to the W lls of East Indians, whether dom r d within or

**WILLS ACT (XXV OF 1838)—concluded**

beyond the testamentary jurisd ction of the High Court. *HOGG v GREENWAY* 2 Hyde 3

Held on appeal the W lls Act only appl d where the H gh Court had an exclus ve jurisd ct n andalous to that of the Ecclesiastical Court in E land It d d not apply in the case of a person who was not ent led by b rth or dom c ls to have app d to him the actual law of E nland Therefore it d d not apply to the case of an East Ind n t tator (the illegitimate daughter of a Mahomedan woman) who resid d and died oute in the limits of the ord nary civil jurisd ct n f the Court. *GREENWAY v HOGG* *HOGG v GREENWAY* [Bourke, A O C., 111 Cor., 97]

**WINDOWS OR DOORS.****Shut to close—**

See CASES UNDER JURISDICTION OF CIVIL COURT—PRIVACY INVASION OF

See RIGHT OF CIT—PRIVACY

[L L R., 18 Mad 163]

See TRESPASS—GENERAL CASES

[3 R L R., A C., 11]

**WITHDRAWAL OF APPEAL.**

See APPEAL—OBJECTIONS BY RESPONDENT. [L L R., 17 All, 518]

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT [I L R., 15 Boul, 30]

See PAUPER SUIT—APPEALS

[L L R., 18 Boul., 464]

**WITHDRAWAL OF APPLICATION FOR EXECUTION**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT [L L R., 12 All, 179 339]  
I L R., 17 All, 108  
L R 23 L A., 44  
I L R., 18 Calc., 462, 515 630  
I L R., 15 Mad., 340

See LIMITATION ACT ART 1 2 SIZE X AID OF EXECUTION [I L R., 23 Calc. 617]

**WITHDRAWAL OF CRIMINAL PROCEEDINGS.**

See MAGISTRATE, JURISDICTION OF—WITHDRAWAL OF CASES

See POSSESSION ORDER OF CRIMINAL COURT AS TO—TRANSFER OR WITHDRAWAL OF PROCEEDINGS. [L L R., 23 Calc 898]

## WITHDRAWAL OF SUIT.

See APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—PLAINT.

[I. L. R., 9 All., 191  
L. R., 13 I. A., 134

See APPELLATE COURT—OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—WITHDRAWAL OF SUIT.

[L. R., 3 All., 528

See COMPROMISE—REMEDY ON NON-PERFORMANCE OF COMPROMISE.

[Agra, F. B., 1

See DEKKAN AGRICULTURISTS' RELIEF ACT, s. 53 . I. L. R., 12 Bom., 684

See DIVORCE ACT, s. 35.

[9 B. L. R., Ap., 6  
I. L. R., 25 Calc., 222

See MULTIFARIOUSNESS.

[I. L. R., 16 All., 279

See PRACTICE—CIVIL CASES—AFFIDAVITS.

[3 Bom., O. C., 55

See PRACTICE—CIVIL CASES—WITHDRAWAL OF SUITS OR APPEALS Cor., 67

[I. L. R., 7 Bom., 287

See RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM.

[I. L. R., 1 All., 324  
I. L. R., 10 Mad., 180  
I. L. R., 17 All., 53

See RES JUDICATA—RELIEF NOT GRANTED.

[I. L. R., 21 Calc., 265

## Order allowing—

See APPEAL—DECREES.

[I. L. R., 8 All., 82  
I. L. R., 18 Calc., 322  
I. L. R., 15 All., 169  
I. L. R., 16 All., 19  
I. L. R., 17 All., 97

See APPEAL—ORDERS.

[I. L. R., 6 All., 211

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, s. 622.

[I. L. R., 11 Mad., 322  
I. L. R., 15 All., 169

## Power to allow—

See SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—REFERENCE TO HIGH COURT.

[I. L. R., 24 Calc., 129

It was formerly held in some cases that the power to allow withdrawal of suits given by the Civil Procedure Code (s. 97 of Act VIII of 1859) was not applicable to suits under the Rent Act, 1859.

DOYAL CHUNDER GHOSE v. DWARKANATH MISHRA  
[Marsh., 148: W. R. F. B., 47  
1 Ind. Jur., O. S., 41: 1 Hay, 347

MODHOO SOODUN MELICK v. PANCH COWREK  
MELICK . . . . . 7 W. R., 302

## WITHDRAWAL OF SUIT—continued.

BEER CHUNDER JOBRAJ v. TARINEE CHURN ROY  
[11 W. R., 46

RAMANATH DUTT v. JOYKISHEN MOOKERJEE  
[11 W. R., 3

In other cases rent suits were held not to be excluded. RAM CHARAN BYSAK v. HARVEY  
[2 B. L. R., S. N., 11: 10 W. R., 373

WOOMANATH ROY CHOWDHRY v. SREENATH SING . . . . . 15 W. R., 260

Since the Bengal Rent Act, 1869, however, the procedure in rent suits has been, and is now, the same as in any other suits.

1. ——— Sanction for fresh suit—Act VIII of 1859, s. 97.—Civil Courts had no power to sanction the bringing of a fresh suit, except under s. 97, Act VIII of 1859. ARGOON SINGH v. HUREE HUB SINGH . . . . . 14 W. R., 472

ANUND MOHUN PAUL CHOWDHRY v. RAM KISHEN PAUL CHOWDHRY GORIND CHUNDER PAUL CHOWDHRY v. RAMKISHEN PAUL CHOWDHRY  
[2 W. R., 297

2. ——— Leave to one of several co-plaintiffs to withdraw—Consent of co-plaintiff—Civil Procedure Code, 1877, s. 373.—The proviso in the third clause of s. 373 of the Code of Civil Procedure does not deprive the Court of power to permit one of several co-plaintiffs to withdraw unconditionally from a suit, even though his co-plaintiffs do not consent to his withdrawal. MOHAMAYA CHOWDHRAIN v. DURGA CHURN SHAHA  
[9 C. L. R., 332

3. ——— Withdrawal with consent of defendant—Civil Procedure Code, 1859, s. 97—Right to bring fresh suit.—A plaintiff filed a plaint for an account to be taken. The plaintiff withdrew the plaint, without the permission of the Court to withdraw from the suit, with liberty to bring a fresh suit. This was done for the purpose of a submission to arbitration under a deed mutually executed between the plaintiff and defendant. The deed was not acted upon. Held, reversing the decision of MACPHERSON, J., that the plaintiff was not debarred by s. 97 of Act VIII of 1859 from bringing a fresh suit to establish the agreement for reference to arbitration, and also for the account, which was a relief to which he was entitled. The section only applied to cases where the plaintiff withdraws from the suit without the consent of the defendant. JUGGUBUNDO CHATTERJEE v. WATSON & Co.  
[Bourke, A. O. C., 162

S. C. in Court below . . . Bourke, O. C., 250

4. ——— Withdrawal of claim under s. 230, Act VIII of 1859—Right to bring subsequent suit.—In a suit to recover the possession of land of which the plaintiff had been dispossessed in execution of a decree against the first defendant, it appeared that the plaintiff had applied within one month from the date of his dispossession to the Court from which the process of execution had issued under s. 230 of the Code of Civil Procedure, sitting up his title, and it was numbered and registered as a suit

**WITHDRAWAL OF SUIT—cont. sued.**

under the sect. n. Before the claim came on for hearing the plaintiff was allowed by the Court to withdraw the proceeding with liberty to bring a fresh suit upon the claim at a future date. The plaintiff subsequently brought the present suit. *Held* that the former proceeding was a suit within the meaning of s. 9 of the Code and liberty having been given on a withdrawal before decree to bring another suit, the present suit was well brought. **SUBBARAMIAI v. J. STRAWMY HETTI** 5 Mad., 298

5 Substitution of assignee of plaintiff's rights and allowing him to withdraw.—*Power of Court Civil Procedure Code 1859 s. 97* Where the Court allowed the plaintiff of the plaintiff's rights to be substituted for him and then permitted him to withdraw the suit—*Held* it was an order not within s. 9 and one which the Court had no power to make. **JUDGOPITTEE CHATTERJEE v. CHUNDER KANT BHUTTA ARJEE** [9 W. R. 309]

6 ——— Withdrawal after issue joined.—*Civil Procedure Code 1859 s. 97*—*For leave to support in a* A plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issue has been joined and he has failed to produce evidence to support his claim. **MITTUN RAM DOS v. ISHIL ALI CHOWDHRY** [21 W. R. 291]

7 ——— Discretion of Court.—*Power to refuse with discretion on appeal*—Where after issue joined, the plaintiff was permitted to withdraw his suit with liberty to sue again.—*Held* that to allow withdrawal and fresh suit at that stage was a discretion to be exercised with great caution but the discretion having been exercised it could not be interfered with on appeal by the Judge. **OMESH CHUNDER MUKHERJEE v. THAKOOR DASS MOOKERJEE** 33 W. R., 345

8. ——— Withdrawal before final judgment.—*Discretion of Court Civil Procedure Code 1859 s. 7*—A lower appellate Court has no power to interfere with the decision of a first Court under s. 8 of Act VIII of 1859 in allowing a plaintiff whether before or after the settlement of issues and before or after the acceptance of evidence upon the issue, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit in the same matter. **LAW KANT DUTT v. HAROO CHUNDER MOHOMDAR** 17 W. R., 229

9 ——— s. 97 of Act VIII of 1859 applied only to cases where a plaintiff before final judgment is permitted by the Court to withdraw from his suit, with liberty to sue again. **ASUND MORY PAUL CHOWDHRY v. RAM KISHEN PAUL CHOWDHRY** 608 v. CHUNDER PAUL CHOWDHRY v. RAM KISHEN PAUL CHOWDHRY [2 W. R. 297]

10 ——— Leave to bring fresh suit.—*Civil Procedure Code 1859 s. 97*—*Permitted under s. 97 to bring a fresh suit* could not be given after final judgment has been pronounced. **SHYORAJ**

**WITHDRAWAL OF SUIT—cont. sued**

**VANDER SINGH v. RAJCOOMAR HAROO DHO NEW DUN SINGH** 24 W. R., 23

11. ——— *Power to dismiss of suit—Procedure*—The power to dismiss a suit, with liberty to bring a fresh one for the same matter is limited to cases where the suit fails by reason of some point of form such liberty should not be given where after issue joined the plaintiff has failed to make out his case. **WARSON v. COLLECTOR OF RAJSHY** [3 R. L. R., P. C., 48 13 W. R. P. C., 43 13 Moore & L. A., 160]

**ee MOHA BIBE v. OOMED ALI** 16 W. R., 376

12. ——— *Civil Procedure Code 1859 s. 53*—*Ground for allowing withdrawal*—*Quere*—Whether under s. 53 of Act X of 18 the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail? proceeded with. **ZAKIR UN NISSA v. KHUDA YAR KHAN** [L. R., 3 All., 529]

13 ——— Ground for allowing withdrawal.—*Civil Procedure Code 1859 s. 97*—*Ability to prosecute claim*—Where a plaintiff asked for permission to withdraw his claim saying that it would be out of his power to adduce the evidence which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, the Court was competent under s. 97 Act VIII of 1859 to grant him permission to withdraw the suit. **FORESH NARAIN ROSE v. SERTY COOCHBER DEBEE** 18 W. R., 100

14. ——— *Insufficiency of evidence*—In a suit by one of several sharers of certain mortgaged property for contribution on account of payments made by the plaintiff to prevent foreclosure the Court on appeal thought the plaintiff might have produced better evidence but his claim being a good one it allowed him to withdraw the suit with leave to bring a fresh one. **KHAROOK KOONWAR v. HURDOOT NARAIN SINGH** [20 W. R., 163]

15 ——— Compromise of suit on appeal.—*Civil Procedure Code 1859 s. 7*—*Subsequent suit on compromise*—A suit founded on a compromise which was entered into when special appeal was withdrawn, was not barred by s. 7 Act VIII of 1859 as it was not a suit for the same matter within the meaning of that section; but if the compromise was duly made by the parties thereto, and if its terms have been broken a party to it is entitled to maintain a suit to enforce it. **GOLAN SINGH v. CHEDA SINGH** 3 Agrs 136

16 ——— Private agreement.—*Restoration of suit*—Where a plaintiff filed a petition with drawing his claim unconditionally the suit should be at once struck off the file. If the defendant had entered into some private agreement and did not fulfil the same it might give a new right of action to the plaintiff for enforcing that agreement but was no



**WITHDRAWAL OF SUIT—continued.**

reason for setting aside the petition for withdrawal of the suit as null and void. **SHOMSHEE BANADDOOR v. MAHOMED ALI BEG** 3 Agra, 158

17. — Suit for possession—*Subsequent suit for rent—Civil Procedure Code, 1859, s. 97.*—There was nothing in s. 97, Act VIII of 1859, to prevent a suitor from instituting a claim for possession and afterwards bringing one for rent. **RAMKISHORE MUNDLE v. MOORAD MUNDLE**

[W. R., 1864, Act X, 67]

18. — Suit for possession after release from attachment in execution in another suit—*Civil Procedure Code, 1857, s. 97.*—A claim to attached property made under Act VIII of 1859, s. 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree-holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again and sold in execution of the same decree. *Held* that a subsequent suit for possession of the property against the purchaser at the execution sale was not barred under s. 97 of Act VIII of 1859. **Eshen Chunder Singh v. Shama Churn Bhutto, 11 Moore's I. A., 7, cited.** **MUKHODA SOONDURY DASI v. RAM CHURN KARMOKAR** I. L. R., 8 Calc., 871

19. — Suit withdrawn under Regulation law—*Civil Procedure Code, 1859, s. 97.*—A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit in the same cause of action in 1866. *Held* that he was not debarred from doing so, as the provisions of s. 97 of the Code of Civil Procedure did not apply. **VINAYAK JOSHI v. JANARDAN JOSHI** 7 Bom., A. C., 23

20. — Nature of fresh suit—*Fresh suit filed upon a different title in existence at date of former suit—Civil Procedure Code (XIV of 1862), s. 373—Practice.*—The plaintiffs, who were an English joint stock company registered under the English Companies Act of 1862, sued the defendant as a past member of the bank, upon a balance order of the High Court of Justice in England, dated 21st February 1881, to recover the sum of £678-3. In August 1882 the plaintiffs had filed a previous suit against the defendant to recover the said sum of £678-3. That suit was based upon a call order, dated 11th November 1880, which it sought to enforce. By an order made in that suit on 7th April 1883, the plaintiffs were permitted to withdraw it, with liberty to bring a fresh suit for the same cause of action. The present suit to enforce a balance order, dated the 21st February 1881, was filed on 11th February 1883. It was contended on behalf of the defendant that the present suit being based upon an order which was in existence at the date of the previous suit, the plaintiffs could not now sue upon it; that the plaintiffs could not abandon the title upon which they claimed in the first suit, and set up a different title in the second. *Held* that the plaintiffs were not precluded from bringing the second suit upon the balance order, and that the suit was properly framed.

**WITHDRAWAL OF SUIT—continued.**

**LONDON, BOMBAY, AND MEDITERRANEAN BANK v. BURJORJI SOBAJI LEWALLA**

[I. L. R., 9 Bom., 346]

21. — Withdrawal of suit by next friend—*Suit on behalf of a minor—Civil Procedure Code (Act VIII of 1859), s. 97—Fraud.*—Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, any withdrawal of the suit by that party would have precisely the same effect as the withdrawal of a suit by a person of full age. But where a person acting for a minor has fraudulently withdrawn the minor's suit under s. 97 of Act VIII of 1859, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it is open to the minor to relieve himself from the consequences of the fraud in one of three ways, *viz.*, (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar. **ESHAN CHUNDRA SAFOOI v. NUNDAMONI DASSEE**

[I. L. R., 10 Calc., 357]

22. — Withdrawal wrongly allowed—*Arbitration—High Court's powers of revision—Civil Procedure Code, ss. 2, 373 588, 622—Practice—Notice to show cause—Amendment of plaint.*—An order under s. 373 of the Civil Procedure Code permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by s. 588, or being a "decree" within the meaning of s. 2, is not appealable. When the plaintiff in a suit applies for permission to withdraw it, with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted. *L.*, claiming as heir to *H.*, a deceased Hindu, sued *K.*, his widow, and *G.*, a minor represented by his mother and guardian *B.*, to have the adoption by *K.* of *G.* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of, *K.* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. This application was rejected, on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that *K.* having died, he was entitled to possession of the immovable property left by *H.* This permission was granted. The minor defendant applied to the High Court for revision. *Held* that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K.*, the adoptive mother of the minor defendant, had died *pendente lite*, had no arbitration proceedings taken place in the course of the suit; but when the parties

WITHDRAWAL OF SUIT—cont. *used.*

had referred the referees to arbitration and an award had been made in favour of the defendant and had been set aside and an application for revision of the order setting aside the award had been refused on the ground that the matter could be made the subject of appeal from the final decree in the suit permitted on withdrawal of the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course and the suit had not abated against him by the death of K while on the other hand the decree in the suit in his favour would decide the litigation, and in favour of the plaintiff would prevent his bringing a suit for possession on the separate cause of action which had arisen. *Sahsahm di Walford L. R., 4 Q. B. D. 217* referred to. The High Court refused to allow the plaintiff in the suit to be amended by the addition of a claim for possession of the property left by H. KALLAN SING & LEKHRAJ SING.

[L. L. R., 6 All. 211]

23. *Spec. Rel. of Act (1 of 1877) s. 21* Ar. r. 1 n. A. r. 10. *Order after* — *Order under s. 506 C. Procedure Code to refer matters in dispute to arbitration* — *Order under s. 33 pending reference or arbitration* — *Plaintiff permitted to withdraw with liberty to bring a fresh suit*. The parties to a suit were permitted to agree to refer the matters in difference between them to arbitration and for the purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted arbitrators were appointed and it was ordered that the should make the award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex parte* application under s. 33 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject matter. The application was granted, the suit struck off, and a fresh suit was instituted in pursuance of the permission thus given by the Court. In defence to the suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (1 of 1877). Held that the Court in the former proceedings had no power to revoke the order of reference or to award except as provided by s. 510 of the Code. That consequently the Court's order under s. 33 was *ultra vires* if involving such recitation of fact not involving it, fit the order of reference in force, that either alternative the suit was barred by s. 21 of the Specific Relief Act and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *PER TRILL, J.* that the suit was barred by the second clause of s. 33 the Court having had no jurisdiction to pass the order under that section, or having referred the suit to arbitration, to resume the suit to its file and treat it as awaiting the Court's decision. *SERODAKA v. DEODAT* L. L. R., 9 All. 168

24. *Civil Procedure Code s. 373* — *Withdrawal of suit with liberty to bring fresh suit* — On the 5th September 1874 R. H. N. and his sons borrowed Rs 5000 from F. and mortgaged to him certain land, items 1 & 2 and 3. On the 11th Sep-

WITHDRAWAL OF SUIT—cont. *used.*

tember 1874, F. borrowed Rs. 5000 from R. V. and mortgaged his rights in items 1 and 2 and land of his own to R. V. In 1877 R. V. bought at a sale in execution of a decree against R. the share of R. in the said items 1 and 2 subject to the mortgage created by R. on 5th September 1874, and to another mortgage created by R. on 11th January 1875. In 1880 R. sued F. and the sons of R. for arrears of interest due under his mortgage bond. The suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885 R. V. sued the sons of R. and F. to recover principal and interest due under his mortgage bond. Held that the claim of R. V. was not barred. *VENKATA v. RANGA*

[L. L. R., 10 Mad., 180]

25. *Withdrawal of suit with permission to bring a fresh suit on the same cause of action* — *Civil Procedure Code s. 43*. — Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained an order under s. 373 of the Code will not be debarred by s. 43 from claiming, in a subsequent suit, relief which he might have claimed but did not, in the suit in which he was permitted to withdraw. *VENKATA CHETTI v. PANGA VAYAL I. L. R. 10 Mad., 160* followed. *BRASSI LAL PAL v. BHANU MAI DASI*

[L. L. R., 17 All. 53]

26. *Decree containing clause stating that a fresh suit may be instituted on a part of the subject matter* — *Res judicata* — A suit for possession of immovable property was wholly dismissed on the ground that the plaintiff had not made out his title to the whole of the property claimed though he had proved title to a one-third share of such property. The decree included an order in these terms: "This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of H. L. in the fields specified in the deed of sale" upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted. Held by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity any effect. *Kudrat v. Dina, I. L. R., 9 All. 155* *Ganesha Rao v. Kalka Prasad I. L. R. 5 All. 535*; *Sah Ram Pahal v. Tirilwan Pahal, Weekly Notes All. 1883 171* and *Mahomed Salim v. Yabian Bhai I. L. R. 3 All. 232* explained. *SEKH LAL v. BHIRI*

[L. L. R. 11 All. 167]

27. *Withdrawal of part of claim—Part of property in suit with and part without the jurisdiction of the Court* — Suit for partition and possession of an undivided share of property sold to plaintiff by an

**WITHDRAWAL OF SUIT—continued.**

aged gosha lady of the class of Canarese Mahomedans called Navayats. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866, and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immoveable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants, who had it in their possession, and pursued his claim against the other immoveable property and obtained a decree. *Held* that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bona fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit. **KHATTA v. ISMAIL** . . . **I. L. R., 12 Mad., 380**

**28.** ————— *Summons not served on defendant—Suit for damages—Civil Procedure Code (Act XIV of 1852), ss. 97, 477, 491—Arrest of defendant before judgment under s. 477—of Civil Procedure Code (Act XIV of 1852)—of Subsequent application by plaintiff under s. 373 of Civil Procedure Code for leave to withdraw suit—Right of defendant to appear at hearing, although summons not served upon him—Compensation for arrest—Rule of Court No. 64—Practice—Procedure.*—The plaintiff sued the defendant in Bombay for damages for breach of contract. The suit was not filed on the 13th May 1890. The summons was not served on the defendant, but on the 16th May the plaintiff's agent procured his arrest before judgment. On that day he was brought before a Judge of the High Court, and was at once discharged. When the case subsequently came on for hearing, the plaintiff applied, under s. 373 of the Civil Procedure Code, for leave to withdraw the suit, with liberty to file a fresh suit on the same cause of action. The defendant's Counsel objected, and claimed either that the plaintiff should continue his suit to a hearing, or that the suit should be dismissed with costs, and that compensation for his arrest should be awarded to the defendant under s. 491 of the Civil Procedure Code. The plaintiff contended that, inasmuch as the summons had not been served on him, the defendant was not entitled to appear, and that no compensation could be awarded to him. *Held* (1) that, inasmuch as the plaintiff had by a legal process brought the defendant before the Court, the defendant had the right to appear at the hearing of the case, although no summons had been served upon him, and that he was entitled to object to the suit being dismissed under Rule of Court No. 64; (2) that under the circumstances the defendant was entitled to compensation for his arrest under s. 491 of the Code of Civil Procedure; (3) that the plaintiff might withdraw the suit under s. 373 of the Civil Procedure Code with liberty to bring a fresh suit on payment of the costs incurred by the defendant in the present suit. **SYED ALI v. ADIB** . . . **[I. L. R., 15 Bom., 160]**

**WITHDRAWAL OF SUIT—continued.**

his right to sell certain property in satisfaction of a decree against B, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted another suit to establish his right to sell the same property in satisfaction of another decree against B,—*Held* that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure. **KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY** . . . **[I. L. R., 21 Calc., 285]**

**30.** ————— *Withdrawal of suit without permission to bring fresh suit—Application of s. 373 of the Civil Procedure Code to suits in Revenue Courts—Act X of 1859.*—S. 373 of the Civil Procedure Code does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself. **RADHA MADHUB SANTRA v. LUKHI NARAIN ROY CHOWDHRY** . . . **I. L. R., 21 Calc., 428**

**MORUNDA BULLAYKAR v. BHOGABAN CHUNDER DAS** . . . **I. L. R., 21 Calc., 514**

**31.** ————— *Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.*—In 1893 the plaintiff sued to eject the defendants, alleging they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants. *Held* that the second suit was not maintainable by reason of Civil Procedure Code, s. 373. **ACHUTA MENON v. ACHUTA NAYAR** . . . **[I. L. R., 21 Mad., 35]**

**32.** ————— *Fresh cause of action—"Subject-matter of suit," Meaning of.*—Where a plaintiff brought a suit for partition of joint property from which he withdrew with the consent of the defendants, but without leave from Court to bring a fresh suit, and subsequently, being dispossessed from the same joint property, brought this suit for the recovery of joint possession of the same,—*Held* that the mere fact of the suits being in respect of the same property would not be sufficient to make the latter suit one for the same subject-matter as the former, when the state of facts leading to the two suits and the reliefs claimed under them are different, and s. 373, Civil Procedure Code, does not apply. **Kamini Kanto Roy v. Ram Nath Chuckerbutty**, **I. L. R., 21 Calc., 285**, followed. *Quere*—Whether the mere fact that a plaintiff withdraws with the consent of the defendant, but without leave of the Court, makes s. 373, Civil Procedure Code, inapplicable. The observation of **NORMAN, J.**, on this point in **Juggobundo Chatterji v. Watson & Co., Bourke, A. O. C., 103**, doubted. **GOPAL CHANDRA BANERJEE v. PUENO CHANDRA BANERJEE** . . . **4 C. W. N., 110**

*See JUGGUBUNDO CHATTERJEE v. WATSON & CO.*  
**[Bourke, A. O. C., 102]**

**29.** ————— *Institution of fresh suit.*—Where a plaintiff instituted a suit to establish

## WITHDRAWAL OF SUIT—continued

33. — *Costs—Power to award costs—Withdrawal without leave*—The High Court has no power under the Civil Procedure Code to award costs to the defendant when the plaintiff withdraws or having asked leave to do so with liberty to bring another suit for the same matter. *BRASS v. TRIVENGODA PILLAI* 1 Mad., 247

34. — *Power to award Costs—Civil Procedure Code 1859 s. 97* Where the plaintiff applies under s. 97 Act VIII of 1859 to be allowed to withdraw from the suit with liberty to bring a fresh suit for the same matter the Court refused the application. Another application for leave simply to withdraw from the suit was granted the Court dismissing the suit with costs. *BRASS v. TRIVENGODA PILLAI* 1 Mad. 247 dissenting from *POSSANI BIRI v. PERI KRANTH* [1 B. L. R., O. C., 45]

35. — *Form of order—Civil Procedure Code 1859 s. 97* A plaintiff who is permitted to withdraw from his suit under s. 97 Act VIII of 1859 must pay the defendant's costs. On such withdrawal the proper order to be recorded is not one of dismissal but one simply permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may direct. *DOUGHERT v. WISE* 1 W. R., 322

36. — *Payment of costs not made conditio precedent to fresh suit—Power to stay suit*—A plaintiff brought an action against B who was allowed to withdraw with leave to bring a fresh suit, and was also ordered to pay the costs. Held that the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings in the fresh suit, on the ground that the costs had not been paid. *CHITTO v. MURZEN HOSSAIN* [2 Hyde, 212]

37. — *Small Cause Court*—A Small Cause Court is not bound to allow a plaintiff to withdraw a suit, on the ground that he has received payment from one of the defendants in the suit that attempt to withdraw having been made after the plaintiff had succeeded in getting a judgment against two defendants which had been set aside by the Court on various grounds, and a new trial ordered. In such a case the Court may permit the withdrawal of the suit upon the terms of plaintiff paying the first defendant's costs. *RAMA CHANDRA SHASTRY v. PAPPAYAN* 3 Mad., 27

38. — *Withdrawal of appeal—Power of Appellate Court*—An Appellate Court has authority to permit an appeal to be withdrawn. *RAM KISHORE GUNA v. BHUWORA KACHWAR* [9 W. R., 328]

39. — *Notice of withdrawal of appeal*—An appellant has no right to withdraw an appeal which has been regularly registered, without the permission of the Court. Where the appellant had given notice of the withdrawal of the appeal before the day of the hearing,

## WITHDRAWAL OF SUIT—continued.

and notice of withdrawal had been given to the respondent but not until costs had been incurred, Held that the appellant was not at liberty to withdraw the appeal, and the Court ordered that the appeal be set down for hearing. *BARROW LEE v. BRYAN LEE* 3 Mad., 383

40. — *Withdrawal of suit on appeal—Act XXIII of 1861, s. 37—Power of Appellate Court*—Under s. 37 Act XXIII of 1861 the High Court, upon appeal from a Judge sitting in the exercise of the ordinary original jurisdiction of the Court had power before pronouncing final judgment in appeal to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit. *GREGORY v. DOOLLY CHAND* [14 W. R., O. C., 17]

41. — *Civil Procedure Code 1859 s. 97—Exercise by Appellate Court of powers under s. 37, Act XXIII of 1861*—Where application was made for leave to withdraw a suit with leave to bring a fresh one it being contended that the fact of a nathari protest on inland lake, and of their being in the hands of the holder without signature, was proof of dishonour, and further that defendant being a Hindu, there was no necessity for notice of dishonour—the Appellate Court reversing the decision of the Court below, granted the application under the power given by s. 37, Act XXIII of 1861. *BOMBAY CITY BANK v. MOOVJEE HERRY DOSS* Bourke, A. O. C., 89

42. — *Civil Procedure Code 1859 s. 97*—The plaintiff having, sued, and the issues having been laid down as though the suit was for separate possession, the decree of the lower Court for joint possession was set aside, with leave to plaintiff, under Act VIII of 1859 s. 97 to bring a fresh suit for joint possession. *JAGANNATH DESAI v. MORENOOLIAN* 17 W. R., 184

43. — *Appellate Court—Powers of Discretion, Exercise of—Civil Procedure Code, 1852, ss. 573-582*—Where on appeal from a decree dismissing a suit, the Appellate Court, being of opinion that the plaintiff was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission under s. 373 of the Civil Procedure Code, to withdraw the suit with leave to institute a fresh one—Held per STRAIGHT J. that with reference to the terms of s. 582 of the Civil Procedure Code, the Appellate Court had power to avail itself of the provisions of s. 573 and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *GREGORY v. DOOLLY CHAND*, 14 W. R., O. C., 17, and *KALASH KOSKAR v. HARDOOT ARAJIB SINGH*, 20 W. R., 163 referred to. Also per STRAIGHT J. that it could not be said that the Appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal. Per TRENKLE J. that it might be taken that the Appellate Court though not so stating in express terms, meant to set aside and did set aside, the decree of the Court of first instance, regarding it as a decree which

**WITHDRAWAL OF SUIT—concluded.**

could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that in this view there was no legal objection to the exercise by the Appellate Court of the discretionary power of Ch. XXII of the Code. *GANGA RAM v. DATA RAM*

[I. L. R., 8 All., 82

44. ——— Applications for execution of decree—*Civil Procedure Code, s. 374—Withdrawal of application.*—The rule laid down in s. 374 of the Civil Procedure Code (Act XIV of 1892)—that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought—does not apply to applications for execution. *Pirjade v. Pirjade, I. L. R., 6 Bom., 651*, dissented from. *TARACHAND MEGRAJ v. KASHINATH TRIMBAK, I. L. R., 10 Bom., 62*

45. ——— *Civil Procedure Code, ss. 373, 374, 647—Application for execution withdrawn by decree-holder—Act XV of 1877, sch. II, art. 179 (4).*—S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh, I. L. R., 7 All., 359*, and *Pirjade v. Pirjade, I. L. R., 6 Bom., 651*, followed. *Tarachand Megraj v. Kashinath Trimbak, I. L. R., 10 Bom., 62*, and *Ramanandan Chetti v. Periatambi Chervu, I. L. R., 7 Mad., 260*, dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act. *SARJU PRASAD v. SITA RAM*

[I. L. R., 10 All., 71

46. ——— Revocation of withdrawal—*Civil Procedure Code, 1859, s. 97.*—A plaintiff who has withdrawn from his suit is at liberty to rescind the act of withdrawal at any time before final judgment. S. 97 of the Civil Procedure Code was held to be inapplicable to a case where the plaintiff rescinded after two days a petition he had presented of withdrawal from his claim. The last clause of that section contemplated cases in which the withdrawal is not revoked. *RAMBHURAS LALE v. GOPAL BHEDE*

**WITNESS—CIVIL CASES.**

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*See COMPANY—WINDING UP—COSTS AND CLAIM ON ASSETS*

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[I. L. R., 3 Mad., 271]

*See LIBEL* I. L. R., 14 Bom., 97

----- Refusal of party to attend as—

*See SUPERINTENDENCE OF HIGH COURT—CHARTER ACT s 10—CIVIL CASES.*

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----- Refusal to summon—

*See APPELLATE COURT—ERRORS AFFECTING OR NOT MERITS OF CASE*

[I. L. R., 18 All., 218]

WITNESS—CIVIL CASES—*cont. sued.*1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*concluded.*

3. ----- Magistrate—*See if a malicious prosecutor on—Magistrate who held preliminary enquiry into criminal charge.*—Magistrates are not empowered to give evidence of matters which have come before them in the course of a preliminary enquiry into a criminal charge. *Held* that in a suit for a malicious prosecution the defendant had a right to the evidence of the Subordinate Magistrate who held a preliminary enquiry to a charge of forgery preferred by the defendant against the plaintiff. *RAMABHAI ATTAN v RAMU NUPAN* 3 Mad., 372

4. ----- Magistrate's evidence before a Judge—Where a Judge who is a Judge of law and fact in a case tried before him cannot give evidence before himself or report material facts into his judgment not stated on oath before the Court in the presence of the accused. *QUEEN EMERSON v MANIKAM* I. L. R., 19 Mad., 263

5. ----- Munsif—Where a Munsif is called on to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif and he is entitled to exemption. *ANANT MOGA* 6 Mad., Ap., 42

6. ----- Person against whom affidavit order is sought—*Criminal Procedure Code 1882 s 469—Evidence Act (I of 1872) s 120—Bastardy proceedings—Matters coming under the provisions of s. 483 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act and the person sought to be charged is a competent witness on his own behalf.* *MAHOMED v. HUSMULLA JAY* I. L. R., 18 Calc., 781

HIRA LAL v. SAREEN JAY I. L. R., 18 All., 107

7. ----- Mamlatdar as assessor under Land Acquisition proceedings. On reference to the Collector under the Land Acquisition Act, the Mamlatdar acted as an assessor appointed by the Collector and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge eventually upheld the Collector's award. On an application under s. 122 of the Civil Procedure Code (Act XIV of 1882).—*Held* that a person who is appointed as an assessor under s. 19 of the Land Acquisition Act (X of 1870) performs quasi-judicial functions, and is therefore incompetent to testify as a witness in the same proceedings. *SWAMINATH v. COLLECTOR OF DHANUWAL* [I. L. R., 17 Bom., 229]

8. ----- Wife—Evidence of wife to prove non-access—Husband and wife—Exemption of illegitimate children—*See s 112 and 113.*—A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children. *ROZARIO v. INGLETS* [I. L. R., 18 Bom., 468]

## 1. PERSONS COMPETENT OR NOT TO BE WITNESSES.

1. ----- Arbitrator—*See after award*—If an arbitration award is set aside and the matter is tried as a suit before the Court, the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission which may have been made before him in the course of the arbitration and which might be material evidence. *WILKINSON BOSS v. MOHINI CHANDER DUTT* 17 W. R., 518

2. ----- Attorney—Advocate—Competent witness.—An attorney who has acted as advocate for one of the parties, and pleaded his case in Court, can be examined as a witness in the case. *KANPAL SHAW v. BHANUBHAI MANDAL* [5 B. L. R., Ap., 28]

WITNESS—CIVIL CASES—*continued.*

## 2. SUMMONING AND ATTENDANCE OF WITNESSES.

9. ———— *Duty of Court—Securing attendance of witnesses.*—Every Court is bound to render all reasonable assistance to a party to enforce the attendance of his witnesses. *NILMONER BANERJEE v. SHURBO MONGOLA DEBEE* . . . 6 W. R., 14

10. ———— *Civil Procedure Code, 1882, s. 159.*—Under s. 159 of the Civil Procedure Code (Act XIV of 1882), a party to a suit is entitled, as of right, to obtain summonses for his witnesses any time before the day fixed for the disposal of the suit. *BAI KALI v. ALABAKH PIRBHAI* . . . I. L. R., 15 Bom., 86

11. ———— *Application for summons to cite witnesses.*—A party is entitled at any stage of the case before hearing to apply for a summons to cite witnesses without reference to the number of such applications which he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause. *ANURUP CHANDRA MUKHOPADHYA v. HIRAMANI DAS* [3 B. L. R., Ap., 38

*S. C. ONOOROO CHUNDER MOOKERJEE v. HEERA MONER DOSSEE* . . . 11 W. R., 418

*HARI DAS BAIASAKH v. MOAZAM HOSSEIN*

[8 B. L. R., Ap., 16: 15 W. R., 447

12. ———— *Power to summon witnesses—Settlement of issues.*—Act VIII of 1859 conferred no authority upon a Judge to issue summonses to witnesses to attend on the settlement of issues. The written statements must be prepared with great care and deliberation, so as to dispense altogether with parol evidence at the settlement of issues. *ANUND CHUNDER BANERJEE v. WOOMESH CHUNDER ROY* [1 Ind. Jur., O. S., 15: 1 Hyde, 147

The subsequent Codes, however, expressly provide for the attendance of witnesses at a settlement of issues: *see* s. 159, Civil Procedure Code, 1882.

13. ———— *Discretion of Court to summon witnesses.*—A Judge's discretion in not compelling the attendance of witnesses named by one of the parties must be exercised on reasonable grounds distinctly stated in the judgment. *OZEER MAHOMED v. BYDNATH DOSS CHOWDHRY* [5 W. R., Act X, 6

*HARA CHAND PORAMANICK v. KRISHTO MONER GIREE* . . . 1 W. R., 298

*MATUNGUNEE DABEA v. KALER DABEA*

[2 W. R., 4

*See NEEM CHUND DEY v. ANUND COOMAR ROY CHOWDHRY* . . . 7 W. R., 147

14. ———— *Selection of witnesses by Court.*—It is not right for the lower Court to select five out of twenty witnesses tendered for examination. It is the bounden duty of the Judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case,

WITNESS—CIVIL CASES—*continued.*2. SUMMONING AND ATTENDANCE OF WITNESSES—*continued.*

or otherwise to obstruct the ends of justice. *RAMDHAN MANDAL v. RAJBALLAB PARAMANIK*

[8 B. L. R., Ap., 10

15. ———— *Power to refuse to summon witnesses.*—A Court has no power to refuse to summon witnesses when expressly requested by a party to do so unless the witnesses are required to be summoned in such a manner, or in such numbers, as clearly indicates a vexatious desire of obstructing the course of justice. *RAM PHUL PANDEY v. WAHED ALI KHAN* . . . 14 W. R., 66

16. ———— *Refusal to summon witnesses—Reasons for refusing application to enforce attendance.*—It is not incumbent on a Court to give detailed legal reasons for its refusal to comply with an application to enforce the attendance of a party to a suit as a witness. *SIDDHESUREE DEBIA v. DEBOBUNDHOO KOONDHOO* . . . 6 W. R., 65

17. ———— *Preliminaries to summoning witness—Materiality of evidence.*—Before the Court makes an order compelling the attendance of a party to the suit, it must be satisfied that his evidence will be material. *GOPAL CHUNDER HAZRAH v. MOHESH CHUNDER BANERJEE* . . . 21 W. R., 44

18. ———— *Summoning plaintiff as witness—Reasons for summons—Duty of Court—Materiality of evidence.*—A Court is bound, before summoning a plaintiff to give evidence, to record the reasons of its being satisfied that the evidence of the plaintiff is essential to the defendant's case. Where, however, the Court does not give reasons for being satisfied that the presence of the plaintiff is necessary, it does not follow that the defendants had failed to satisfy the Court that there was sufficient ground for the application. *MAKOOND ADIT v. SUTTOONGUN ADIT* . . . 17 W. R., 507

19. ———— *Application to summon witnesses—Witnesses declared unnecessary by Court.*—Where on a case coming on for hearing before a Court to which it had been remanded, the Judge observed that the evidence of witnesses would be unnecessary, the declaration was held to have sufficiently justified the plaintiffs in making no further application for a summons on their witnesses. *RAM JEWUN SINGH v. RADHA PERSHAD SINGH* [16 W. R., 109

20. ———— *Undertaking to bring witnesses—Practice.*—On the 12th October 1879 the plaintiff applied to the Court for subpoenas to his witnesses. The Court refused to grant them, on the ground that the plaintiff had himself originally undertaken to bring his witnesses. (The Court had fixed the 28th October 1879 for the final hearing of the plaintiff's case.) *Held* that the plaintiff's failure to bring his witnesses was no sufficient reason for depriving him (the plaintiff) of his right to have subpoenas issued, if he found himself unable to bring his witnesses or to detain them till they could be examined, although it might possibly be, under certain circumstances, a reason for not waiting for them, if the

WITNESS—CIVIL CASES—cont. *next*

## 2. SUMMONING AND ATTENDANCE OF

WINE-S&amp;S-cont used

plaintiff's case had been in other respects finished before they could be examined. PANDURANG ANPAI v. KESHAVJI JADHAVJI. I. L. R. 6 Bom. 74.

21. Time for summoning witnesses — D. s. f. C. s. The ( ) Procedure Code under this expressly nor impliedly declares that witnesses must be summoned before the day fixed for the first hearing of the suit. So long as the hearing merely is adjourned and so long as the party who wishes to summon witnesses has not closed his case the court is bound to summon them unless it appears that the application is made so late that the witnesses cannot be reasonably expected to attend in time to be examined before that party's case is closed.   
INDRO CHANDER BANO O DUTLOR 9 W R 530

22. ————— Ground for refusal to sum  
mon witnesses 1 ga n of u o ass st  
pa te—De a g ngames f and witnesses  
—Where an appella layd to ge n h nam s  
of h w n s bu w o l l t h a t e n e h r e a  
sonable t m to sec u h r attendance n the da  
of hearing if summo s had been at through diff rent  
poens by th railwa —Held hat the l w r App llate  
Court was bound o ba e direct d the issue of the  
summo s and o ba e g n e v r y assistance to the  
party ask g f r them a d oal expenses being  
paid by such party I EAREK MOHTY MOOKERER v  
MADRAS CHINDER GLOBAL 9 W R 489

23. *Omission of proper steps to examine witnesses—*  
Where some of the *asses* (defendants) in a suit had been examined and a *stiff* petitioned the Court to have the remaining defendants examined as witnesses, he was held not to have taken the necessary steps required by law to enforce the attendance because he did not make any special application to the Court, nor show sufficient grounds in support of his petition. *RAM TIRUL THAKUR v. OODIR NARAIN SINGH*  
13 W. R. 38

24. *Deewan Ag cul ar* *Act (XVII of 1879) s 7*  
—*2 ght of defendant to all witnesses*—The plain  
tiff su d, und r s. 3, cl. w) of Act XVII of 1879  
for money due on a bond dated the 8 h September  
18—The defendant though duly summoned, did  
not appear on the day fixed in the summons, which  
was for the final disposal of the suit. The Court  
therefore proceeded with t *ex parte*. The defen  
dant, being subsequently summoned and examined as  
a witness und r s. 7 of the Act, admitted the bond  
sum upon, but pleaded part payment of the plain  
tiff's claim. He then applied to the Court that his  
witnesses should be summoned and that t r evidence  
be taken in support of his allegation. The Subordi  
nate Judge was of opinion that he (d defendant) was  
not entitled to offer the evidence. On h s referring  
the case to the High Court,—*Held* that t was his  
du y to summon the witnesses named by the defen  
dant. DELCHAND & DINGHAT.

## WITNESS—CIVIL CASES—cont. used

## 2. SUMMONING AND ATTENDANCE OF

WITNESSES—cont. read

25. Code 1877 s. 187—Summons to produce documents—  
In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 13 of the Code of Civil Procedure, the Court ought not to refuse such application merely because in its opinion the witnesses can or be present, or the documents cannot be produced before the termination of the trial. **HRIYANA CHURN BANSAL v. PRADIP CHUNDER BERNIA**

26. — Adjourment for attendance of witnesses. *Cel Procedure Code (Act XIV of 1852) s 156—D sent on, Exec c of—W issues Attend a c of—Power of U gh Court on second appeal—On the day fixed for the hearing of a s t, the defendant appeared for process against certain of his w t n s s who had been summoned, but who had failed to attend, asking for an adjournment to obtain the r attendance. This application was refused and the case was proceeded w th. The plaintiffs' evidence was recorded and that of one of the defendants the d f n d n t s being unable to produce further evidence, the Court recorded that the case was closed and that judgment would be delivered on the f l l o w i n g day the 31st December. On the day following, the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs. *Held per PETHAM C.J.*—That the omission to examine the defendants' witnesses on the 31st December was a substantial error in procedure, and that the Magistrate had exercised his discretion wrongfully. *Per GHOSE, J.*—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice. **MOHI LAL BANOOPALITA v. KHUSODA DAS***

See TAYLOR & SARAT CHUNDER FOY CHOWDHRY  
[I. L. R., 20 Calc., 745 note]

27 Civil Procedure  
*Cole (1892) 138*—Application to summon witnesses—Duty of Court in respect of such applications.—Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing, postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue, as the Court is not given a discretion under s. 139 of the Code of Civil Procedure enabling it to refuse such an application. *Krishna Chandra Bose v. Prabodh Chandra Sarmah* I L. R. 7 Cal. 560, and *Bai Ku v. Alarath Pilla* I L. R. 15 Bom. 46 approved.  
 BHAGWAT DAS v. DEBI DIN I L. R. 16 All. 218



## WITNESS—CIVIL CASES—continued.

## 2. SUMMONING AND ATTENDANCE OF WITNESSES—continued.

28. ——— Ground for adjournment of suit—*Delay in making application to summon witnesses—Discretion of Court.*—If a party applies for summons to witnesses so late that he cannot bring the witnesses on the day of hearing, it still remains in the discretion of the Court to decide whether or no the case should be adjourned. A Munsif is bound under the Procedure Code to issue summonses to witnesses when asked for. *ABDOOL KADIR v. ABIN MINDHA* . . . . . 24 W. R., 280

29. ——— *Civil Procedure Code, 1882, ss. 159 and 167—Summoning witnesses—Delay in serving summonses.*—Under s. 159 of the Code of Civil Procedure (Act XIV of 1882), parties are entitled to summonses for their witnesses at any time before the final hearing, but if there has been delay and want of diligence in consequence of which witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing. *KAJI AHMED v. KAJI MAHAMAD* [I. L. R., 9 Bom., 308

30. ——— Power to dismiss suit—*Dismissal of suit on ground of there not being time after filing of list to summon witnesses—Civil Procedure Code, 1859, s. 149; 1877, s. 159.*—The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff on the 17th of March, and the defendant on the 19th filed their list of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suits came on for hearing, it was dismissed on the ground that, when the plaintiff filed his list, there was not sufficient time left to summon the witnesses. *Held* that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been absolutely impossible to secure the attendance of the witnesses had the summonses been granted on the 17th instant. S. 149 of Act VIII of 1859, and s. 159 of Act X of 1877, discussed. *RAJENDRO NARAIN NEOGI v. KUMUD NARAIN BHUP* . . . . . 3 C. L. R., 569

31. ——— Issue of fresh subpoenas to witnesses—*Re-hearing of ex-parte case under s. 119, Civil Procedure Code, 1859.—Quare*—Where, either under s. 119, Code of Civil Procedure, or in the exercise of a power of review, a suit is restored to its original position, is the plaintiff bound to obtain and issue fresh subpoenas? *BISHEN PRKASH SINGH v. RUTUN GREER CHELA* 20 W. R., 3

32. ——— Service of subpoenas—*Liability for non-service.*—After a list of witnesses has been filed and the talukana paid, the Court's officers, not the applicant, are responsible for the service and return of notice. *MUSSTEE KHANUAR v. HOOKOOM BIBEE* . . . . . 15 W. R., 88

33. ——— Form of summons—*Omission to state place of attendance.*—A summons should state the place of attendance. *ANONYMOUS* [7 Mad., Ap., 14

*ANONYMOUS* . . . . . 7 Mad., Ap., 43

See s. 163, Civil Procedure Code, 1882.

## WITNESS—CIVIL CASES—continued.

## 2. SUMMONING AND ATTENDANCE OF WITNESSES—concluded.

34. ——— Summoning public officer as a witness.—In fixing the time for the attendance of a public officer as a witness, or in granting an adjournment for that purpose, the fullest consideration must be given to the exigencies of the public duties of the officer summoned. *ANONYMOUS* [8 Mad., Ap., 6

35. ——— Issue of warrant on non-attendance of witness—*Warrant of arrest for witnesses not attending—Verbal order to attend.*—A verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issuing of a warrant for the apprehension of such witnesses in case they failed to attend in obedience to such verbal order. *VENKATAPPAH v. PAMPANAH* . . . . . 5 Mad., 132

*ANONYMOUS* . . . . . 6 Mad., Ap., 10

See, however, *ANONYMOUS* . . . . . 5 Mad., Ap., 15

## 3. EXPENSES OF WITNESSES.

36. ——— Right to be paid expenses—*Omission to apply for expenses before giving evidence.*—A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has not applied for them before giving his evidence. *LONDON, BOMBAY, AND MEDITERRANEAN BANK v. MAHOMED IBRAHIM PARKAR* . . . . . I. L. R., 4 Bom., 619

37. ——— Suitable expenses—*Persons of rank and wealth.*—People of rank and wealth, when summoned as witnesses to a distance from their place of residence, are entitled to travelling and other expenses suitable to their circumstances. *CHUNDER SEKHUR DEB v. JADUR CHUNDER SETT* [19 W. R., 78

38. ——— Payment of expenses into Court—*Civil Procedure Code, 1859, s. 151.*—Under s. 151, Act VIII of 1859 (extended to Revenue Courts by s. 67, Act X of 1859), the defendant was not bound to pay into Court the costs of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable. *MOHUN MUNDUR v. BRIJ BHOKUN SINGH* . . . . . 9 W. R., 128

39. ——— Power to order evidence to be taken—*Omission to tender expenses—Evidence of tender of expenses.*—Where there was no proof that a defaulting witness's expenses were tendered to him by the party at whose instance he was summoned, the Court on appeal declined to order that witness's evidence to be taken or to take it itself. *ISHEN CHUNDER SEN v. GNATH NATH DEB. COWELL v. ISHEN CHUNDER SEN* . . . . . 18 W. R., 18

40. ——— Amount of expenses—*Compensation for loss of time.*—Act VIII of 1859 made no provision for compensation to witnesses for loss of time. *NAWAB NAZIM OF BENGAL v. PROSOMO NARAIN DEB* . . . . . 2 Hyde, 236

## WITNESS CIVIL CASES—continued

## 3 EXPENSES OF WITNESSES—concluded.

41. — Provision for expenses—*See for expense—Costs of action*—No action for the expense of a witness will lie. Explanation of the manner of paying for the payment of such expenses. DE SARAN v. HERRIS CHANDER BISWAS [5 W R., S. C. C. Ref., 8]

## 4 DEFAULTING WITNESSES

42. — Non attendance of witnesses on summons—*Duty of parties Commission*.—When witnesses do not appear after service of summons, it is the duty of the party requiring their evidence, and not of the Court to make provision for them. A summons to be taken to a surety for a tuncance and when a commission is issued for the examination of witnesses the Court must be made to wait for the return. NUND MOHON CHOWDHRY v. GOLTRY NATH MOGEE [11 W R. 89]

43. — *Duty of parties*.—*Issue of attachment—C. I. Procedure Code 1859 s. 68*. Where witnesses do not appear on summons to satisfy part of the Court not for the Court to proceed with the further production of the witnesses, though the Court may issue attachment and s. 18 Code of C. I. Procedure if it is shown that the witnesses are absconding or keeping out of the way. HACHMAN JAIL BEHARAN PANDRY [13 W R. 324]

44. — *Civil Procedure Code (1859 s. 14)*.—Non-attendance of witnesses ordered to a summons. *Warrant of arrest Non-payment of expenses in accordance with s. 160 C. I. P. or Code*. There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who has been summoned, has failed to attend when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued, of the necessary expenses of such witnesses specified in s. 160 of the Code of Civil Procedure. TUDAR MAL v. SAID MUHAMMAD [L. L. R. 17 All. 277]

45. — *Order for arrest of witnesses—C. I. Procedure Code 1859 s. 168*. *Proceed against witness who has been summoned*.—Where a lower Appellate Court by the terms of its order is empowered to issue a summons to witnesses, under s. 168, Code of Civil Procedure undertook to see that proper orders should be passed. It was bound to pass such orders as might, in its judicial discretion be necessary and that section. MOHARUN SHARAF v. NEO THOT GERR [9 W R. 359]

46. — *Witness making default in appearing—C. I. Procedure Code 1859 s. 168*.—*Ground for issue of warrant*.—S. 168 of the C. I. Procedure Code required that there should be a reason to the Court to be a satisfactory ground for believing that the default of the party of witnesses summoned to give evidence was without lawful excuse.

## WITNESS CIVIL CASES—continued

## 4 DEFAULTING WITNESSES—continued.

before issuing a warrant for the arrest of such witnesses. But it was not necessary for this purpose to institute a formal investigation and come to a determination on the evidence adduced. PERIYAL CHETTI v. GOVINDA GOUDEN [5 Mad. 104]

47. — *Issue of proclamation against absent witness—Materiality of evidence—Ground for non-attendance*.—A Court was held to be not bound to issue a proclamation against a witness in a case where it was not satisfied that the witnesses were material or that they had really absconded to avoid attendance. BROOKE MOYER DOSSER v. KISHORE DOSSER [8 W R., 235]

48. — *Application for process against absconding witness—Ground for refusal of application—C. I. Procedure Code s. 159*.—On application being made under ss. 159 and 163 of Act VIII of 1859 for issue of process against an absconding witness, the Court, satisfied (as it was bound to be) that the witnesses had absconded and that he was a material witness, on his grant the application unless the applicant had placed himself in such a position by his conduct that it would be unreasonable to grant it. KASOON SINGH v. LALLA BALGOWIND LAL [1 W R., 29]

49. — *Notice of proclamation—C. I. Procedure Code 1859 ss. 159 and 165*.—*Service of proclamation*. The proclamation issued under s. 159 Act VIII of 1859 could not be legally affixed to the mail cut by of a defaulting witness. Before the provisions of that section can come into play personal service of summons must be attempted. In the absence of process of legal service the Magistrate's order of imprisonment for contempt under s. 14 of the P. A. Code and s. 163 of the Code of Criminal Procedure was quashed. QUEEN v. HURYSATH CHOWDHRY [7 W R., Cr., 58]

50. — *Discretion of Court as to issue of proclamation—Proclamation against absent witness—C. I. Procedure Code s. 159 s. 159*.—S. 159 Code of Civil Procedure gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment; but such Court is bound to exercise a reasonable discretion. PORAY CHANDER GHOSH v. GOPINATH SINGH [8 W R. 505]

51. — *Ground for issue of proclamation—C. I. Procedure Code 1859 s. 159*.—A Court was not authorized to issue the proclamation and attachment mentioned in s. 159 Code of Civil Procedure unless it was proved to its satisfaction that the evidence of the witness was material and that he was avoiding the summons; and after these circumstances have been shown, it was a matter of discretion to issue the proclamation and attachment and after issue to it the case stands over. KALEN DAS CHUCKERBUTTY v. EBNATH CHANDER CHATTERJEE [13 W R., 418]

52. — *Production of document—C. I. Procedure Code 1859 s. 174*.—*Court's jurisdiction*.

WITNESS—CIVIL CASES—*continued.*4. DEFAULTING WITNESSES—*continued.*

*diction to punish a witness for refusing to produce a document—Procedure—Penal Code (Act XLV of 1860), s. 175—Criminal Procedure Code (Act X of 1882), s. 480.*—A witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But this statement was disbelieved, and the Court fined him Rs 75 under s. 174 of the Code of Civil Procedure. *Held* that the fine was illegally levied. The jurisdiction of the Court to punish under s. 174 of the Civil Procedure Code exists only in the case of a witness who, not having attended on summons, has been arrested and brought before the Court. The case of a witness who having a document will not produce it is provided for by s. 175 of the Penal Code and s. 480 of the Code of Criminal Procedure. *IN RE PREMCHAND DOWLATRAM* . . . I. L. R., 12 Bom., 63

53. ———— *Service of subpoena—Civil Procedure Code (Act XIV of 1852), ss. 60, 174—Failure to attend—Fine.*—S. 174 of the Code of Civil Procedure is a section of a highly penal nature, and its provisions, in order to give validity to anything purporting to be done under them, must be strictly complied with. Where the return of the pcon of the service of a summons upon a witness was in these terms: "The remaining witness No. 1 being in Calcutta, the copy of summons in his name has been hung upon the mat wall of the catchery house of the defendant's residence," *Held* that the circumstance that the pcon could not find the witness when he says he knew where the witness was, is not sufficient *per se* to warrant the pcon in affixing a copy of the summons to the house of the witness, so as to constitute good substituted service under s. 80, Civil Procedure Code. That under s. 174, Civil Procedure Code, a witness who has failed to appear on his summons can only be fined after he has been arrested and brought before the Court. Where a witness was served as above and he applied for a time to appear, *Held* that the fact of his applying for time would not preclude him from saying that there had been no such service of the summons as could warrant s. 174, Civil Procedure Code, being put into force against him. *KALI NARAIN ROX CHOWDHURI v. BAJOO* . . . 3 C. W. N., 307

54. ———— *Ground for postponement of case—Application for process against absent witness made at late stage of case—Civil Procedure Code, 1859, s. 159.*—Where an application was made at a very late stage of a case to enforce the provisions of s. 159 of the Code of Civil Procedure, without proffer of any proof that the witness was absconding or keeping out of the way for the purpose of avoiding the service of the summons the lower Appellate Court was held to have been justified in not postponing the case to secure the attendance of the witness, although material. *AJOODHYA DOSS v. MISRUN* . . . 15 W. R., 176

55. ———— *Fine for avoiding service of summons—Act XIX of 1863, s. 28—Act X of*

WITNESS—CIVIL CASES—*continued.*4. DEFAULTING WITNESSES—*concluded.*

1861.—S. 28 of Act XIX of 1853 having been repealed by Act X of 1861, a Judge had no jurisdiction, under Act VIII of 1859, to inflict a fine for the purpose of punishing a witness who absconded, or kept out of the way, to avoid service of summons. *IN RE GAJADHAR PRASAD NARAYAN SINGH*

[1 B. L. R., A. C., 186

GUJADHUR PERSHAD NARAIN SINGH v. JUGDEO NARAIN . . . 10 W. R., 233.

## 5. SWEARING OR AFFIRMATION OF WITNESSES.

56. ———— *Objection to take oath—Member of Church of England—Stat 17 and 18 Vict., c. 125.*—A member of the Church of England is not exempt by law from taking an oath in a Court of justice in India, although he may entertain sincere objections against taking an oath on the Bible, and is willing to make an affirmation binding upon his conscience. The English Stat. 17 & 18 Vict., c. 125, does not apply to India. *VALU MUDALI v. SOWBERRY* . . . 2 Mad., 246

57. ———— ————Where a Mahomedan witness stated that he had no objection to oaths in general, but that he was suffering from a disease which disqualified him from taking an oath on the Koran until purification, *Held* that the witness must be sworn in the regular way or not at all. *ANONYMOUS* . . . 1 Mad., 99 note

58. ———— *Refusal to examine witnesses—Dismissal of suit by first Court without examining defendant's witnesses—Reversal of decree on appeal—Duty of Appellate Court to direct examination of witnesses before reversing decree.*—Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal, *Held* that, before doing so, the lower Appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants. The Court directed the first Court to examine the defendants' witnesses, and, having done so, to return their depositions to the lower Appellate Court, which was to replace the appeal upon its file and dispose of it. *KHODA BUKHSH v. IMAM ALI SHAH*

[I. L. R., 9 All., 339.

## 6. EXAMINATION OF WITNESSES.

## (a) GENERALLY.

59. ———— *Selection of witness—Duty of parties.*—It is not the business of a Court to determine what witnesses shall be examined. The parties must select their own witnesses, and call upon

WITNESS—CIVIL CASES—*cont. and*

6 EXAMINATION OF WITNESSES—*cont. and*  
 the Court to examine such of them as they may offer for (and not on) and it is their own fault if they do not take the necessary steps to have the witnesses examined or to compel them to be present for examination at the proper time. **MORAN MOYSE DEBEE & BREEN KOOMAR CHOWDHRY** 8 W R 231

**DEEN DYAL SINGH & DANES ROY**

[13 W R 185]

60 ——— Right to have witnesses examined. *Ground for refusing to hear witnesses—Opinion of C. J. as to materiality of evidence—* Every party to a suit is entitled to have all the witnesses whom he desires to call and ready at the trial to produce heard by the Court whatever opinion the Court may form by and in relation to the probable value of the evidence when it shall be given. **LOGOO SINGH & RAJENDR LALA**

[8 W R 364]

**LOMAN CHIT DES GHOSSE & GOPENATH SINGH**

[8 W R 505]

**CHOWDHRY KHOSBO ROY & SHIB TONUL ROY**

[17 W R 172]

61 ——— *Ground of appeal—* On an appeal from a Court to examine witnesses—As a general rule all the witnesses brought forward by a party ought to be examined. But when an objection is made in special appeal that the Judge below has committed an error in examining certain witnesses it ought to be shown that the evidence of those witnesses would have been material to the case. **WILKINSON & COFFEE DEBEE** 8 W R 324

62 ——— Want of opportunity to adduce evidence. *Proof of Tender and reject on of witnesses—* In order to establish such a plea as that he was not allowed an opportunity to adduce evidence a party must show that he tendered witnesses or other evidence and that his tender was rejected on the ground alleged. **LUKSH ARI CHOWDHURY & JOYANT LALAN**

[11 W R 248]

**CHUNDER NATH SINGH & ANANDMOYEE DEBEE**

[11 W R 280]

**QUEEN & TOTARAM**

[11 W R, Cr 15]

63 ——— Refusal to examine witness. *Ground for refusal—* On an appeal from a Court of first instance—The fact of a witness not having been examined in the plaintiff's suit of witnesses is no ground for refusing to examine him when produced at the proper time. **RAJNATH DOSS MENDEL & PRATAP CHUNDER HATRAH**

[12 W R 455]

64 ——— *Refusal of verbal request of vakil—Ground of special appeal—* Where a lower Appellate Court's refusal to examine witnesses in a suit for damages for assault is made a ground of special appeal it is not sufficient to put in an affidavit to the effect that a verbal request of the vakil to examine the witnesses was refused by the Judge. **RAMSARAN BHATTACHARYA & NATH NARAYN CHUCKERBUTTY**

[14 W R 419]

WITNESS—CIVIL CASES—*cont. and*

6 EXAMINATION OF WITNESSES—*continued*

65 ——— *Add oral witnesses to facts already in evidence—Tender of large number of witnesses—Ground for remand—* In a suit for possession of zamindari and other estate claimed by the plaintiff as son and heir of the deceased zamindar the defendants denied the title of the plaintiff alleging that he was a spurious and supposititious child and tendered fifty-eight witnesses to prove that fact. The Allahabad Court having taken the depositions of thirty of the witnesses, refused to permit the remaining twenty-eight to be examined on the ground that as they were going to prove the facts deposed to by those already examined it was unnecessary to take their depositions, and ultimately decided in favour of the plaintiff. The defendants appealed to the Sadar Court which refused to examine the witnesses rejected by the Allahabad Court, and affirmed the decree of that Court. On appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sadar Court, being of opinion that the refusal by that Court to permit the examination of the witnesses tendered was irregular and that no decision could be come to upon the merits under such circumstances. **JES VUNT BINGOJEE UBBY & BINGOJEE JET BINGOJEE UBBY BINGOJEE**

[2 Moore's L. A. 424]

66 ——— *Ground for remand—* A lower Court having allowed some of the witnesses of the plaintiff to depart without taking their evidence the plaintiff objected to the taking the evidence of more of the defendant's witnesses than of his own. Upon this the Court allowed some of the defendant's witnesses to leave the Court without examining them. The case on coming up to the High Court, was remanded for examination of all the remaining witnesses and a fresh decision. **GOPAL OJHA & HIR GORIND SINGH** 12 W R 223

67 ——— *Application to re-examine after consent to allow evidence in one suit to be evidence in others—* Five suits having been brought to recover a balance of accounts from defendants, who were alleged to be partners of a trading concern, a deed as such liable certain witnesses were examined in four of the cases in which the plaintiff in one of the suits was not a party and at his request the evidence taken in those cases was allowed to be used as evidence in his case and then the witnesses were discharged. Two days after this he applied to have the witnesses re-examined giving no reason for his application which was refused. *Held* that the refusal was just and in the absence of any new reason for the re-examination. **REEMATH LAL & GOLICK CHUNDER DEBEE** 15 W R 348

68 ——— Death before delivering legal judgment—*Objection to hear witnesses again—Consent of parties—* A suit was dismissed by a Deputy Collector who died before recording a legal judgment, whereupon it was made over by the lower Appellate Court for trial to the deceased collector's successor who decided the case in favour of the plaintiff upon the evidence as it stood on the record without any objection by either party. *Held* that

## WITNESS—CIVIL CASES—continued.

## 6. EXAMINATION OF WITNESSES—continued.

it was not the duty of the second Deputy Collector to remand the witnesses or to take additional evidence unless requested to do so by the parties. *GOUD CHUNDER SEN v. MANICK RAM* . 13 W. R., 76

69. ——— Recall of witness—*Witness for plaintiff recalled for defendant—Leave of Court.*—When a witness has been examined on behalf of the plaintiff, he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination. *MACKINTOSH v. NOBINMONEY DOSSEE* . 2 Ind. Jur., N. S., 160

70. ——— Examination of witness by Appellate Court.—Courts should in all cases exercise the powers with which they have been entrusted by the law in the examination of witnesses, if they see that they are not properly examined through the incompetency of those who have the management of the suits. If the Munsif fails to take proper evidence, the Appellate Court should not decide the case on such evidence as there is, but having the power to call for further evidence under s. 355, Act VIII of 1859, it should take proper means for making the evidence complete. *RANGARI v. IMITARI BANEE* . 1 B. L. R., S. N., 20 [10 W. R., 280]

71. ——— Mode of taking evidence.—Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case. *PHUL KUAN v. SURJAN PANDEY* [I. L. R., 4 All., 249]

72. ——— Irregularity in examination of witness—*Witness for plaintiff examined in absence of defendant or his pleaders—Irregularity—Objection not taken in time—Evidence Act, s. 167.*—The examination of a material witness of the plaintiff, in the absence of the defendant, his wakil having been removed, and no other wakil then acting for him, is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence. But where no objection was urged during the trial, or until an appeal was interposed, the Judicial Committee held that the objection came too late and could not be sustained, as, notwithstanding such irregularity and miscarriage, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case. But although the other evidence rendered the evidence improperly admitted immaterial, the Judicial Committee, as there had been an irregularity in the Court below in affirming the judgment, refused to give the costs of the appeal. *BOMBARAUZE BAHADUR v. RANGASAMY MUDALIY* . 6 Moore's I. A., 232

73. ——— Evidence given without cross-examination and without opportunity of cross-examination.—Evidence given when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be

## WITNESS—CIVIL CASES—continued.

6. EXAMINATION OF WITNESSES—continued.  
so used. *GORACHAND SIKKAR v. RAM NARAIN CHOWDHRY* . 9 W. R., 587

74. ——— Evidence to contradict witness—*Contradiction of witness to collateral questions—Right to call evidence to contradict.*—The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence. *GULAM ALI BIN KAZI ISMAIL v. AGA KEAN* [6 Bom., O. C., 93]

75. ——— Evidence of experts—*Proof of signatures*—In a suit for arrears of rent for 1273 at an enhanced rate, plaintiff relied upon an agreement said to have been executed by defendant in that year. The Assistant Collector found that the agreement had not been executed by defendant. On appeal, the Judge called an expert who proved that the signatures of the attesting witnesses were not all genuine, and the decision of the Assistant Collector was affirmed. *Held* that the Judge was wrong in calling for and acting upon the evidence of the expert. *BINDESSUREE DUTT SINGH v. DOMA SINGH* [9 W. R., 88]

76. ——— Consent to be bound by particular witness—*Evidence not legally admissible.*—An *a priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible, i.e., evidence as to such facts as the witness can directly speak to. *LUCKEEMONEE DOSSEE v. SHUNKUREE DOSSEE* [2 W. R., 252]

*MUNNOO SINGH v. AMBUT LALL* . 5 W. R., 234

77. ——— Witness sworn in particular manner.—Where the plaintiff rested her claim solely on the deposition of the defendant to be taken by his placing his hand on a particular text of the Koran, and the defendant, not being examined in that way but in the usual way, did not prove the claim,—*Held* that the Court was not right in allowing the plaintiff to examine further witnesses and to re-open her case. *MAHOMED SALEH v. MURTA MOONISSA* [10 W. R., 284]

78. ——— Plaintiff agreeing to be bound by defendant's evidence—*Statements obviously untrue.*—Where the defendant on examination makes statements which amount to nothing and are manifestly untrue, the plaintiff cannot be bound by them, even though he had agreed to be bound by what the defendant said. *GOOROOBOSS ROY v. GREEDHUR SEIN* . 11 W. R., 110

79. ——— Subsequent refusal—*Duty of Court.*—Where a defendant, after asking the lower Appellate Court to summon plaintiff as a witness, and consenting to abide by his deposition, had again petitioned the Court that the plaintiff

**WITNESS—CIVIL CASES—contd**

**6 EXAMINATION OF WITNESSES—contd**

should not be examined. Held that defendant should not have been bound solely and absolutely by the plaintiff's deposition but that the other evidence on the record should also have been considered. **JAGDEO SINGH v. JAGJIT SINGH** 13 W. R., 108

**(b) CROSS EXAMINATION**

**80** — **Right to cross-examine** — *It is the call of the Court* A witness called by the Court is liable to be cross-examined by any of the parties at a suit. **TARINI CHARAN CHOWDHURY v. BAROD SUNDAR DAS** [3 B. L. R., A. C. 145 11 W. R., 468]

**81** — *Witness called by Court* — A party summoned by the Court to give evidence is not only required to give answers to the questions put to him by the Court but also to the party has a right to cross-examine him. The statement of any person examined is a statement in law the opposite party has a right to put questions to him. **CHANDRA MOHAN v. CHANDRA MOHAN** [11 W. R., 110]

**82** — *Defendant separately represented* — One of the defendants, whose interests are separately represented, may cross-examine another. **NARASIMMA v. K. S. N. MA** 1 Mad., 456

**83** — *Recall of witnesses* — *On motion to give opportunity for cross-examination* A Court of first instance directed a case to be argued on a set of affidavits and at a rehearing directed the plaintiff to recall the witnesses, whom therefore the defendant had no opportunity to cross-examine, and award a decree for the plaintiff. The lower Appellate Court rejected the evidence of plaintiff's witnesses and reversed the decree. Held that the Court of first instance should have recalled the plaintiff's witnesses and given the defendant an opportunity of cross-examination. **RAM BAKS LALL v. HIRSHOT MOHAY NANA** [3 B. L. R., A. C. 273 12 W. R., 130]

**84** — *Refusal to allow cross-examination* — *Act III of 1859 s. 10* — A defendant failed to appear when ordered to attend under s. 10 Act VIII of 1859. The Judge did not at once pass judgment against him, but called the plaintiff's witnesses, and refused to allow the defendant a vakil, who was present, to cross-examine them. Held that the Judge ought to have allowed the defendant a vakil to cross-examine the plaintiff's witnesses. **PAKANTAR v. JAGDAN BHAKAT** [2 B. L. R. Ap., 13]

**85** — *Refusal of witnesses to answer questions on cross-examination* — *Civil Procedure Code 1859 s. 169* — *Lawful excuse* — A party to a suit tendering himself as a witness, and declining without lawful excuse to answer questions put on cross-examination was liable to be dealt with under s. 169 of the Civil Procedure Code. "Without lawful excuse" means

**WITNESS—CIVIL CASES—continued**

**6 EXAMINATION OF WITNESSES—continued**

such an excuse as would in law justify the refusal to give evidence. **LEKH PAI v. PALEN RAM** [1 N. W., 163 Ed. 1873 211]

**86** — *Cross-examination to credit* — *Opinion formed as to credit of witness by another Judge in another case* — A Judge's opinion of the particular estimate formed by a Judge in another case of the credit to be attached to the testimony of a witness who is cross-examined in a subsequent trial is inadmissible. **IN THE MATTER OF PAKHIAJI JAGAPPA** 4 C. W. N., 684

**7 CONSIDERATION AND WEIGHT OF EVIDENCE**

**87** — *Credibility of witnesses* — *Power to set aside decision on evidence* — The credibility of witnesses is a matter altogether for the Court of first instance and the Court which hears a regular appeal; and if these Courts are satisfied that the witnesses are not to be believed, their decision cannot be set aside by the High Court on special appeal, even though upon a general review of the case it should think that if it had tried the case originally it might have come to a different conclusion. **GOVERNMENT v. KESHAV KONDHOOR v. PRANATHI KESAV** [10 W. R., 385]

**88** — *Modes of testing credibility* — *Several witnesses to same facts* — In examining evidence with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words or whether they substantially agree, not, indeed, concurring on all the minute particulars of what passed, but with that agreement in substance, and that variation in unimportant details, which are usually found in witnesses intending to speak the truth and not tutored to tell a particular story. **NARAIN RAO v. HANSEN PUNTH HINDO** [March, 1898 9 Moore's L. A., 93]

**89** — *Witnesses called to support case of evidence contrary to it* — A party who calls a witness to give evidence on his behalf is not necessarily bound by his evidence, but if the evidence is at variance with the truth of his case (e.g. if a witness called to prove execution of a document swears that it was not executed and has the means of knowing the fact), it throws a suspicion on the case which renders the clearest testimony necessary to establish its truth. **PUZZELL v. BARNES v. OMDAN BERNES** 10 W. R., 469

**90** — *Credibility of witnesses support as a fact* — Although it does not necessarily follow that where a witness gives evidence on a particular fact in a case and that fact is found against his evidence, he is to be entirely disbelieved on the other parts of the case he has spoken to, yet where witnesses who were not merely giving an opinion upon an isolated fact in the case, but came in a Court to prove the whole case made by the plaintiffs, and that a very special case

WITNESS—CIVIL CASES—*continued.*7. CONSIDERATION AND WEIGHT OF EVIDENCE—*continued.*

and it is shown to be a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the case. **HABIBDOOLAH v. GOVIND ALI KHAN**

[18 W. R., P. C., 523

91. ———— *Ground for refusal to consider evidence—Non-production of best evidence.*—The principle that a plaintiff is bound to produce the best evidence in his power was held not to justify a Judge in omitting to consider the weight and legal effect of the remaining witnesses, when plaintiff had failed to produce the most important witness. **LATORE MISTREE v. AGAMUDDER NUSHYO**

[14 W. R., 482

92. ———— *Mode of weighing evidence—Consideration of motives for bringing a suit.*—Where the evidence in support of a case is doubtful, the Court, in weighing that evidence, may properly take into consideration the motives imputed to the plaintiff as having induced him to sue. **BIRCH v. PURZIND ALI**

3 N. W., 303

93. ———— *Estimating value of evidence—Witness swearing affirmatively to fact.*—In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not. **CHOWDHRY DEBY PERSAD v. CHOWDHRY DOWLAT SINGH**

[6 W. R., P. C., 55: 3 Moore's I. A., 347

94. ———— *Credit of witness, a servant or dependant of plaintiff.*—The circumstance of a witness being a servant or a dependant of the plaintiff does not of itself disentitle him to credit. **SHOODUL CHUNDER KULLEAH v. KOYLASH CHUNDER MAL**

14 W. R., 23

95. ———— *Rejection of evidence unnecessarily and unjustifiably.*—Held by **NORMAN, J.**, that the Judge was not at liberty to reject, as matters which he could wholly leave out of consideration, any of the evidence before him in a case where the witnesses were unimpeached in their general character and uncontradicted by any testimony on the other side, and where there was no improbability in the facts which they related, and that the probative force arising from concurrent testimony was the compound ratio of the probabilities of the testimonies taken singly. **RADHA KANT DEB v. KUSMA DOSSEER**

7 W. R., 105

96. ———— *Evidence of witnesses found unreliable in criminal case.*—A Judge was held to have done wrong in throwing out the evidence of witnesses tendered by the defendant in a civil action, merely because they have been found untrustworthy when examined with reference to a charge of breach of trust against the same defendant in a criminal case. **LALL CHAND ROY v. BRINDABUN CHUNDER ROY**

13 W. R., 226

97. ———— *Evidence, Weight of—Witness, Evidence of, part of which is disbelieved, value of.*—If a part of the evidence of a

WITNESS—CIVIL CASES—*continued.*7. CONSIDERATION AND WEIGHT OF EVIDENCE—*concluded.*

witness is disbelieved, other evidence coming from the same quarter must be viewed warily, but that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met. **RAMESWAR KOER v. BHARAT PERSHAD SAHI**

4 C. W. N., 18

98. ———— *Evidence of person who has been convicted of perjury or other offence.*—The evidence of a person who has been punished for perjury or of a person who has been convicted of a criminal offence can hardly be entitled to the credit that would be given to the testimony of a person against whom no such imputation can be brought. **DOONGUN RAI v. DOORGA RAI**

2 N. W., 97

99. ———— *Evidence of truth of witness.*—The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing and then have given rise to such an objection. **SOORIAH ROW v. COTAGHERY BOOCHIAH**

[5 W. R., P. C., 127: 2 Moore's I. A., 113

100. ———— *Credibility of witnesses—Professional witness—Witnesses in former cases.*—The Privy Council, referring to the generality of the Principal Sudder Ameen's observations as to certain witnesses having given evidence in other cases, observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness had given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India. **LALL BHABEE LALL v. GOPEE BEEBER**

18 W. R., P. C., 265

101. ———— *Discrepancies in statements of witnesses.*—Discrepancies in an account of what took place in a conversation are not a sufficient ground for disbelieving statements made by different witnesses. **BHAJU SING v. KAIENATH TEWARI**

3 B. L. R., A. C., 332

102. ———— *Ground for discrediting witness.*—A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony. **KASINATH SHAHA v. DWARKANATH SIKHAR**

[9 B. L. R., 215: 17 W. R., 550

## 8. PRIVILEGES OF WITNESSES.

103. ———— *Exemption from appearance in Court—Natives of rank, Prejudices of, to appear in Court.*—The prejudices of natives of rank to appear as witnesses in a Court of justice will not be allowed to relax the rule that the best evidence must be produced of which the case is susceptible. **RAM MOHUN MOOKERJEE v. NURSING DEB**

[1 Ind. Jur., O. S., 63: W. R., F. B., 54

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### 8 PRIVILEGES OF WITNESSES—continued

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[8 W H 453]

RAJEE CHUNDER CHOWDHURY & SATTY BOOK  
DUREX MEDIA 19 W R 45

104. — Exemption from suit in respect of evidence—*It is of damages—false evidence*—W in case can be sued for damages in respect of evidence given by them in a judicial proceeding. If their de c be false they should be proceeded against by an indictment for perjury.

[11 B L R, P C 321 17 W R 253

105 ——— Right of suit — S an r — law  
der entered by witness while under examination as a  
judicial proceeding — A witness in a court of  
justice is absolutely privileged as to anything he  
may say as a witness having reference to the inquiry  
in which he is called as a witness. The plaintiff  
sued to recover damages for slander of the station  
complained of being a girl in the plaintiff to have  
been made by the defendant while in examination as  
a witness during the hearing of a case before a  
Magistrate. It was found that the statement was  
made in answer to questions put to the defendant as  
a witness and allowed by the Court as relevant to  
the case. The plaintiff alleged that the statement  
was made maliciously that the defendant bore him a  
grudge and that it was to perpetrate that grudge  
and to injure his reputation that the statement was  
made. Held that the plaintiff had no cause of  
action and that the suit had been properly dismissed.  
BRITMUR SINGH v. BECHARAM NISAR. THE  
KUMAR SINGH v. GOPI KRISHNA DAS

[L. L. R., 15 Calc. 284]

See CHIDAMBARAM & THIRUMANI

[L L R, 10 Mar, 87]

103 Defamation—Penal Code s. 50 Statement by witness M S was convicted under s. 50 of the Penal Code of defamation by making a certain statement when under cross-examination as to his before a Court of criminal jurisdiction. Held that the conviction was valid. The statements of witnesses are privileged if false the remedy is by indictment for perjury and not for defamation. MANJARA v. S. H. NETHI

(1 L. R., 11 Mass. 477

107 *Perda abson. Spec. of damage.*—The plaintiff was cited as a witness by one Simon and testified by him against the defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant, the defendant was examined by the Court, and stated that there was enmity between him and the plaintiff, and on the Court inquired to know what was the cause of enmity defendant used words contrary to the measure that plaintiff's death was legitimate. *Held* by HONORABLE J., that under the circumstances the state

WITNESS--CIVIL CASES--continued

### A. PRIVILEGES OF WITNESSES—continued.

ment complained of was made by defendant while deposing in the witness-box and therefore absolutely privileged. *Per* MAXWELL J (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished, and when he was no longer in the witness-box had not been tried, and the order remanding the case for trial on the merits was not further than that the English law of slander as forming part of the law of defamation, and as such drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage is not applicable to this country either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India; that whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage; that such abusive and insulting language unless excused or protected by any other rule of law is in itself a substantive cause of action and a civil injury apart from defamation and that malice is an element of liability for abusive and insulting language and that such malice will be presumed or inferred, unless the contrary is shown; that when the defendant is absolutely privileged and protected by reason of the office or occasion in which he employed such language, he renders himself subject to a civil liability for damage irrespective of any plea of justification based upon proven truthfulness of the statements contained in the abusive and insulting language complained of; that the rule of English law as to the privilege or protection of witnesses in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insult, and abusive language used by a witness and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely so long as they are relevant to the inquiry in the broad sense of the phrase and that, even where such statements have no relevance to the inquiry the defendant may prove the absence of malice and that they were made in good faith for the public good. DAWAN NISAN C. MANOH SINGH. I. L. R. 10 All. 435

L. L. R. 10 All. 495

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## 1. PERSONS COMPETENT OR NOT TO BE WITNESSES.

1. Judge—Competent witness.—A Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer, provided that he has no personal or pecuniary interest in the subject of the charge, and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part. QUEEN v. MUKTA SING . 4 B. L. R., A. Cr., 15; 13 W. R., Cr., 60

See ROUSSEAU v. PINTO . . . 7 W. R., 190

2. Magistrate—Evidence Act, s. 121—Power of Sessions Judge to compel Magistrate to give evidence—Privilege of witness.—A Sessions Judge finding, in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been

# WITNESS—CRIMINAL CASES

—continued.

## 1 PER-ON'S COMPETENT OR NOT TO BE WITNESSES—continued

fully complied with summoned the committing Magistrate and to k his evidence that the accused person duly made the statement recorded. The Magistrate of the district objected to this proceeding of the Sessions Judge contending that it was "contrary to law." The Sessions Judge referred the question, whether or not his proceeding was contrary to law to the High Court. *Per* TRAIST C J PRABHU J OLDFIELD J and TRAIST C J. That the privilege given by s. 121 of Act I of 18 2 is the privilege of the witness, not of the Judge or Magistrate of whom the question is asked if he waives such privilege or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege, the reference the objection not having been taken by the Subordinate Magistrate but the Magistrate of the district should be answer and accordingly *Per* PANKAJ J.—That a Sessions Judge while trying a case cannot compel a witness to answer questions as to his own conduct in Court as such Magistrate EMPEROR OF INDIA v CHILDA KHAN

(I L R, 3 All, 573)

3 — *Judge trying case*—In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly—*parties* whom he himself tried on that charge,—it was held that he was bound to state to the accused so far as he could, what were the facts he himself observed and to which he himself could bear testimony and the prisoner in such situation had a right, if he thought it desirable, to cross examine the Judge whose evidence should be recorded, and form part of the record in the case. The proper course however for the Deputy Magistrate to have taken in this case would have been to decline to try the case and to ask that it should be undertaken by some other Judge. *IN THE MATTER OF THE PETITION OF HERRO CHANDER PAUL*

(20 W R, Cr, 78)

4 — *Conviction on illegal trial*—A Magistrate cannot be called a witness in a case in which he is the sole judge of law and fact. *Per* MAKER J.—Where a such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad. *Per* PRABHU J.—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed to support the conviction. *EMPEROR v DOKKILLY*

(I L R, 2 Calc, 405)

5. — *Magistrate as witness*—A Magistrate is not a witness in an appeal—It is undeniable that Magistrates, whose decisions are under appeal, or who have been engaged in promoting the prosecution as police officers concerned in a case, should sit on the Bench beside or converse privately in Court with the Judge

# WITNESS—CRIMINAL CASES

—continued

## 1 PER-ON'S COMPETENT OR NOT TO BE WITNESSES—continued

who is engaged in trying, the prisoner's appeal. If the Appellate Court wishes to ascertain any fact relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate on oath or solemn affirmation in the same manner as an ordinary witness. *REG v. HANSHIRATH DIXIT*

[8 Bom, Cr, 128]

8 — *Examination of Magistrate trying case*—Case in which the High Court permitted a Deputy Magistrate to be examined on behalf of a petitioner whose case was investigated by the Deputy Magistrate. *QUEEN v. MURDOCK SODUN I CR*

18 W R, Cr, 49

— See s. 131 OF THE EVIDENCE ACT 18 2

7 — *Prisoner—Tendering pardon to prisoner*—Procedure as to tendering, a pardon to a prisoner before examining him as a witness, discussed. *QUEEN v. GAGAIT*

[8 B. L. R, Ap, 50 12 W R, Cr, 50]

8. — *Co-defendants Examination of as witnesses*—Where there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants. *QUEEN v. ASHUTOSH SHINKE*

8 W R, Cr, 81

9 — *Prisoners tried together jointly*—Examination of one as witness against another—Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. *IN THE MATTER OF DAVID*

5 C. L. R, 574

10 — *Person brought up with accused and not discharged*—A person apprehended by the police and brought before the Magistrate with the accused is, though not discharged by the Magistrate a competent witness against the accused provided he be not charged along with the accused. *REG v. VARADAN SUDHAN*

5 Bom, Cr, 1

11. — *Evidence of woman on charge of adultery*—A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf. *IN RE BIRNCO*

8 W R, Cr, 93

12. — *Person against whom affiliation order is sought—Criminal Procedure Code (1852), s. 459—Order for maintenance*—A person against whom an order for maintenance under s. 455 of the Code of Criminal Procedure is sought is a competent witness on his own behalf in such proceedings. *HIRA LAL v. ANAND JAIN*

(I L R, 18 All, 107)

See *NUB MAHOMED v. BISMILLAH JAIN*

(I L R, 18 Calc, 781)

13 — *Evidence Act s. 119—Competency of persons of tender years*—The competency of a person to testify as a witness is a condition precedent to the admissibility to him

## WITNESS—CRIMINAL CASES —continued.

### 1. PERSONS COMPETENT OR NOT TO BE WITNESSES—concluded.

of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. *QUEEN-EMRESS v. LAL SAHAI* . . . I. L. R., 11 All., 183

14. ———— *Evidence Act (I of 1872), s. 118—Evidence of a witness illegally pardoned by the police—Meaning of "accused" in s. 342 of the Code of Criminal Procedure (Act X of 1882).*—During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom, named H, made certain disclosures to the police, and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. *Held* that the evidence of H was admissible under s. 118 of the Evidence Act, though he had been illegally discharged by the police. *Held* also that by the word "accused" in s. 342 of the Code of Criminal Procedure (Act X of 1882) is meant a person over whom the Magistrate or other Court is exercising jurisdiction. *QUEEN-EMRESS v. MONA PUNA* [I. L. R., 16 Bom., 661]

15. ———— *Accused persons under trial separately for a substantive offence and for abetment of that offence competent witnesses on each other's behalf—Criminal Procedure Code (1882), s. 342.*—Prisoner A was tried for an offence under s. 403 of the Indian Penal Code and was convicted, but was sent to a Magistrate of higher powers than the convicting Magistrate to be sentenced. Whilst his case was pending before the second Magistrate, prisoner B, being on his trial separately for abetment of the offence for which A had been tried, applied for A to be summoned as a witness on his behalf. B's application was refused. *Held* that s. 342 of the Code of Criminal Procedure was no bar under the circumstances to A's giving evidence for B, and that B's application ought to have been granted. *QUEEN-EMRESS v. TIRBENI SAHAI* [I. L. R., 20 All., 420]

### 2. SUMMONING WITNESSES.

16. ———— *Dispensing with personal attendance of witnesses—Deposition—Trial before Sessions Court.*—It is only in extreme cases of delay or expense that the personal attendance of a

## WITNESS—CRIMINAL CASES —continued.

### 2. SUMMONING WITNESSES—continued.

witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to. *EMRESS v. MULU* . . . I. L. R., 2 All., 646

17. ———— *Application to enforce attendance of witnesses—Witnesses for defence—Examination of accused.*—In a case under Ch. XV, Code of Criminal Procedure, 1861, it was incumbent on the accused either to produce their witnesses or to apply beforehand for a summons to enforce the attendance of any witness who was not likely to appear without a summons; it was not necessary in such cases to record the examination of the accused with the same formalities as in cases under Chs. XII and XIV. *QUEEN v. CHUDEE KOONJRA*

[14 W. R., Cr., 76]

18. ———— *Discharge of witness from attendance.*—It is incumbent upon a Court when it discharges a witness from the duty of attendance before the trial is ended to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony; and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary. *KHURRUCDHAREE SINGH v. PERSHADEE MUNDUL* [22 W. R., Cr., 44]

19. ———— *Discretion of Court as to summoning witnesses—Criminal Procedure Code, 1872, s. 192—Discretion of Magistrate as to examining witnesses.*—It is entirely within the discretion of a Magistrate conducting a trial in a warrant case to admit evidence on behalf of either side at any stage of the trial, s. 192, Act X of 1872, applying to such a case; but the Magistrate, in exercising the discretion conferred on him by this section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused. *QUEEN v. KASSY SINGH. QUEEN v. HULKOREE SINGH* . . . 21 W. R., Cr., 61

20. ———— *Duty of Court as to summoning witnesses—Criminal Procedure Code, 1872, s. 359—Adjournment for appearance of witnesses for defence.*—Certain persons were charged before the Magistrate with rioting, and being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused. *Held per JACKSON, J.*, that this being a warrant case, it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case. *Held further per JACKSON, J.*, that the meaning of s. 359 of the Criminal Procedure Code is, that if among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is

# WITNESS—CRIMINAL CASES, WITNESS—CRIMINAL CASES

—cont. next

## 2. SUMMONING WITNESSES—cont. next

material but that the section is not intended to make the Magistrate to inquire what the defence of the accused person is to be and to consider whether or not learn the nature of the defence, he is absolutely to stay from summoning the whole of the witnesses called by the accused and further that in the present case there was not any purpose of verifying the delay and that by the refusal to grant further time the accused had been prejudicially prejudiced in their defence. **EMPEROR v. RAJCOOMAR SINGH** 1 L. R., 3 Cal., 573

S. C. IN THE MATTER OF THE PETITION OF RAJCOOMAR SINGH 3 C. L. R., 62

31. — *Objection to summon witnesses* Criminal Procedure Code 1861 s. 156 CA XII. In a case tried under the provisions of Ch. XIV of the Code of Criminal Procedure the accused were entitled to have their witnesses summoned and a Magistrate had no power to refuse to summon them. **QUEEN v. LOOBAGATTY** 11 W. R., Cr., 55

22. — *Discretion of Magistrate—Criminal Procedure Code 1861 s. 62.* Held by **BAILEY J. (MARKET J. dubitante)** that a Magistrate had a discretion under s. 207 of the Code of Criminal Procedure to summon a witness when he was likely to get material evidence on behalf of the accused. **IN THE MATTER OF THE PETITION OF AMER CHAND NOHATTA, QUEEN v. AMER CHAND NOHATTA** 13 W. R., Cr., 63

23. — *Forcibly rescuing cattle—Act III of 1857 s. 13 Criminal Procedure Code 1861 s. 2—summoning witnesses.*—In a case of forcibly rescuing cattle under s. 13, Act III of 1857 in which the accused did not summon any witness, it was held that, even if the accused wanted them summoned, the Magistrate under s. 202 of the Code of Criminal Procedure need not have summoned them, unless persuaded that they were likely to give material evidence and that they would not attend voluntarily. **AKBAR TAUDEGER v. PUNCHOOR BIRWAS** 10 W. R., Cr., 42

24. — *Duty of parties—Criminal Procedure Code 1861 s. 251 202—Attendance of witnesses.* In a case under Ch. XV of the Code of Criminal Procedure, it was expected that parties would bring their own witnesses with them. If they required the attendance of any witness, they should apply to the Magistrate to cause his attendance and why so they did not so apply it was sufficient if the Magistrate recorded in his judgment the substance of the defendant's answer. **RAGHUB LAXMI v. MOHINDER NARAIN** 10 W. R., Cr., 18

25. — *Criminal Procedure Code 1861 s. 186.* In the case of a charge of an offence triable by the Court of Session alone, the Magistrate was bound, under s. 186 of the Criminal

## 2. SUMMONING WITNESSES—cont. next.

Procedure Code to summon the competent witnesses. **QUEEN v. ZAKIR ALLY** 8 W. R., Cr., 4

26. — *Criminal Procedure Code, 1861 s. 5—Accused person, F. 11 of.*—An accused person is entitled to have examined as a witness any person named in his list of witnesses delivered to the Magistrate; and the Magistrate should take measures to enforce the attendance of such person. **QUEEN v. IMAN BUTT** 10 R. L. R., Ap., 83 15 W. R., Cr., 34

27. — *Right of accused to have witness summoned who has refused to give evidence in the Magistrate's Court—Criminal Procedure Code (1857) s. 311.*—If an accused person on being called upon under s. 211 of the Code of Criminal Procedure to give evidence or in writing what of the persons whom he wishes to be summoned to give evidence on his trial declines to give in evidence, he cannot compel the Magistrate after committing to issue any summonses for witnesses on his behalf. Nevertheless under such circumstances with the Sessions Judge be obliged to issue summonses for the attendance of such witnesses unless he is satisfied that their evidence may be material. **QUEEN v. EMPRESS v. HAR GUD and SINGH I L. R., 11 All., 242 referred to QUEEN v. EMPRESS v. SHAKIR ALI** 1 L. R., 19 All., 562

28. — *Criminal Procedure Code (Act XXV of 1861) ss. 158, 207 217 and 223—Arrest and detention of witnesses.*—S. 207 of the Criminal Procedure Code gave no power to the Magistrate to call up and examine witnesses for the defence whose names have been given in a list under s. 227 when the prosecutors reserve their defence for the Court of Session; but under s. 224 he was bound to summon them to give evidence before the Court of Session. **IN THE MATTER OF MANISH CHANDRA BANERJEE, QUEEN v. PURNA CHANDRA BANERJEE, QUEEN v. KALI SARKAR** 4 R. L. R., Ap., 1 13 W. R., Cr., 1

29. — *Credibility of witnesses.*—It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he is not to determine beforehand what credit he will give to their evidence. **IN THE MATTER OF THE PETITION OF MARINA CHANDRA SHAH** 4 R. L. R., Ap., 78 15 W. R., Cr., 15

30. — *Criminal Procedure Code 1861 s. 15—s. 62.*—s. 15 of the Code of Criminal Procedure referred to cases under Ch. XII, which were triable by the Court of Session, and not to cases under Ch. XV which were triable by a Magistrate. To the latter cases s. 62 applied. **MOHENDONATH BANIA v. BHAKDOO LOO** 10 W. R., Cr., 3

31. — *Right of accused to have witnesses summoned—Criminal Procedure Code s. 187, s. 203.*—Under s. 203 Code of Criminal Procedure a prisoner was entitled, as a matter of right, to have any witnesses named in the list which

# WITNESS—CRIMINAL CASES

—continued.

## 2. SUMMONING WITNESSES—continued.

he delivered to the Magistrate, summoned and examined. *QUEEN v. PROSUNNO COOMAR MOTTO*

[23 W. R., Cr., 58]

32. ———— *Criminal Procedure Code, 1861, s. 253.*—Under s. 253 of the Criminal Procedure Code, 1861, it was imperative on the Magistrate to summon the witnesses named by the prisoner. *QUEEN v. MUDSOODREN* 2 N. W., 148

33. ———— *Summoning witnesses for accused—Criminal Procedure Code (Act XXV of 1861), s. 253.*—*Per AINSLIE, J.*—In a trial under Ch. XIV of the Criminal Procedure Code, the Magistrate was not bound, under s. 253, to summon any witness whom the accused might require. It was only discretionary with him to do so, and in the circumstances of the present case he exercised his discretion rightly in refusing to summon the witnesses asked for. *Per PAUL, J.* (differing).—The right of an accused to have witnesses for his defence summoned during the pendency of the trial is an ordinary and natural right, and this right was not taken away, but affirmed, by s. 253; the Magistrate was bound to summon the witnesses, though it was discretionary with him to adjourn the trial. In the present case, treating it as a matter of discretion only, the Magistrate was wrong in refusing to summon the witnesses required. *QUEEN v. BHOLANATH MOOKERJEE*

[7 B. L. R., 584; 16 W. R., Cr., 28]

34. ———— *Discretion of Magistrate—Criminal Procedure Code, 1861, ss. 253, 262, 263.*—S. 253 of the Criminal Procedure Code did not apply to cases triable under Ch. XV of that Code; and ss. 262 and 263 were applicable when the offence was not punishable with more than six months' imprisonment; and it was in the discretion of the Magistrate to summon the witnesses for the defence, if he considered their evidence essential to the just decision of the case, and incumbent on him to summon them only if it appeared to him that they were likely to give material evidence on behalf of either party, and that they would not voluntarily appear for the purpose of being examined at the time and place appointed for the hearing of the complaint. *QUEEN v. MOHURREE*

[2 N. W., 393]

35. ———— *Discretion of Magistrate—Criminal Procedure Code, 1861, ss. 227, 228.*—Where a prisoner, under s. 227, Code of Criminal Procedure, gave in a list of the witnesses he wished to summon, after his case had been committed, the Magistrate was bound to exercise his discretion upon the point, and to state whether he would summon the witnesses or not, and he ought to state his reasons for not doing so. If he thought the witnesses were included in the list for the purpose of delay, he should proceed under s. 228 of the Code. *QUEEN v. RAJCOOMAR MOOKERJEE* . . . 16 W. R., Cr., 14

38. ———— *Discretion of Magistrate—Criminal Procedure Code, 1872, ss. 215, 362.*—It was not incumbent on a Magistrate

# WITNESS—CRIMINAL CASES

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## 2. SUMMONING WITNESSES—continued.

to summon every person named as a witness by the complaint. S. 215, expl. 3, of the Criminal Procedure Code, 1872, must be read with s. 362, which vested a discretionary power in the Magistrate. *JEIDHARI SINGH v. SHUNKUR DOYAL*

[23 W. R., Cr., 9]

See, however, *EMPRESS v. HEMATULLA*

[I. L. R., 3 Calc., 389]

*EMPRESS OF INDIA v. KASHI*

[I. L. R., 2 All., 447]

*QUEEN v. PURASURAMA NAIKAR*

[I. L. R., 4 Mad., 329]

ANONYMOUS . . . 8 Mad., Ap., 5

37. ———— *Criminal Procedure Code, 1861, Ch. XIV.*—In a case of an offence (such as hurt, under s. 323, Penal Code) punishable with imprisonment exceeding six months and therefore falling under Ch. XIV of the Code of Criminal Procedure, a Magistrate was bound to summon all the witnesses required by the accused. *QUEEN v. BOOLAKEE* . . . 14 W. R., Cr., 81

38. ———— *Criminal Procedure Code, 1869, s. 131—Claims to stolen property.*—Petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared, whereupon petitioner preferred his claim and asked the Assistant Magistrate to summon certain witnesses, but the Assistant Magistrate refused to do so, and disallowed his claim, the Magistrate on appeal declining to interfere. On reference by the Judge, the High Court held that the Assistant Magistrate was bound to summon the witnesses named by the petitioner, set aside that officer's order, and directed him to dispose of the case after taking due steps for securing the attendance of the witnesses in question. *SOOKHAN SAHOO v. GOVERNMENT* . . . 18 W. R., Cr., 5

39. ———— *Issue of summons—Criminal Procedure Code (Act XXV of 1861), s. 318.*—Although there was no mention in Ch. XXII of Act XXV of 1861 of any particular provisions under which witnesses might be summoned, yet it was the duty of the Court, if parties could not procure the attendance of their witness, to issue summonses for their attendance. IN THE MATTER OF THE PETITION OF SHAMASANKAR MAZUMDAR

[9 B. L. R., Ap., 45]

*SHAMASUNKUR MOZOOMDAR v. ANUNDMOYEE DASSYA* . . . 18 W. R., Cr., 64

40. ———— *Ground for postponement of case.*—A Magistrate was held to be right, under the circumstances, in not postponing the case for the purpose of summoning witnesses for one of the parties. IN THE MATTER OF THE PETITION OF GAYINDA CHANDRA GHOSE . . . 9 B. L. R., Ap., 39

41. ———— *Non-attendance of witnesses—Criminal Procedure Code, 1861, s. 269—Ground for adjournment of trial.*—In a trial held

## WITNESS—CRIMINAL CASES

—continued.

## 2. SUMMONING WITNESSES—continued.

46. ———— *Omission to take steps to summon witnesses.*—A complainant in a case who mentioned the names of several witnesses on his behalf was requested to produce them on a certain date. Instead of doing that, he produced only two witnesses, who were examined. *Held* that, as the complainant did not apply to the Magistrate to issue summonses on the other witnesses, or ask him to proceed under s. 262, Code of Criminal Procedure, 1861, the Magistrate was not wrong in law in deciding the case on the evidence which was before him. *QUEEN v. NOTOVUE BERA* . 15 W. R., Cr., 87

47. ———— *Refusal to summon witness for accused—Participation in charge—Illegal conviction.*—A refusal to summon witnesses cited by an accused, on the ground of their being implicated in the charge, vitiates the trial and conviction. *RAM SHAHAI CHOWDHRY v. SANKER BAHADUR* . 6 B. L. R., Ap., 65 : 15 W. R., Cr., 7

48. ———— *Refusal to summon witnesses named for the defence.*—Where the Subordinate Magistrate convicted certain persons without allowing them a proper opportunity for the summoning and attendance of witnesses named for the defence, the High Court quashed the conviction and directed the Subordinate Magistrate to re-hear the case. *ANONYMOUS* . 5 Mad., Ap., 27

49. ———— *Criminal Procedure Code, 1872, s. 362—Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings.*—Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in Court or by commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code,—*Held* that the conviction of the accused person must be set aside, and the case be reopened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law. *IN THE MATTER OF THE PETITION OF SAT NABAIN SINGH*

[I. L. R., 3 All., 392]

50. ———— *Criminal Procedure Code, 1882, ss. 256, 257—Right of accused to call witness upon charge being framed in a warrant case.*—The accused was charged with having committed an offence under s. 420 of the Indian Penal Code. On the last day that the case was taken up, certain witnesses for the prosecution, who had been examined-in-chief, were cross-examined by the accused, and upon the conclusion of such cross-examination a charge was framed. The accused then stated that he could produce witnesses if the case were postponed, but the Magistrate refused postponement on the ground that at the outset the accused had stated that he had no witnesses. The accused moved the High Court and stated in his affidavit that what he had meant was that he had no witnesses present in Court. *Held* that, under ss. 256 and 257 of the Criminal Procedure Code, the accused was, as of right, entitled to an

## WITNESS—CRIMINAL CASES

—continued.

## 2. SUMMONING WITNESSES—continued.

adjournment for the purpose of adducing evidence in defence. *EXTAZ ALI v. JAGAT CHANDRA BANERJEE* [1 C. W. N., 313]

51. ———— *Right of accused to have witnesses re-summoned and re-heard—Criminal Procedure Code (Act X of 1892), s. 350 (a), s. 537—Commencement of proceedings—Interlocutory orders—Trial, Meaning of—Right to have witnesses summoned and re-heard—Irregularity—Refusal to recall witnesses.*—An accused person does not lose the right of having the witnesses re-summoned and re-heard under prov. (a), s. 350, of the Criminal Procedure Code, because an interlocutory application for enforcing the attendance of certain witnesses has been made and granted not at the trial, but before the trial and with a view to the trial. The proper time for making such application is when the trial commences before the Magistrate. The expression "trial" means the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecutions and for the defence, if the accused be defended, present in Court, for the hearing of the case. S. 537 of the Criminal Procedure Code cannot cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses in contravention of prov. (a), s. 350. *GOMEN-SIRDA v. QUEEN-EXPRESS*

[I. L. R., 25 Cal., 863]

2 C. W. N., 465

52. ———— *Right of accused—Compelling attendance of witnesses—Evidence—Criminal Procedure Code (Act X of 1892), s. 237.*—Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing, or to issue fresh processes for the attendance of the defendant's witnesses, on the ground that they were all friends of the accused who would come to Court if the accused desired it. The prisoners were convicted. *Held* the conviction must be set aside: the Magistrate having once granted processes, he was bound to assist the accused in enforcing the attendance of his witnesses. *QUEEN-EXPRESS v. DIANANJOI CHOWDHRY* . I. L. R., 10 Cal., 931

53. ———— *Non-attendance of witness, Enquiry into reasons for—Criminal Procedure Code, 1861, s. 221.*—It was held that an enquiry should be made into the excuse given by a person for his non-attendance as a witness before enforcing a fine for such non-attendance, in order that the Sessions Judge, or other authority, might fairly exercise the discretion given him by s. 221 of the Criminal Procedure Code. *QUEEN v. AMBER KHAN. IN RE BRUGWAN DOSS* . 2 N. W., 113

54. ———— *Mode of summoning witnesses—Recognizances to appear.*—A subordinate Magistrate cannot bind over witnesses by recognizances to appear before himself. The

## WITNESS—CRIMINAL CASES

—continued

## 2. SUMMONING WITNESSES—cont. next

power courts to enforce attendance is by summons and if that fails, by warrant. ANONYMOUS

[4 Mad., Ap., 6]

See ANONYMOUS

4 Mad., Ap., 17

VENKATAPPAH &amp; PAPAMMAH

5 Mad., 132

55

*Criminal Procedure Code 1861 s 191—Warrant to enforce attendance of witnesses.*—A Magistrate was not bound, under s 101 of the Code of Criminal Procedure, to enforce the attendance of witnesses by warrant except upon proof of due service of summons. IN THE MATTER OF THE PETITION OF ABDOO RICHMAN

[7 W. R., Cr., 37]

QUEEN &amp; SUTHERLAND

QUEEN &amp; NARAIN

SINGH

14 W. R., Cr., 10

56

*Criminal Procedure Code ss 76, 81 and 160—Investigation by police—Power of Magistrate to issue warrant for arrest and production of witnesses.*—*Penal Code s 174* Where a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police and in attempting to execute such warrant the police arrested the wrong person and were assaulted in the attempt, *Held* that, apart from the fact that the attempt to arrest was made on the wrong person a District Magistrate has no authority to issue a warrant for the production of a witness at an investigation by a police officer but only before his own Court under ss 76 and 81 of the Code of Criminal Procedure. *Held* also that as the investigation was held by a police officer under Ch XIV of the Criminal Procedure Code, the proper course was for the Sub-Inspector of Police to require the attendance of the witness under s 160 of the Code of Criminal Procedure, and, on failure by her to comply with such order, prosecute her under s 174 of the Penal Code. QUEEN EMPRESS & JOGENDRA NATH MUKERJEE

[I. L. R., 24 Cal., 320]

1 C. W. N., 154

57

*Issuing summons to witnesses out of jurisdiction.*—Magistrate may, under the Criminal Procedure Code, issue summonses for service upon witnesses beyond the limits of their districts. (COLLET J dissenting) ANONYMOUS

[3 Mad., Ap., 5]

58

*Service of summons—Affixing summons to door of house.*—Service of summons on a witness by affixing it to the door of his house was held to be no evidence of his having received it, in a charge brought against him of disobeying the summons. ANONYMOUS

[8 Mad., Ap., 29]

59

*Service of summons.*—The mere showing to a witness of a summons issued under s 186 of the Criminal Procedure Code 1861, is not sufficient service. Either the original

## WITNESS—CRIMINAL CASES

—continued

## 2. SUMMONING WITNESSES—cont. next

should be left with the witness, or it should be exhibited to him, and a copy of it delivered or tendered. LEO & KARNANAL DANATHAM

[5 Bom., Cr., 20]

## 3. AVOIDING SERVICE.

60. ———— *Warrant for apprehension of witness—Commitment of witness in default of appearance.*—*Criminal Procedure Code 1861 s 191.*—s 189 only empowers a Magistrate to issue a warrant for the apprehension of a witness when he has reason to believe that the witness will not attend to give evidence without being compelled to do so, and it does not empower a Magistrate to commit a witness. IN THE MATTER OF MARSH CHANDRA BANERJEE, QUEEN & LALBA CHANDRA BANERJEE, QUEEN & HALDIBHAR

[4 B. L. R., Ap., 13 W. R., Cr., 1]

## 4. SWearing OF AFFIRMATION OF WITNESSES.

61. ———— *Oath or affirmation.*—*Criminal Procedure Code, 1861, s 199—Memorandum of deposition.*—A witness may be examined either on oath or on solemn affirmation, but he cannot both be sworn and put on solemn affirmation at the same time. The memorandum required by s 199 of the Code of Criminal Procedure should always be appended to the depositions. QUEEN & HOSAIN SUDHAN

[13 W. R., Cr., 17]

## 5. EXAMINATION OF WITNESSES.

## (a) GENERALLY

62. ———— *Power of Court to dispense with examination of witnesses.*—*Criminal Procedure Code, 1861, s 362—b 362 of the Code of Criminal Procedure* did not give a Magistrate discretion to dispense with the examination of witnesses summoned by the prosecution. QUEEN & PARASRAMA NAIKAN

[I. L. R., 4 Mad., 329]

63

*Commitment without examining witnesses.*—Where a Magistrate committed a person charged with perjury in a trial before himself to the Sessions without examining the witnesses for the prosecution, *Held* that the commitment was illegal. QUEEN & CHINSA VEDAGIRI CHETTI

[I. L. R., 4 Mad., 227]

QUEEN &amp; BIRENATH MOOKHOPADHYA

[7 W. R., Cr., 45]

DINONATH GOPE &amp; SARODA MOOKHOPADHYA

[7 W. R., Cr., 47]

64

*Power of interference of High Court.*—*Criminal Procedure Code, 1861, s 363*—Where it was not shown that there were any witnesses forthcoming for examination other than those whom the Sessions Judge and

## WITNESS—CRIMINAL CASES

—continued.

## 5. EXAMINATION OF WITNESSES—continued.

examine, the Court refused, with reference to s. 363, Code of Criminal Procedure, to interfere with the Sessions Judge's proceedings. *QUEEN v. JUMDER SINGH* . . . 12 W. R., Cr., 73

65. ——— Duty of defence as to calling witnesses.—*Inference from failure to call witnesses.*—A prisoner or his counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another. *HARRY CHURN CHUCKERBUTTY v. EMPRESS*

[I. L. R., 10 Cal., 140; 13 C. L. R., 358]

66. ——— Duty of prosecution as to calling witnesses.—*Inferences to be drawn on failure to call witnesses.*—*Misdirection.*—It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. No such corresponding inference can be drawn against an accused. *IN THE MATTER OF THE PETITION OF DHUNNO KAZI. EMPRESS v. DHUNNO KAZI* . I. L. R., 8 Cal., 121

S. C. DHUNNO KAZI v. EMPRESS

[10 C. L. R., 151]

67. ——— *Obligation to call witnesses examined before Magistrate.*—Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witness in Court on the part of the prosecution that they had been examined by the committing Magistrate against the express wish of the police officer in charge of the prosecution,—*Held* that that was not a valid ground for the non-production of the witnesses in the Sessions Court. In conducting a case for the prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined. *QUEEN-EMPRESS v. RAM SAHAI LALL* . . . I. L. R., 10 Cal., 1070

68. ——— *Trial in Sessions Court—Non-production of material witnesses for Crown—Duty of public prosecutor.*—It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge. The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling those witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences

## WITNESS—CRIMINAL CASES

—continued.

## 5. EXAMINATION OF WITNESSES—continued.

unfavourable to the prosecution must be drawn from the non-production of its witnesses. *QUEEN-EMPRESS v. TULLA* . . . I. L. R., 7 All., 804

69. ——— *Discretion of Public Prosecutor as to calling witnesses whose names are returned in the calendar—Practice.*—In a trial before a Court of Session or a High Court, it is entirely in the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any witness or witnesses whose names appear in the calendar as witnesses for the Crown. *QUEEN-EMPRESS v. DURGA* . . . I. L. R., 16 All., 84

70. ——— *Witness for Crown tendered at Sessions trial who had not been examined by committing Magistrate.*—At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment, or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice. *QUEEN-EMPRESS v. HAYFIELD*

[I. L. R., 14 All., 212]

71. ——— *Witness for Crown "not called" at Sessions trial, though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.*—At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness's testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present at the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *In the matter of the petition of Dhunno Kazi, I. L. R., 8 Cal., 121, and Empress of India v. Kaliprosanno Doss, I. L. R., 14 Cal., 245, approved. Empress v. Grish Chunder Talukhdar, I. L. R., 5 Cal., 613, and Queen v. Ishan Dutt, 6 B. L. R., 4p., 88; 15 W. R., Cr., 32, dissented from. QUEEN-EMPRESS v. STANTON*

[I. L. R., 14 All., 521]

72. ——— *Obligation of Court of Session to examine all witnesses sent up by the committing Magistrate.*—It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it has good reason to believe that such witness came into the Court-house with a predetermined intention of giving false evidence. *QUEEN-EMPRESS v. BANKHANDI* . . . I. L. R., 15 All., 6

73. ——— *Revival of prosecution—Presidency Magistrates Act (IV of 1877), s. 57, expl. 12.*—A "revival of a prosecution," as



## WITNESS—CRIMINAL CASES

—continued

5. EXAMINATION OF WITNESSES—*cont. aurd.*  
mentioned in capt 2 of s. 87 of Act IV of 1877, is not a continuance of the original prosecution from which the accused has been discharged. On the revival of the prosecution all the witnesses on whose evidence the prosecution intend to rely must be examined before the Magistrate and if any of them were examined at the time of the original prosecution they must be examined *de novo*. **EM PRESS & CHUNDER NATH DUTT**  
[1 L. R. 5 Cal. 121. 4 C. L. R., 305]

74. Witnesses for prosecution  
—*Witness examined by prosecutor on offer of defence*—  
It is irregular to allow a witness to be examined on behalf of the prosecution after the prisoner has made his defence when the witness is not one to contradict any new case set up by the prisoner. **QUEEN v. CHOTAY LAL**  
3 N. W. 271

**QUEEN v. SHAMSHERO HOLLAR**

[13 W. R., Cr., 36]

Where how the prisoner had full notice of the evidence which was to be given by such witness and made his defence in allusion to the evidence of the witness the High Court refused to set aside the conviction having regard to s. 439 of the Code of Criminal Procedure. **QUEEN v. SHAM KISHORE HOLLAR**  
13 W. R., Cr., 38

75. — Criminal Procedure Code 1861 s. 572—*Recalling witness for prosecution*—Under s. 32 of the Code of Criminal Procedure an accused should be called upon to enter upon his defence and to produce his evidence when the case for the prosecution has been brought to a close. Where there is one witness for the prosecution was recalled after the prisoner had made his defence, and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction and ordered a new trial. **QUEEN v. ASHAFULLAH**  
[13 W. R. Cr., 15]

76. — Witnesses for defence—*Criminal Procedure Code 1861 s. 32—Duty of Court as to witnesses for defence*—Under s. 32 of the Code of Criminal Procedure the accused should be asked, at the end of the case for the prosecution to produce his evidence and it is at that point the duty of the Court of Session to ascertain who the witnesses are whom the prisoner desires to examine in his defence. **QUEEN v. MOOKUN**  
[13 W. R., Cr., 22]

77. — *Omission to examine witnesses for accused*—The Court quashed the sentence which was passed upon a prisoner who had not been asked if he had any witness to call, although he was tried at the same time with others who had been so asked. **BRUGMAN v. DOXAL GORE**  
[10 W. R., Cr., 7]

78. — *Criminal Procedure Code (Act XXV of 1881) s. 266—Witnesses attend voluntarily*—In cases coming under Ch. XXV of Act XXV of 1861 to which s. 266

## WITNESS—CRIMINAL CASES

—cont. aurd

5. EXAMINATION OF WITNESSES—*continued.*  
applied, and not s. 25, the Magistrate was not obliged to call on the accused to produce his witnesses but he was bound to hear them if they attended voluntarily as by s. 266, read with s. 26, they were supposed to do. **IN RE BHINA ROY**  
[7 B. L. R., 568 note]

**S. C. BHIMANI ROY v. DHOTEN ROY**  
[10 W. R., Cr., 36]

79. — *Objection of Magistrate to hear witnesses—Criminal Procedure Code 1861, s. 266*—s. 266 of the Code of Criminal Procedure only required the Magistrate to hear such witnesses as the accused shall produce in his defence. **ANONYMOTS**  
4 Mad., Ap., 29

**QUEEN v. AMLE CHAND BHATTIA**  
[13 W. R., Cr., 63]

80. — *Refusal of Court to allow witness for defence to be examined—Illegal conviction—Criminal Procedure Code (Act XXV of 1861) s. 266*—Conviction set aside on the ground of the Magistrate's irregularity in refusing in a trial before him under Ch. XV of the Criminal Procedure Code to allow the examination of a witness who had been tendered on behalf of the accused. **QUEEN v. MAHIMA CHANDRA CHUCKERBUTTY**  
[4 B. L. R., Ap., 77. 12 W. R., Cr., 77]

81. — *Criminal Procedure Code (1882) ss. 210 and 212—Settling case—Defence reserved—Power of Magistrate to examine witnesses named for the defence*—The fact that an accused person committed to a Court of Session by a Magistrate has reserved his defence does not preclude the Magistrate from acting under s. 112 of the Code of Criminal Procedure, and examining any witnesses named by the accused as witnesses whom he intended to call in the Sessions Court. **IN THE MATTER OF THE PETITION OF LUDRA NIGH**  
[1 L. R., 18 All., 380]

82. — *Criminal Procedure Code (1882) ss. 203 and 240—Summoning case.*—Where a Magistrate before whom a complaint was made held an inquiry under s. 203 of the Criminal Procedure Code for the purpose of ascertaining the truth or falsehood of the complaint before issuing process, and after holding, such inquiry summoned the accused examined witness on both sides, and, after a short adjournment, examined a witness called by himself and found the accused guilty under s. 241 of the Penal Code.—*Held* that the Magistrate was strictly within his rights under s. 510 of the Criminal Procedure Code in receiving fresh evidence after evidence on both sides had been taken, and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken. **IN THE MATTER OF ANANDA CHUNDER MISHRA v. DASU MUDH**  
1 L. R., 34 Cal., 167

83. — *Witnesses under examination—Threatening of witnesses by Court.*—It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless

## WITNESS—CRIMINAL CASES

—continued.

## 5. EXAMINATION OF WITNESSES—continued.

they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge. *QUEEN-EMPRESS v. HARGOBIND SINGH*

[I. L. R., 14 All., 242]

84. — Recording evidence of witness—*Obligation to record evidence of witnesses.*—If a person is before the Court as a witness, his evidence must be recorded as the law directs; if he is not a witness, and is not examined as such, the Judge has no right to allude to his having made any statement. *QUEEN v. PHOOLCHAND alias PHOLEE AMIR*

8 W. R., Cr., 11

85. — Note of deposition—*Criminal Procedure Code, 1861, s. 195.*—A separate note of each witness's deposition was required to be taken by s. 195 of the Code of Criminal Procedure, 1861, which was not satisfied by a statement that a witness "deposes as last witness." *REG. v. BYRA VALAD SURJIM*

1 Bom., 91

86. — Mode of examination—*Examination in absence of accused.*—It is illegal to examine the witnesses for the defence and to pass sentence in the absence of the accused. *BIHOORAM v. ALLAH KOHITA*

1 B. L. R., S. N., 8

*QUEEN v. RAMNATH*

7 W. R., Cr., 45

87. — Examination in absence of accused.—Where witnesses are not examined in the presence of the accused, the conviction will be quashed. *QUEEN v. LALLA CHOWDEY*

[2 N. W., 49]

*QUEEN v. RAMNATH*

7 W. R., Cr., 45

ANONYMOUS

3 Mad., Ap., 34

*QUEEN v. RAJCOOMAR SINGH*

8 W. R., Cr., 17

*QUEEN v. RAMDHUN SINGH*

11 W. R., Cr., 22

*QUEEN v. RAM DASS BOISTUB*

[11 W. R., Cr., 35]

*QUEEN v. RUSSICK DOSS*

24 W. R., Cr., 76

*ALI MEAH v. MAGISTRATE OF CHITTAGONG*

[25 W. R., Cr., 14]

88. — Evidence not taken in presence of accused—*Criminal Procedure Code, 1861, s. 194.*—When the accused has been arrested, the evidence of a witness for the prosecution ought, under s. 194 of the Code of Criminal Procedure, to be taken in the presence of the accused. *QUEEN v. HOSSAIN ALI CHOWDHRY*

[8 W. R., Cr., 74]

89. — *Criminal Procedure Code, 1872, s. 327.*—Evidence taken in absence of accused.—Under s. 327, Criminal Procedure Code, 1872, the witnesses for the prosecution should be examined in the presence of the accused when practicable, notwithstanding that their statements have been previously recorded in his absence. *QUEEN v. BOOHA CHOWKEDAR*

22 W. R., Cr., 33

## WITNESS—CRIMINAL CASES

—continued.

## 5. EXAMINATION OF WITNESSES—continued.

90. — Evidence taken in absence of accused—*Warrant cases.*—It is not irregular in a warrant case for a Deputy Magistrate to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused. All that the accused has a right to expect after the charge has been framed is that the complainant and witnesses who had been examined in his presence before the charge was framed should be recalled for the purposes of cross-examination. *QUEEN v. KASSY SINGH. QUEEN v. HULKOREE SINGH*

21 W. R., Cr., 61

91. — Depositions taken in absence of accused—*Criminal Procedure Code, 1872, s. 327.*—S. 327 of the Criminal Procedure Code, 1872, which permitted the depositions of a witness to be taken in the absence of an accused person who had absconded, did not apply to a deposition taken before that Code was passed. Where s. 327 did apply, it was necessary to show that when the former deposition was taken the accused had absconded, and after due pursuit could not be arrested. *QUEEN v. ETWARDEE DHARRE*

[21 W. R., Cr., 12]

92. — Duty of committing Magistrate—*Examination on oath in absence of accused—Statements of witnesses.*—The Magistrate to whom a complaint was made examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what, case against the prisoners; and he did not take down in writing the statements of the persons so examined. Held that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing. IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN. *EMPRESS v. ASGUR HOSSEIN*

[I. L. R., 6 Cal., 774]

S. C. IN RE ASGUR HOSSEIN

8 C. L. R., 124

93. — Examination of, in absence of accused—*Criminal Procedure Code, 1872, s. 327.*—Power to quash commitment.—An accused who was charged with murder not being found, the witnesses were examined under s. 327 of Act X of 1872 in his absence. The accused was subsequently arrested and committed on the strength of the evidence taken in his absence. Before the Sessions Court he pleaded not guilty. Held that the prisoner having been put upon his trial and having pleaded, the commitment could not be quashed. Held further that if, in the course of a trial, the Sessions Judge should be of opinion that the prosecution has not laid a proper basis for the reception of evidence in the absence of the accused, his proper course is to adjourn the trial under s. 264 of the Criminal Procedure Code, and then under s. 351 summon such witnesses as he may deem material. Semble—The mere absence of questions in the record

## WITNESS-CRIMINAL CASES

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## 5. EXAMINATION OF WITNESSES—con. and

of a y MODER's statement does not render it und  
THIS L.H. AMP E S AGAINST

13 C L. R. 120

94. \_\_\_\_\_ Read no depo  
tion of a new In every criminal case, whether  
the witness has been before the Court, the  
witness must be sworn de novo in the same  
manner as if the case were entirely new and the  
witness had no examination before. To read to  
a witness his deposition on a formal statement is not an  
examination of the witness in the presence of the  
accused. **QUINN v. HAYATT W. R. 1884. Cr. 1**

QUICK & AFFAIRS W R., 1884 Cr., 13

QIGLES e KAKITE SNEKLA

[W R, 1864, Cr. 39]

QUEEN v. KALYANDAS DOTS 3 N W. 100

See also QUEEN, c. JOSEPH Paxton

[22 W R Cr. 38]

85. — *Lead by deponent*  
The High Court refused to grant a writ when the evidence of witness given on a previous trial was read out and used in a subsequent trial at the express request of the prosecutors, instead of the witness being examined de novo. *PERMANSER DIXON v. DOROTHY AUDER KATZ*  
13 W. R. Cr. 40

13 W R. Cr 40

93. Criminal Procedure Code 1552, s 258—Trial left to Court of Sessions—Ex decessu et al fore committing Magistrate as defendant to contradict witness s. 255 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat that evidence before the Court itself. *Queen v. Amooli* 12 B. L. R. 474, 15, referred to. A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statement, and so forth. In a case in which the Sessions Court had neglected to apply the above rule, *TRAUGHT J.* quashed the conviction. *QUEEN-EMRESS v. DAN*  
ARAI

QUEEN-EMPERESS v. DAN  
I.L.R. 7 All 632

87 ——— Witness offering hearsay evidence — *Law of Court*. The moment a witness commences giving evidence which is inadmissible — e.g. hearsay evidence, — he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence and to decide on the legal evidence alone. *QUEEN v. PITTMAN & SINDAR*. 2 B. & C. 231.

QUEEN & BALI CHURN GABLOOLY

98. ——— Refreshment [7 W R, Cr., 2

98. — Refreshing memory of  
witness Ground for aspect of document to re  
fresh memory of witness — to aspect docu-

## WITNESS-CRIMINAL CASES

— 1935 —

## EXAMINATION OF WITNESSES—contd.

**men s—Per FIELD J.** The grounds upon which the  
oppe to party is permitted to inspect a wit in (d)  
to refresh the m. mory of a witness are three (1) (i)  
to secure the full benefit of the wit as a recollection  
as to the whole of the facts; (2) to check the use of  
improper comments; (3) to compare his oral testi  
mony with his written statement. **Per FIELD, J.—**  
The oppe to party has a right to look at any particu  
lar writing before r at the moment when the  
wit is used it to refresh his memory and r to  
answer a particular question, but if he has refused  
to exercise his right, he cannot come to the stand  
to testify throughout the whole of the subject in ques  
tion of the witness. IN THE MATTER OF THE  
FETTER OF JEROME MANTON. **EXHIBIT—JESSE**  
**200 MANTON** **T. T. R. 8 Cal. 239**

L. L. R. 8 Calc., 739

В. С. Игнатович Мантов и Евгений

112 C. L. R. 233

152 s 119 - In giving evidence a police officer may refresh his memory by referring to documents in which he has, under s 119 of Act X of 1872, reduced into writing statements of persons examined by him during an investigation but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. ROBERTS

(L. L. R. 9 Calc. 455 11 C. L. R. 563)

100. Memorandum made by police officer—Criminal Procedure Code (Act X of 1892) ss. 113 and 115.—A prisoner on his trial is not entitled to insist that a memorandum made by a police officer under the provisions of s. 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer be referred to by the latter for the purpose of refreshing his memory. *Reg. v. Uttamchand Kapurchand*, 11 Bom. 123, distinguished. IN THE MATTER OF THE PETITION OF KALI CHURN CHYSAEL. EXPENSES v. KALI CHURN CHYSAEL. I. J. H. 8 Calo. 154

L. L. R. 8 Calc, 154

S. C. IN THE MATTER OF KALI CHURN CHUTIA

[10 C L R. 61

101. *Mad col witness.*  
*Evidence of—Experts—Exam nation of medical witness exam and before Magistrate—Crim col Proceeds a Code 15 2 s. 323.*—The evidence of a medical man who has seen and has made a post mortem examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly to prove the nature of injury which he observed and secondly as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and

# WITNESS—CRIMINAL CASES —continued.

## 5. EXAMINATION OF WITNESSES—continued.

to ask the witness's opinion on those facts. S. 323 of Act X of 1872 did not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who had been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom. **ROHUNI SINGH v. EXPRESS**

[I. L. R., 9 Calc., 455; 11 C. L. R., 569]

102. ——— Treatment by Court of witnesses for defence.—When a prisoner makes a distinct defence, and calls witnesses to prove it, instead of dismissing the witnesses at once on their saying they know nothing in the prisoner's favour, a Judge should put a few questions to them in detail to see if there is any truth in the prisoner's statement or any part of it. **QUEEN v. BRUGNER PUTWA**

[11 W. R., Cr., 9]

## (b) EXAMINATION BY COURT.

103. ——— Examination of witness by Judge.—Evidence Act, s. 138.—Duty of Court in examining witnesses.—At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed. Held that such a course of procedure was irregular and opposed to the provisions of s. 138 of the Evidence Act. It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. **NOOR BUX KAZI v. EXPRESS**

[I. L. R., 6 Calc., 279; 7 C. L. R., 335]

## (c) CROSS-EXAMINATION.

104. ——— Duty of Court as to allowing cross-examination.—Cross-examination of witnesses by accused.—The Judge ought, if requested, to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution by the committing Magistrate, but whose evidence is dispensed with by the prosecutor at the trial. His refusal to do so is, however, not an error in law. **RSG. v. FATECHAND VASTACHAND**

5 Bom., Cr., 85

105. ——— Right of accused to cross-examine witnesses for the prosecution before commitment.—Criminal Procedure Code (1861), s. 194; (Act X of 1872), s. 191; (Act X of 1882), ss. 210, 256, 257, and 258.—An accused person has

# WITNESS—CRIMINAL CASES —continued.

## 5. EXAMINATION OF WITNESSES—continued.

the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Criminal Procedure Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provision of ss. 210 and 256 of the latter Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature, when framing the Code of 1882, as being redundant, seeing that the Evidence Act of 1872, which was passed at the same time as the Criminal Procedure Code of 1872, made sufficient provision on the subject. S. 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time, subject to a discretion given to the Magistrate by s. 257. Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was held that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused within the meaning of s. 288 of the Code. **QUEEN-EXPRESS v. SAGAL SAMBA SAJAO**

I. L. R., 21 Calc., 642

106. ——— Further cross-examination by accused.—Criminal Procedure Code, 1882, ss. 256, 257.—D was put upon his trial for having caused grievous hurt to M. The Magistrate, after hearing the evidence for the prosecution, framed a charge under s. 325 of the Penal Code, and on the 6th June 1886 refused an application by the accused to re-summon the prosecution witnesses for further cross-examination. On 19th June, on the application of the accused citing some of those witnesses as his own witnesses, the Magistrate summoned them, but on the 29th, when the witnesses so summoned appeared, he refused to allow the accused to cross-examine them, and, upon the accused declining to examine them as his witnesses, convicted him on the evidence on the record. Held that the Court was wrong in refusing permission to the accused to cross-examine the witnesses present in Court on 29th June. Held further that the accused was not deprived of the right which he had by law of cross-examining the witnesses for the prosecution under s. 257 of the Criminal Procedure Code, although they were summoned as his witnesses. Held also that the application of the 6th June being under s. 257, and not under s. 256, the order of the Deputy Magistrate of that date was wrong. **MOWLA BUX BISWAS v. DERASUTULLA SARKAR**

1 C. W. N., 19

107. ——— Right to cross-examine.—Right of accused to cross-examine witnesses.—The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses

## WITNESS—CRIMINAL CASES

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## 5. EXAMINATION OF WITNESSES—continued.

for the prosecution called a witness. If he wishes to avail himself of evidence which has been given or which can be given by a witness called for another of the parties accused, he must call him as a witness who is *QUEEN v. STEPHENSON* PART.

(12 W. R., Cr., 76)

109. —

*Evidence Act,*

s. 165. Witness called by the Court. Witnesses summoned on behalf of the prosecution and not called, ought to be placed in the box for cross-examination in order that the defence may have the opportunity of exercising this right and a fortiori if such a witness is called and examined by the Court under s. 165 of the Evidence Act the prisoner should be allowed to cross-examine. *EMPRISS v. GILSON CHURCHER TALCHUDAR*

(I. L. R., 5 Cal., 614 5 C. L. R. 364)

109. —

*Witness called*

by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act I of 1852) s. 540.—In a trial before the Sessions Court the prosecution is not allowed to tender for cross-examination all witnesses called before the examining Magistrate. The Court should not call a witness whose evidence it could not put simply to trial. *QUEEN v. EMPRISS v. HALIFORD AND DAVIS*

(I. L. R., 14 Cal., 245)

110. —

*Cross-examination*

of witness called by the Court. *Evidence Act (I of 1852) s. 165—Criminal Procedure Code (1852) s. 540.*—Where in the course of a criminal proceeding, a Magistrate himself summoned a witness and examined her under s. 165 of the Evidence Act, but refused to allow the attorney who appeared for the complainant to cross-examine the witness. *Held* that the Magistrate was wrong in not allowing the complainant's attorney to cross-examine the witness when she was summoned. *Held* also that there is nothing in s. 165 of the Evidence Act disqualifying a party to a proceeding from cross-examining any witness summoned by the Court. *6 PILLAI SEAL v. MANICK LALL SEAL*

(I. L. R., 24 Cal., 288)

111. —

*Hostile witness*

*Evidence Act s. 154.*—The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that but that the witness is one who ought not to be believed unless supported by other satisfactory evidence. *HALACHAND PILLAI v. QUEEN v. EMPRISS*

(I. L. R., 13 Cal., 53)

112. —

*Medicine witness*

As to cross-examination by accused of medical witness called in a professional capacity. *QUEEN v. JAMES DUFF*

(6 B. L. R., Ap., 68 15 W. R., Cr., 34)

## WITNESS—CRIMINAL CASES

—continued.

## 6. EXAMINATION OF WITNESSES—continued.

113. —

*Evidence Act*

(II of 1852), s. 34.—Cross-examination on previous statements reduced to writing.—The complainant's plea was held to be at liberty before the Magistrate to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so as regards previous statements which were reduced to writing, without showing the writing. *34, Act II of 1852, explained. TERNATA LAL v. TERNATA KISHOR*

15 W. R., Cr., 23

114. —

*Evidence Act*

1852 s. 23.—Cross-examination on previous statements reduced to writing.—A witness, when under examination-in-chief before the Court of Session, should not have his attention directed to his deposition before the Magistrate. He might, under s. 23, Act II of 1852, be cross-examined as to previous statements made by him in writing, when his attention might be drawn to the parts of the former writing which were to be used for the purpose of contradicting him. *QUEEN v. LAURENCE KISHOR*

(13 W. R., Cr., 18)

115. —

*Prosecution witness examined before the Magistrate but not called in the Court of Session.*—Witness called by the defence.—Cross-examination by defending counsel.—Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness box by counsel for the defence, it was held that counsel for the defence was not entitled to examine his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination, with the permission of the Court, if the witness proved himself a hostile witness. *QUEEN v. EMPRISS v. ZAWAR HUSSAIN I. L. R., 20 All., 185*

116. —

Right of witness on cross-examination.—Right to qualify statements.—A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief. *QUEEN v. TRIST DOBSON*

18 W. R., Cr., 57

117. —

Right to recall witnesses for cross-examination.—Cross-examination of accused.—Witness for defence.—Record of evidence.—The charge having been read to the accused person, he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then called all the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence. *Held per STANLEY, J.*, that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be

## WITNESS—CRIMINAL CASES

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### 5. EXAMINATION OF WITNESSES—continued.

cross-examined by the accused on the date fixed for the examination of the witnesses for the defence. *Held also per SPANKIE, J.*, that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined. *EMPRESS OF INDIA v. BALDEO SAHAI* [I. L. R., 2 All., 253]

118. — Cross-examination after reading depositions—*Irregularity in examination—Criminal Procedure Code, ss. 286, 288.*—At a trial before a Sessions Court, the attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon: to this course the Government Prosecutor and the Court consented. *Held* that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted. *SUBBA v. QUEEN-EMPRESS*. I. L. R., 9 Mad., 83

119. — Cross-examination of witness after his examination by the Court—*Evidence Act (I of 1872), s. 155.*—The principle that parties cannot, without the leave of the Court, cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction. *REG. v. SAKHARAM* s. 155 of Act I of 1872. REG. v. SAKHARAM *MUKUNDJI*. 11 Bom., 166

120. — Recalling witnesses for cross-examination—*Refusal to recall witness.*—When the charge had been framed and the defendant put on his defence, he had a right, under s. 218 of the Criminal Procedure Code, 1872, to have the prosecutor's witnesses recalled for the purpose of cross-examination. The claim to recall the witnesses for the prosecution was very different from the request made by the accused person to summon a witness under s. 62, Act X of 1872. *IN THE MATTER OF THE PETITION OF BELLIOS*. *BELLIOS v. QUEEN* [19 W. R., Cr., 53]

121. — *Criminal Procedure Code, 1861, s. 252.*—A Magistrate could not refuse to allow witnesses whom he allowed to be cross-examined by the accused previous to the preparation of a charge to be recalled and cross-examined after the accused had been put upon his defence, under s. 252 of the Code of Criminal Procedure, treating them as witnesses for the prosecution. *IN THE MATTER OF THAKOR DYAL SEN* [17 W. R., Cr., 51]

*IN THE MATTER OF THE PETITION OF NOBIN CHAND BANERJEE*. 25 W. R., Cr., 32

## WITNESS—CRIMINAL CASES

—continued.

### 5. EXAMINATION OF WITNESSES—continued.

122. — *Warrant cases—Criminal Procedure Code, 1872, Ch. XVII.*—In the trial of warrant cases the accused may, after the charge is drawn up and the witnesses for the defence have been examined, recall and cross-examine the witnesses for the prosecution. *TALLUBI VEN-KAYYA v. QUEEN*. I. L. R., 4 Mad., 130

123. — *Right of accused to cross-examine witness—Criminal Procedure Code, 1872, s. 218.*—An accused person had, under s. 218 of Act X of 1872, the right to recall and cross-examine the witnesses for the prosecution at any time while he was engaged on his defence and before his trial was concluded. He is not precluded from asserting and exercising the right, by reason of his having cross-examined them before he was put on his defence, or by reason of his not having, *suo motu*, expressed his wish to do so at the time he was called upon to enter on his defence, and when the witnesses were in attendance in the Court and did not require to be re-summoned. *QUEEN v. LALL SINGH* [6 N. W., 270]

124. — *Criminal Procedure Code, 1872, s. 218—Recall of witnesses for prosecution.*—Under s. 218 of the Code of Criminal Procedure, a Magistrate is not competent to refuse to recall the witnesses for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application. *QUEEN v. AMIRUDDIN FAKHER* [31 W. R., Cr., 29]

125. — *Cross-examination—Recalling witnesses for further cross-examination after charge—Criminal Procedure Code (Act X of 1882), s. 257.*—There is, under s. 257 of the Criminal Procedure Code, no absolute right of cross-examination which would enable the accused to recall and cross-examine the witnesses for the prosecution, no matter how completely and fully they have already been cross-examined. Where the witnesses for the prosecution were fully cross-examined and a charge framed against the accused, and after an adjournment for ten days the witnesses for the defence were examined and cross-examined, and on the day on which the judgment was to be delivered an application under s. 257 of the Code of Criminal Procedure was made on behalf of the accused, asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined, *Held* that, if the Magistrate was of opinion that the application was made with the intention and for the purpose of vexation or delay or for defeating the ends of justice, he was right in refusing the application. It lies upon the party who thinks himself aggrieved to show that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses. It is necessary to be very careful that persons on their trial should not be prejudiced; but it is also necessary, on the other hand, to see that proceedings in the Criminal Courts are not hampered in a needlessly carping and litigious spirit, losing

## WITNESS—CRIMINAL CASES

—continued

## 5 EXAMINATION OF WITNESSES—continued

Right of the main purpose of those proceedings and in any event not on a matter of mere form. *DIKANTA SINGH v. QUEEN* *EMPHRES*

[L. L. R., 20 Cal., 469]

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*Right of co-accused to cross-examine witness called by another co-accused for defence where the case is a joint case—Evidence Act (I of 1872), s. 137*—One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first. *LAL CHAND CHATTERJEY v. HANU BHAIKAR*

[L. L. R., 21 Cal., 401]

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*Right of prosecution witnesses before charge—Right of accused to have prosecution witnesses recalled after charge drawn up for purposes of cross-examination—Direction of Magistrate in Criminal Procedure Code (Act V of 1898) ss. 244, 256 and 257—Power of Magistrate (Act XLV of 1960) s. 342*—After a charge has been drawn up, the accused is entitled to have the witnesses for the prosecution recalled for the purposes of cross-examination. Section 244 of the Code of Criminal Procedure gives the Magistrate no discretion in the matter. After a charge has been drawn up, it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and if so, which of the witnesses for the prosecution whose evidence has been taken. The fact that there has been already some cross-examination before the charge has been drawn up does not affect this principle. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. *ZAMUKIA v. LAM TAIHAI*

[L. L. R., 27 Cal., 370]

4 C. W. N., 469

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*Summoning witnesses for prosecution for further cross-examination—Refusal of such application for inadequate reason—Criminal Procedure Code 1898 s. 247*—The mere fact that the witnesses for the prosecution had already been cross-examined is not a sufficient reason for refusing to re-summon them unless the Magistrate expressly records his opinion that the application for the second cross-examination is within the terms of s. 247 of the Criminal Procedure Code for the purpose of vexation or delay or for defeating the ends of justice. An order refusing to re-summon witnesses without ascribing any such reasons is not a proper order. When an application to re-summon witnesses for the prosecution was made, not on the day the accused were called on to make their defence but on the following day. Held that the delay of one day was in itself no sufficient reason for refusing the application. *SHREYATH BHAIKAR v. EMPHRES*

4 C. W. N., 241

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*Criminal Procedure Code (Act V of 1898) ss. 246, 247—Cross-examination of witness for prosecution Right of—*

## WITNESS—CRIMINAL CASES

—cont. next.

## 5 EXAMINATION OF WITNESSES—continued

When after the charge was drawn the accused claimed the right to have the medical officer re-summoned for the purpose of cross-examination, and the Magistrate refused to allow process to go on payment of fees for his attendance and the Magistrate in his explanation to the High Court said that the accused had the opportunity to cross-examine the witness immediately after his examination, a chief was concluded but that he had declined to do so. Held that under the terms of s. 246, Criminal Procedure Code, the accused was entitled to claim this as a matter of right and that s. 247, Criminal Procedure Code did not apply to the present case. *LAWA LACHUNDER DATT v. HARI KUMAR DATT*

4 C. W. N., 351

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*Cross-examination previous to framing of charge—Criminal Procedure Code 1872 s. 219*—An accused person was held to be not deprived of the right given him by s. 218 Act X of 1872 to recall and cross-examine the witnesses for the prosecution after the charge had been drawn up, against him by reason of the witnesses having been cross-examined before the charge was framed. A Magistrate should not of his own motion discharge the witnesses for the prosecution until the accused person has exercised or waived the right of cross-examination given him by the section. When it becomes necessary to adjourn the hearing the Magistrate should in all cases enquire of the accused if he desires to exercise his right of recalling the witnesses for the prosecution, or consents to the discharge of all or any of them. If the accused consents to their discharge and they are discharged accordingly he is not entitled to have them re-summoned as a matter of right. Where it became necessary to adjourn the hearing and the Magistrate did not call upon the accused to exercise his right under the section and there was no sufficient proof that the accused consented to the discharge of the witnesses for the prosecution, it was held that the accused was entitled to have the witnesses whom he desired to cross-examine at the further hearing re-summoned. *Quare*—If the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time whether the Magistrate would thereupon be at liberty to discharge the witnesses. *QUEEN v. LALL MARO-MED*

6 N. W., 234

## 131. — Right of accused to cross-examine witnesses—Examination of accused—Direction of Magistrate.

—An accused should be allowed at preliminary inquiries before a Magistrate to cross-examine the witnesses; but whether the accused himself shall be examined upon the matter of the charge by the Magistrate is left entirely to the discretion of the Magistrate and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner. *QUEEN v. BHAIKAR*

10 W. R., Cr. 25

## WITNESS—CRIMINAL CASES

—continued.

### 5. EXAMINATION OF WITNESSES—concluded.

132. ————— *Right of accused to recall witnesses for prosecution*—Criminal Procedure Code (Act X of 1872), ss. 217, 218.—Reading ss. 217 and 218 of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him and he is called upon to make his defence; and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled. FAIZ ALI v. KOROMDI

[I. L. R., 7 Cal., 28

S. C. IN THE MATTER OF FAIZ ALI

[8 C. L. R., 325

133. ————— *Cross-examination of witnesses for the prosecution*.—As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence when the Magistrate may think such a step right and proper. KHURBUCKDHARE SINGH v. PERSHADEE MUNDUL . . . 22 W. R., Cr., 44

134. ————— *Refusal to allow accused to recall witnesses for prosecution*—*Waiver of right by accused*.—Where certain accused persons, who were convicted of using criminal force, had not been allowed to recall and cross-examine the witnesses for the prosecution, because the trying officer believed that such witnesses could only be recalled immediately after the framing of the charge.—*Held* that accused persons always had a right to recall prosecution witnesses, which ceased only when they themselves waived it; that Magistrates could waive all inconvenience to witnesses by asking accused persons, on the drawing up of charges, whether they required the further attendance of the witnesses; and that the conviction must be set aside because the accused had not enjoyed the protection provided by the law. QUEEN v. RAM KISHAN HALWAI

[25 W. R., Cr., 48

### 6. CONSIDERATION AND WEIGHT OF EVIDENCE.

135. ————— *Weight of evidence—Single witness—Evidence of fact*.—The evidence of one witness, if reliable, is sufficient to prove a fact. ZALEM MISSEER v. KUNDUN KOORER

[11 W. R., 184

BALINDUR NARAIN v. KALLA MESSEO KOOS

[18 W. R., 341

PROSONNO NARAIN DEB v. ROMONEE DOSSER

[10 W. R., 236

136. ————— *Discrepancies in evidence of witnesses—Effect of discrepancies*.—Discrepancies in the evidence of witnesses are not the less

## WITNESS—CRIMINAL CASES

—concluded.

### 6. CONSIDERATION AND WEIGHT OF EVIDENCE—concluded.

destructive of their testimony because a greater sagacity on the part of the witnesses would have avoided them. REG. v. KALU PATIL . 11 Bom., Cr., 148

137. ————— *Consideration of evidence—Assumption of bad character of prisoner*.—A Judge cannot properly weigh evidence which starts with an assumption of the general bad character of the prisoners. QUEEN v. KALU MAL

[7 W. R., Cr., 103

138. ————— *Value of evidence—Value of evidence of medical witness*.—In trying a prisoner charged with giving false evidence, a Sessions Judge rejected facts which were proved by the evidence of certain witnesses, because a medical officer gave it as his opinion that what the witnesses deposed to could not be true. *Held* that it was not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved. QUEEN v. AHMED ALLEY

[11 W. R., Cr., 25

139. ————— *Evidence disbelieved in some parts and accepted in others*.—Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereon. JASPETH SINGH v. QUEEN-EMPRESS . . . I. L. R., 14 Cal., 164

## WORKING FOR GAIN.

See CASES UNDER JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.

## WORKMAN.

See ACT XIII OF 1859.

[2 B. L. R., A. Cr., 32

I. L. R., 7 Mad., 100

I. L. R., 7 Bom., 379

I. L. R., 10 Bom., 96

## WRITTEN STATEMENT.

See ADMISSION—ADMISSIONS IN STATEMENTS AND PLEADINGS.

[B. L. R., Sup. Vol., 804

I. B. L. R., A. C., 133

9 W. R., 83, 130, 280

18 W. R., 257

22 W. R., 220

I. L. R., 14 Bom., 516

See SET-OFF—GENERAL CASES.

[14 W. R., 473

I. L. R., 15 Mad., 22

Denial of title in—

See FALSE EVIDENCE—GENERAL CASES.

[I. L. R., 6 All., 626



## WRITTEN STATEMENT—continued

See LANDLORD AND TENANT—FORFEITURE  
—DENIAL OF TITLE

[I. L. R., 13 Calc., 98  
I. L. R., 15 Mad., 123

1. — Form and contents of written statement—*Civil Procedure Code, 1859, s. 123*—*Defendant's written statement*—*Variance between pleading and proof*—S. 123 of the Civil Procedure Code contemplated that a defendant should, in his written statement set forth the case he intended to make at the trial. The rule followed in *Edenbachander Singh v. Shamachura Bhatto 11 Moore's I. A. 7*, *Mohammed Zakoor Ali Khan v. Rulla Koor 11 Moore's I. A., 468* and *Nora vs. Doosay v. Nurrookhury Mohanto Marak 0* that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith applicable to the case made on the pleadings by a defendant. Therefore where the defendant in a suit on ejectment averred in his written statement that the land in dispute was in fact his, but had previously to 1865 been encroached on by the plaintiff who, in 1865 was about to erect a building thereon, and that the defendant then ordered to avoid litigation compromise the dispute by payment to the plaintiff of a sum of money and purchased the land, and had since then remained in possession of it,—*Held* that the only defence open to the defendant was that of purchase and that he could not be allowed at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865. *CHOYA KARA v. ISHA BIN KHALIFA*

[I. L. R., 1 Bom., 208

2. — *Argumentative statement*—A written statement should not be argumentative. *DILREN SAHAY SINGH v. BEER KISHORE SINGH* 3 W. R., 38

3. — *Offer without prejudice*—*Act VIII of 1859 s. 124*—An offer without prejudice should be omitted if in the pleadings. In a suit where the written statement of the plaintiff contained matters relative to an offer made by the defendants without prejudice the Court ordered on the application of the defendant that the paragraphs of the written statement relating to the offer should be struck out. *HALFORD v. EAST INDIAN RAILWAY COMPANY*

[12 B. L. R., Ap., 19

4. — *Irrelevant matter*—*Application to take written statement off the file*—Where there was in a written statement matter irrelevant and improper the Court on application ordered it to be taken off the file with leave to file a fresh one in a week. Written statements should set out the broad facts of the defence and nothing else. *KANTHAL DIT v. TREHARNA*

[3 B. L. R., Ap., 12

5. — *Taking off the file for irrelevancy*—*Relevant matter*—*Tender of written statement*—The Court has jurisdiction to take a written statement off the file, for irrelevancy, until it is "tendered," which is when it is filed

## WRITTEN STATEMENT—continued

at the hearing of the suit. If relevancy is to be judged by what the defendant believed to be material to his case and not whether it did in fact disclose a good defence to the action. *KYANAVJI NAIK v. NARAYANJI ARDESHIR WADIA* 10 Bom., 425

6. — *Inconcurrent plea*

—*Plea allowed on appeal inconsistent with written statement*—A Hindu wrote a will devising certain ancestral property to his wife and on the following day he registered it and took the same off in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will, and that the testator would not have adopted the plaintiff but for the consent of the natural father to these dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement and on appeal raised the further plea that the adoption if any, was conditional on the provisions of the will being acquiesced in. *Held* that the defendants were not precluded from succeeding on the latter of these pleas notwithstanding it was inconsistent with their written statement. *MAHOMED HUKAI KHAN v. HOSAIN BIKH, I. L. R., 10 Calc., 684* I. L. R., 15 I. A. 81 distinguished. *NARAYANAMI v. HAMASAMI*

[I. L. R., 14 Mad., 172

7. — *Court-fee on written statement*—*Code of Civil Procedure (Act VIII of 1859) s. 120*—*Act of 1877 s. 110*—*Court Fee Act (VII of 1870) s. 19*—A written statement of his case tendered by a party to a suit at any time before or at first hearing of the suit, is no liable to any Court-fee and may be written on plain paper (s. 110 of Act X of 1877). A written statement called for by the Court after the first hearing is also exempt from stamp duty (s. 19 of Act VIII of 1859). *NAGU v. YEKHAIH* I. L. R., 5 Bom., 400

*CHERAG ALI v. KAFIR MAHOMED*

[12 C. L. R., 367

8. — *Verification of written statement*—*Admission on record without verification*—A written statement filed by the defendant should be verified but if admitted on the record without verification, its allegations should be noticed and issues framed accordingly. *RADHACHURN ROY v. MORAN & Co.* 13 W. R., 342

9. — *Verification on behalf of Corporation*—*Principal officer of Corporation or Company*—*Civil Procedure Code (1852) ss. 115 and 435*—*Practice—Verification of objection to verification*—*Plaint Verification of*—The Civil Procedure Code by ss. 115 and 435 enables a principal officer of a Corporation to verify a plaintiff's written statement, and it is therefore not necessary that permission for that purpose should be obtained but it should be shown in cases to which s. 435 applies that the person purporting to verify a plaintiff's written statement on behalf of a Corporation or Company is a principal officer of the Corporation, and is able to depose to the facts of the case. If the plaintiff's written statement contains a statement to

**WRITTEN STATEMENT—continued.**

that effect, verification in the usual form would probably be sufficient. Where suits had been filed against the East Indian Railway Company, the plaintiffs in which described the defendant Company as a Corporation, and an application was made for the admission on behalf of the defendant Company of written statements signed "The East Indian Railway Company by their constituted attorney and agent Richard Gardiner," who was described in the verification as the "Agent of the defendant Company," and the written statements contained no statement to the effect that he was a principal officer of the defendant Company and able to depose to the facts of the case,—*Held* that such evidence should be supplied by affidavit before the written statements could be admitted. The provisions in the Code relating to the verification of written statement, however, being intended for the protection of plaintiffs, their observance might be waived by the plaintiffs, and if they were prepared to waive objections to the sufficiency of the verification, further evidence of the nature indicated might be dispensed with. *SREENATH BANERJEE v. EAST INDIAN RAILWAY CO.*

[I. L. R., 22 Cal., 268]

10. ——— *Application to verify—Notice—Practice.*—Where an application is made that a written statement be verified by a person other than the plaintiff or defendant, it is always desirable that notice be given to the other side, although not absolutely necessary. *FINDAY, CAMPBELL & Co. v. STEELE*

[1 Ind. Jur., N. S., 39]

11. ——— *Application to verify by agent—Notice.*—The Court will allow a written statement to be verified by the constituted attorney of the party without notice to the other side. *OVEREND, GURNEY & Co. v. STEELE*

[1 Ind. Jur., N. S., 40]

12. ——— *Filing written statement—Time for filing.*—Under the Code of Civil Procedure, a plaintiff cannot file a written statement after having seen that of the defendants, and by way of rejoinder thereto. *JADUB RAM DEB alias JADUB CHUNDER DEB v. RAM LOOHUN MUDDOOL*

5 W. R., 56

13. ——— *Filing and verifying written statement on behalf of plaintiff—Civil Procedure Code, 1859, ss. 23, 123.*—The plaintiff in a suit went on a pilgrimage after he had been ordered to file a written statement, but without having filed it. Not having returned when the case was on the board, his son applied, under ss. 23 and 123 of Act VIII of 1859, for leave to verify and file a statement, alleging himself to be interested as a reversioner. The application was refused. *Held* that a third party will not be allowed to verify and file a written statement for a plaintiff who has culpably neglected to file one himself. *DENOMOYE DOSSEE v. TARRACHURN COONDOL CROWDER*

[Bourke, O. C., 153]

14. ——— *Admission of written statements—Civil Procedure Code, 1859, ss. 120, 122.*—The admission of written statements of the parties on various dates, unless expressly called for by the

**WRITTEN STATEMENT—continued.**

Court, was held to be contrary to the provisions of ss. 120 and 122 of the Civil Procedure Code, 1859. *ALI NURKE alias EMDAD ALI v. TORAB ALI alias MIRZA NAWAB*

W. R., 1884, 44

15. ——— *Written statement by third party—Power of Court.*—A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing. *SURNOMOYEE v. BYKUNT CHUNDER MUSTOFEER*

25 W. R., 17

16. ——— *Defendant neglecting to put in statement—Adjournment of case—Costs.*—In the event of a defendant neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence; and should it appear desirable that a written statement should be put in, the case will be adjourned for that purpose at the expense of the defaulting party. *RAMRUTON v. ORIENTAL INLAND STEAM NAVIGATION COMPANY*

[2 Hyde, 89]

17. ——— *Additional written statement—Practice—Act VIII of 1859, s. 122.*—An application by the defendant for leave to file an additional written statement allowed on condition of the defendant paying the whole costs and furnishing a copy of the additional statement to the plaintiff free of charge. Distinction made between such an application by a plaintiff and one made by a defendant. *DASMANI DAS v. SRINATH GHOSH*

[3 B. L. R., Ap., 11]

18. ——— *Supplemental statements, Filing of.*—Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing. *MUNCHERSHAW BEZONJI v. NEW DHURUMSEY SPINNING & WEAVING COMPANY*

I. L. R., 4 Bom., 576

19. ——— *Civil Procedure Code, 1859, s. 122.*—A Court was held not to have done wrong in admitting a supplemental written statement which it had called for under s. 122, Civil Procedure Code, 1859, which did not add to or vary the plaintiff's claim. *JAHANGIER BUKSH v. BHICKAREE LALL*

11 W. R., 71

20. ——— *Statement explaining plaint.*—A written statement which was in explanation of the plaint and not starting a new case was allowed to be put in by the plaintiff after evidence was taken, and the defendant not being prejudiced by its admission. *LALL MAHOMED v. DHOOZEE RAM DOSS*

22 W. R., 377

21. ——— *Amendment of written statement—Permission to extend counter claim—Practice.*—The defendants, owing to their ignorance of the true facts, did not include in their counter claim certain sums paid by them to the plaintiff in part payment of the alleged losses incurred in respect of the purchase and re-sale of the aforesaid cotton. *Held* that the lower Court (RUSSELL, J.) had rightly permitted the defendants to put in a supplemental written statement extending their counter claim so as to include these items. *LAKHMIHAND v. CHOTOO-RAM*

I. L. R., 24 Bom., 403

## WRITTEN STATEMENT—concluded

23. ——— Objections to written statement—Sunday—"Four clear days"—C r l Procedure Code 1559 s 121.—A written statement has been "four clear days" upon the file in compliance with the rule 28 although the last of such days is a Sunday. Objections to the written statement on the ground stated in s. 121 of Act VIII of 1859 cannot be taken when the suit is ripe for hearing. *SMALLWOOD v. PARRY* Cor., 39

23. ——— Raising question not raised in written statement—On as onto ra s equi ab s d face s writ ex stat ment.—A defendant is not precluded from availing himself of any equity which might arise out of the facts proved at the trial, merely because he has not raised that equity on the face of his written statement. *GOUR CHUNDER BISWAS v. GURSH CHU DER BISWAS* [7 W R. 120

24. ——— Raising question of jurisdiction—Fresh and Fract—Where a question of jurisdiction had not been raised in a written statement the defence therein being limited to a statement of the merits of the case an application to raise an issue as to jurisdiction was granted on payment of the costs of the adjournment to enable the plaintiff to meet the case set up. *ROZENOLLA v. PALMER* Cor., 8

## WRONG-DOERS

See CONTRIBUTION—CIT FOR—JOINT WRONG-DOERS.

See LIMITATION ACT 15 ART 103 [I. L. R. 24 Calc., 413

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES [I. L. R., 14 Bom., 408

## WRONGFUL ATTACHMENT

See ATTACHMENT—LIABILITY FOR WRONGFUL ATTACHMENT

[I. L. R., 17 Calc. 436  
I. R. 17 I. A. 17

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.

[3 B. L. R., A. C., 413  
I. L. R., 3 Bom. 74  
7 Mad., 235

See CASES UNDER DAMAGES—CITTS FOR DAMAGES—TORTS

See CASES UNDER EXECUTION OF DECREES—LIABILITY FOR WRONGFUL EXECUTION

## WRONGFUL CONFINEMENT

See CONFOUNDING OFFENCE. [I. L. R. 21 Calc., 103

See UNLAWFUL COMPELSON. [I. L. R. 19 Calc., 572

See WRONGFUL RESTRAINT [I. L. R. 12 Bom., 377

## WRONGFUL CONFINEMENT—cont. and

1. ——— What amounts to imprisonment—*See* for damages.—The detaining of a person in a particular place or the compelling him to go in a particular direction by force of an act not will over-powering or suppressing in any way his own voluntary action is an imprisonment on the part of the person exercising that exterior will. *PARAN MURAM VARA SAVA PANTULU v. STUART* 2 Mad., 338

2. ——— Nature of confinement—*Penal Code (Act XLV of 1860) s 345*—In order to render a person liable under s. 316 of the Penal Code it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. *IN THE MATTER OF THE PETITION OF SREENATH RAMESWAR EXPRESS v. SREENATH RAMESWAR* [I. L. R. 9 Calc., 231

3. ——— Unlawful commitment by person in authority—*Illegal arrest—Penal Code s 240—Presumpt on of malice*—Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law and must be proved in order to satisfy the requirements of s. 239 of the Penal Code. *REG v. VARATAN KARAJI* 8 Bom., 349

4. ——— Obtaining arrest of wrong person—*Liability of person setting Court a motion*—Where a wrong person is arrested and imprisoned under a decree to which he is no party the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly. *BHAKMA CHARAN v. DOSTI MURTI* 8 Mad., 38

5. ——— Illegal arrest—*Malice*—Four persons, two of them police constables and two village officers, were convicted of wrongful confinement and abetment thereof. The defendants, the village officers, maliciously directed the arrest of certain persons for resisting the detention of certain pigs found trespassing. *Held* a good conviction. *ANONYMOUS* 5 Mad., Ap., 24

6. ——— Wrongful restraint—*Penal Code ss 339, 340 343—Malice*—Malice is not an essential ingredient in the offence of "wrongful confinement" as defined by s. 340 of the Indian Penal Code (Act XLV of 1860). The offence is complete when a person is wrongfully restrained in such a manner as to be prevented from proceeding beyond certain circumstances limiting limits. And a person is wrongfully restrained when he is voluntarily obstructed so as to be prevented from proceeding in any direction in which he has a right to proceed. The accused as abettor inspected a toddy shop where the complainant and one D were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkari Act (Bombay Act V of 1878) had been committed, the accused made an inquiry in the course of which the complainant made certain statements implicating his fellow-servant. The accused thereupon resolved to prosecute D and make the complainant a witness in the case. In order to prevent him being tutored, the accused ordered his

**WRONGFUL CONFINEMENT—continued.**

sepoj to bring the complainant to his camp, and there detained him during the night, and on the following morning sent him in charge of a sepoj to a Magistrate's Court, where the complainant repeated the statements made by him before the accused. He was then allowed to go away. The accused prosecuted *D*, and in the course of his trial admitted in his deposition that he had ordered his sepoj to bring the complainant to his camp, and had detained him there during the night. After the termination of *D*'s trial, the complainant charged the accused with wrongful confinement under s. 342 of the Indian Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night. The trying Magistrate held this plea proved, and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882). The Sessions Judge held that, though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment. *Held* by the High Court on revision that the mere circumstance that the accused had acted without malice and to the best of his judgment did not protect him, if his act otherwise satisfied the definition of s. 340 of the Indian Penal Code. *DHANIA v. CLIFFORD*.

[I. L. R., 13 Bom., 376]

7. ——— Wrongful arrest—*Penal Code (Act XLV of 1860), s. 342—Criminal Procedure Code (1882), s. 54—Offence committed by a British subject in foreign territory—Powers of the police to arrest for such offence without a warrant.*—S. 54 of the Criminal Procedure Code (Act X of 1882) does not empower a police officer to arrest, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India. *M* was a native Indian subject of the Queen-Empress, residing at Belgaum. A complaint was filed against him in the Sangli State, charging him with committing breach of trust within the territories of that State. Thereupon he obtained an order from the District Magistrate of Belgaum, dated the 15th November 1891, which exempted him from arrest for the offence of criminal breach of trust without a warrant issued by himself or by the Political Agent of the Southern Maratha country. This order was communicated to *M* through the accused, who was the chief constable at Belgaum. On the 27th November 1891 a police officer from Sangli State came to Belgaum with a warrant issued by the Sangli Court for the arrest of *M* on a charge of criminal breach of trust. The chief constable thereupon directed *M*'s arrest. *M* brought to the notice of the chief constable the District Magistrate's order of the 15th November 1891, but he was detained in custody till the matter was reported to the first class Magistrate, who ordered his discharge. In the meantime the complaint filed against *M* in the Sangli State was dismissed without requiring his extradition. *M* thereupon prosecuted the chief constable on a charge of wrongful arrest and wrongful confinement. *Held* that the chief constable had no power to arrest the complainant without a warrant;

**WRONGFUL CONFINEMENT—concluded.**

and that he was guilty of the offence of wrongful confinement under s. 342 of the Penal Code. *IN RE MUKUND BABU VETHE*. I. L. R., 19 Bom., 72

**WRONGFUL CONVERSION.**

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.

[I. L. R., 4 Calc., 116  
5 Bom., O. C., 140  
I. L. R., 10 All., 133]

See ONUS OF PROOF—WRONGFUL CONVERSION . . . . . 7 W. R., 286

See PLEDGEE AND PLEDGEE.

[I. L. R., 19 Calc., 322  
L. R., 19 I. A., 60]

**WRONGFUL DETENTION.**

—— Detention of accused by Police Inspector—*Criminal Procedure Code, 1872, s. 124.*—*Per GLOVER, J.*—Where a Sub-Inspector of Police is charged with having detained prisoners for more than twenty-four hours, it is not necessary for the Crown to prove that he detained them with a guilty knowledge, as s. 124, Act X of 1872, imperatively lays down that accused persons are on no account to be detained beyond that time except under special order of the Magistrate, which was not obtained in this case. *QUEEN v. BASOORAM DASS*

[19 W. R., Cr., 36]

**WRONGFUL DISMISSAL;**

See CASES UNDER MASTER AND SERVANT.

—— Suit for, against Government.

See GOVERNMENT . . . . . 7 B. L. R., 688

**WRONGFUL DISTRAINT.**

See BENGAL RENT ACT (VIII of 1869), s. 27.

[3 B. L. R., Ap., 74  
6 W. R., Act X, 7, 33  
9 W. R., 162  
Marsh., 284  
15 W. R., 451  
3 B. L. R., A. C., 261  
7 W. R., 41]

See BENGAL RENT ACT (VIII of 1869), s. 100.

[Marsh., 470  
3 W. R., Act X, 139]

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N. W. P.

[I. L. R., 12 All., 409]

See MADRAS RENT RECOVERY ACT, s. 78.

[I. L. R., 20 Mad., 449]

See PRIVATE DEFENCE, RIGHT OF.

[23 W. R., Cr., 40]

See RIOTING . . . . . 8 Mad., Ap., 11

[I. L. R., 13 Mad., 148]

See TRESPASS—GENERAL CASES.

[23 W. R., Cr., 40]

**WRONGFUL DISTRAINT—cont. next**

1.—Cutting and carrying away crops—*Persons put in possession in execution of decree*.—Certain persons who, in execution of a decree for khas possession had been put in nominal possession of their lands instead of cutting the raiyats allowed them to cultivate and when they had cultivated cut and carried away their crops. *Held* that the act of the patta dars was an abuse of the law of distraint and rendered them liable for damages. **ANON MOHUN CHATTERJEE & THAKUR MOHAN DASS** 10 W R, 70

2.—Crops Seizure of—*Act X of 1859 s 142 and 143 Trespass*.—Certain sub-teens sued in the Collector's Court the zamindar and others employed by him for the value of crops seized and carried away under a certificate as was alleged by the defendants, granted to them by the Collector but which they failed to produce. *Held* that ss. 142 and 143 of Act X of 1859 applied to the case. **S 143 Act X of 1859 contemplated not only the case of a person who professes to follow the provisions of the law though he has no power to distrain but also the case of a person who, under colour of the Act does distraint but does not do so according to the provisions of the Act.** Such persons were excluded by that section as trespassers, and were liable to the penalty of trespass, in addition to damages which may be awarded against them by the Revenue Court. **RADHA MOHAN NARAYAN & JAGDINATH DASS** 13 B L R, A C, 28 13 W R, 68

3.—Person acting without authority—*Act X of 1859 s 143 Trespass*.—S 143 Act X of 1859 did not apply when a distrainer acted without the authority of the superior holder. In such a case he was a mere trespasser. **HOWARNEY & BROHATH DASS** 5 W R, Act X, 67

4.—Suit for damages for illegal distraint—*Tort Non-jouissance de part et d'autre*.—A suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained. Objection being taken at a late stage of the case on the ground of non-jouissance of a party that party was in his own application added as a plaintiff. *Held* that the rule that persons having the same cause of action must sue jointly does not apply to actions on tort in every case in which persons have been damaged by the same tortious act. If the objection of non-jouissance of party in an action on tort be not taken at the time and in the way provided by law the defendant is liable to such portion of the damages only as have been incurred by the plaintiff who originally brought the suit. **JAGDIO SINGH & PADARATH ARIA** I L R 25 Calc, 285

5.—Persons removing property under rent law—*Procedure—Penal Code s 37A*.—Persons removing property under the provisions of the rent law relating to distraint ought not to be proceeded against under the criminal law but the parties aggrieved by a wrongful distraint should have recourse to the remedy provided by Bengal Act VIII of 1869. **IN THE MATTER OF AGHAHAT AGHAHAT & BHAGI HADWAI** 9 C L R, 204

**WRONGFUL DISTRAINT—continued.**

6.—Right to sue to set aside wrongful distraint—*Right of landlord against trespasser*.—A landlord whose tenant's crops have been wrongfully distrained by a raiyat has a right to sue to set aside such wrongful distraint. **HOZZO NARAYAN & BHODDHA KRISHNO BAKSH** [I L R, 4 Calc, 890 4 C L R, 32]

7.—Right to damages for wrongful distraint—*Bengal Act VIII of 1869 s 69*.—*Liability to suit for damages*.—When on the one hand, a raiyat institutes a suit to resist the demand of a distrainer the Court has no option but must adjudicate upon the demand. If on the other hand, the distrainer has distrained "otherwise than according to the provisions of the Rent Act, he has done so at his peril and rendered himself liable to an action for damages by the owner of the distrained property. **TARINER HASTY LAHIRI CHOWHURY & RAJAKHORE TONTAY** 24 W R, 334

8.—Right to damages—*Act X of 1859 s 142—Suit to contest distraint—Onus of proof—Damages*.—In a suit to contest the demand of a distrainer the landlord is only required to prove the fact of tenancy and the amount of damages; if thereupon the tenant pleads payment and payment is denied, the onus is on the tenant to prove his allegation. Before a tenant can obtain any decree for damages on the ground of illegal distraint, he must prove what loss he has actually sustained. **GOJAN DEWAS & PRANAYATH MUNDLA** 8 W R, 220

9.—Onus of proof—*Suit for damages for wrongful distraint—Act X of 1859 s 143*.—In order to maintain a suit under s. 143 Act X of 1859 it was necessary for the plaintiff to prove that the defendant in making the distraint was acting not only without right but without anything to justify him in supposing that he had a right to distrain—a mere trespasser without any reasonable foundation for the claim set up. **HATE KUNAL DASS & JHOKO MOLLAN** 15 W R, 543

**See JOYLOLL BHEEN & BROHATH PAUL CHOWHURY** 9 W R, 162

10.—Suit on account of property damaged by wrongful distraint—*Act X of 1859 s 143—Damages for rental and distraint*.—*Power of Court to award*.—When a suit had been brought under s. 142, Act X of 1859 on account of property damaged or destroyed by a glect of a distrainer the Court was not competent to award damages for vexatious distraint. Such damages were properly awarded by the Collector under s. 143, in a suit to contest the distrainer's demand. **MOHMOO RAM & MOHMOO LAL** 5 W R, Act X, 69

11.—Procedure—*Bengal Act VIII of 1869 s 101—Proceedings against persons wrongfully distraining*.—When proceedings are taken before a Munsif under Bengal Act VIII of 1869 s. 101 he is bound, first to inquire whether an offence has been committed, and if he is satisfied that it has, the only order he can make against the offenders (not being tenants) is that they shall pay the value of the crops distrained. **PANU CHAND LAMA & ANANDMOO DASS** 20 W R, 445

## WRONGFUL GAIN OR LOSS.

- See THEFT . I. L. R., 15 Bom., 344  
 [I. L. R., 18 All., 88  
 I. L. R., 22 Calc., 869, 1017  
 I. L. R., 25 Calc., 416]

## WRONGFUL LOSS.

- See MISCHIEF . 3 B. L. R., A. Cr., 17  
 [I. L. R., 3 Calc., 573  
 I. L. R., 12 Calc., 55, 680  
 I. L. R., 7 Bom., 126]

## WRONGFUL POSSESSION.

— Trespasser—Sums paid during wrongful possession, Right to recover.—Where a person has wrongfully taken possession of an estate and held it adversely to the true owner, and has, during his possession, paid certain sums for Government revenue on the supposition that he was the lawful owner (being, however, in reality, nothing more than a trespasser and wrong-doer), he is not entitled to recover, as against the true owner, any sums so paid, even though such payments may have enured to the benefit of the true owner, but must be content to bear the burden of his own wrong. *TILUCK CHAND v. SOUDAMINI DASI*  
 [I. L. R., 4 Calc., 586; 3 C. L. R., 456]

## WRONGFUL RESTRAINT.

See COMPOUNDING OFFENCE.

[I. L. R., 21 Calc., 103]

See MISCHIEF . I. L. R., 12 Calc., 55

See WRONGFUL CONFINEMENT.

[I. L. R., 13 Bom., 376]

1. — Penal Code, ss. 339, 340, 342  
 — Police officer, Conduct of.—In a case of a police officer charged under Penal Code, s. 342, where there was no malice, no intention of doing an act of the nature spoken of in s. 339 or 340, and no voluntary obstruction or restraint, though there was probably excessive and mistaken exercise of powers not civilly excusable in a police officer, the facts were held not to amount to the criminal offence of wrongful restraint. *IN THE MATTER OF THE PETITION OF BUDROOL HOSSEIN* . . . 24 W. R., Cr., 51

2. — s. 339—Refusal to let person go until he gave bail.—Where a police officer refused to let a person go home until he had given bail, he was held to have been guilty of wrongful restraint under s. 339 of the Penal Code. *SHEO SHURN SAHAI v. MAHOMED FAZIL KHAN*  
 [10 W. R., Cr., 20]

3. — Police keeping witness in custody under surveillance.—Where the police kept a witness under surveillance for four days, the High Court held, under the circumstances, that there was nothing in law to warrant them in keeping him so in restraint. *BAJRANGI LALL v. EMPRESS* . . . 4 C. W. N., 49

## WRONGFUL RESTRAINT—continued.

4. — Restraint and taking money on false plea.—Where the accused prevented the complainants from proceeding in a certain direction with their carts and exacted from them a sum of money on a false plea,—Held the accused were guilty of wrongful restraint, and not theft. *JOWAHIR SHAH v. GRIDHAREE CHOWDHURY*  
 [10 W. R., Cr., 35]

5. — Penal Code, ss. 79 and 341—Mistake of fact—Act done in good faith under belief it is justified by law.—A Court peon accompanied by two of the decree-holder's men (petitioners) went to execute a warrant of arrest against the judgment-debtor *M.* A palki with closed doors was noticed to be coming out of the male apartment of *M.*'s house. The petitioners, believing that *M.* was effecting his escape in that palki, stopped it and examined it, although the persons accompanying the palki protested and said there was a lady in it. Admittedly, there was in the palki a pardanashin lady of rank. Held that, having regard to the terms of s. 79 of the Penal Code, a conviction of the petitioners under s. 341 was not right. *KANAI LAL GOWALA v. QUEEN-EMPRESS* . I. L. R., 24 Calc., 835

*KANAI GOALA v. QUEEN-EMPRESS*

[I. C. W. N., 665]

6. — Penal Code, ss. 52, 79, 99, and 342—Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bona fide under colour of his office—Act XII of 1856, s. 35—Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), s. 54.—On the 29th December 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujarathi marks and not knowing that such marks are placed on English-made goods, concluded that this statement was false, and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts, alleging that he had arrested the complainant because he had assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go. The complainant then lodged a complaint before the Acting Chief Presidency Magistrate charging the accused with wrongful restraint and wrongful confinement, offences punishable under ss. 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused,

**WRONGFUL RESTRAINT—concluded**

and had been on that account arrested and kept in confinement until released by the Inspector of Police. The Magistrate found that there was no justification for the suspension which the accused professed to entertain that there were no reasonable grounds for questioning the complainant about the cloth in his possession, and that the seizure was caused solely by the action of the accused in treating the complainant without any valid reason as a suspected thief. The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code (Act XLV of 1860) and sentenced him to four months rigorous imprisonment. *Held* by the High Court that the conviction was wrong. The accused having under the circumstances of the case, an honest suspicion that he cloth in the possession of the complainant was stolen property was justified in putting questions to the complainant the answers to which might clear away his suspicions and having received answers which were not in his opinion satisfactory he acted under a bona fide belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant not for the purpose of causing annoyance or from idle curiosity but in order to clear up his suspicions, was an indication of good faith and fined under s. 6 of the Indian Penal Code (Act XLV of 1860). He was therefore protected by s. 49 of the Code. Even though the act of the accused in taking the cloth might not have been strictly justifiable by law—that is even though there might not have been a complete want of fact to justify a reasonable suspicion that the cloth was stolen property—still the complainant had no right of private defence under s. 99 of the Code as the accused was a public servant acting in good faith under colour of his office and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands and in assaulting him. He was therefore legally arrested, under s. 44 cl. 5 of the Criminal Procedure Code (Act X of 1892) for obstructing a police-officer while acting in the execution of his duty. **BRAMWOOD JINJI, MURTI DAYAL** I.L.R. 12 Bom. 377

**WRONGFUL SEIZURE IN EXECUTION**

S. CIVIL PROCEDURE CODE 1882, s. 244  
(Act XXIII of 1901 s. 11)—QUESTIONS  
IN EXECUTION OF DECREE.

- [3 N W 187  
2 Agre, 105  
5 Mad. 185  
12 B L R, 201, 203 note 208 note  
12 W R. 85  
3 B L R, A. C. 413  
I L R, 22 Calc. 483  
*See DAMAGES—RENTS AND ASSESSMENT  
OF DAMAGES—TORTS* Marsh., 485  
[3 Agre 202  
3 B L R, A. C. 413  
I L R, 3 Bom., 74  
7 Mad., 235

**WRONGFUL SEIZURE IN EXECUTION—concluded**

*See CASES UNDER EXECUTION OF DECREE*  
—LIABILITY FOR WRONGFUL EXECUTION  
*See MALICIOUS PROSECUTION*  
[I L R, 18 Bom., 485  
*See CASES UNDER SALE IN EXECUTION OF DECREE—WRONGFUL SALES*

Y

**YEAR.**

—Agricultural—

*See* W P RENT ACT (XVIII OF  
183) s. 24 I L R, 1 All., 613

Z

**ZAMINDAR.**

*See GRANT—CONSTRUCTION OF GRANTS*  
[I L R, 9 Mad., 307  
I L R, 13 I. A., 33

*See GRANT—POWER TO GRANT*  
[3 B L R, Sup Vol, 75, 774

—Kabuliat between Government  
and—

*See SPECIFIC PERFORMANCE—SPECIAL  
CASES* I L R, 3 Calc. 484

—Liability of, for repairs of tank.

*See CONTRACT ACT* s. 70  
[I L R, 19 Mad., 83

—Proof of title of—  
*See OWNERSHIP PRESUMPTION OF*  
[I L R, 15 Mad., 101  
I L R, 18 I. A. 149

—Purchase by of patni interest  
Effect of—

*See MERGERS* 3 C L R. 156  
[I L R, 19 Calc., 760

**ZAMINDAR, DUTY OF—**

—Ancient tanks—Negligence—Statutory powers—Liability for damages occasioned by overflow of tanks—The public duty of maintaining ancient tanks and of constructing new ones was originally undertaken by the Government of India, and upon the cession of the country has in many instances, devolved upon zamindars. Such zamindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under law by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities

**ZAMINDAR, DUTY OF—concluded.**

of such zamindars with regard to these tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. A zamindar, if the tanks of any such tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby. *MADRAS RAILWAY COMPANY v. ZAMINDAR OF CARVETINARAILWAY COMPANY*. 14 B. L. R., 209; 22 W. R., 279; 34 C. L. J., 11 A., 364

S. C. in lower Courts. *MADRAS RAILWAY COMPANY v. ZAMINDAR OF KAVETINUGGUR* [5 Mad., 139]

and after remand. [3 Mad., 180]

**ZAMINDAR, POWER OF—**

1. ———— **Power to grant lease—Lease granted for longer term than zamindar's engagement with Government—Operation of Act XVI of 1842.**—A lease granted by a zamindar for a longer period than the term of his own engagement with the Government was not absolutely void for the excess, but only voidable, and might be confirmed. *Semble*—That Act XVI of 1842 applied to agricultural leases, not to *bona fide* leases for other purposes. *NIRA RAM v. NANUCK DASS* [1 N. W., Part III, 47; Ed. 1873, 103]

*Hindu law—Au-*

thority to grant lease as manager and owner.—Under the Hindu law, the granting of a lease, though for a term, is an act within the scope of a zamindar's authority as manager and owner of the zamindari, and is, as such, binding on his successor, unless, in the circumstances in which it was made, it was otherwise than *bona fide*. *RAMANADAN v. SHINIVASA MURTHI* [I. L. R., 2 Mad., 80]

3. ———— **Power to alter boundaries—**

*Effect of arrangement altering boundary without sanction of Government.*—Zamindars have no authority, without the sanction of Government, to alter the boundaries of their permanently-settled estates, and to transfer villages from one zamindari to another. Such an arrangement is of no binding effect, except between the parties who have made it. *RAMCHUNDER BANERJEE v. MUDDUNMOHUN TEWABEE* [W. R., 1864, 355]

4. ———— **Power to charge estate with**

personal debts.—A decree for possession of certain land with *wasilat* obtained by a zamindar of an estate, as such, cannot be pledged by him as security for a personal debt, nor for such a debt can the estate be made liable, nor his successor be held responsible. *NIMAYE CHURN SEIN v. RAMMONEE BEEBEE* [10 W. R., 152]

**ZAMINDAR, RIGHTS OF—**

*See MADRAS REGULATION XXV OF 1802.*

[14 B. L. R., 115; I. R., 1 A., 268, 252]

*See WASTE LANDS I. L. R., 19 All., 172*

1. ———— **Nature of zamindari estate—**  
*Power to deal with estate.*—A zamindar's estate is

**ZAMINDAR, RIGHTS OF—continued.**

analogous to an estate tail as it originally stood upon the statute *de donis*. The zamindar is the owner of the zamindari, but can neither encumber nor alienate beyond the period of his own life. *CHINFALAPATI CHINNA SIMHADIRAJ v. ZAMINDAR OF VIZIANAGHAM* [2 Mad., 128]

2. ———— **Collections of rent—Claim to intermediate tenures—Omnis of proof.**—A zamindar has as such a *prima facie* right to the gross collections from all the mouzabs within his zamindari. It is for parties setting up an intermediate tenure to prove their grant. *PRAHLAD SEN v. DURGABASAD TEWARI* [2 B. L. R., P. C., 111; 12 W. R., P. C., 6; 12 Moore's I. A., 286]

3. ———— **Right to rent—Payment of revenue by zamindar.**—The right of a zamindar to exact from a tenant payment of rent for a certain piece of land in no way depends on whether he does or does not pay revenue for that land. *JOTENDRO MOHUN TAGORE v. AXMUN BEEBEE* [1 C. L. R., 366]

4. ———— **Liability for rent—Co-sharer in talukh.** *Held* that a zamindar, by becoming a co-sharer in the talukh, does not lose his right to the joint responsibility of all the other co-sharers for the due payment of the rent; he only becomes bound to make an allowance for that portion which he as a co-sharer ought to pay. *GOBINDO COOMAR CHOWDHRY v. MANSON* [15 B. L. R., 56; 23 W. R., 152]

5. ———— **Compensation—Compensation to patnidar for loss sustained by erection of works by railway company.**—A zamindar who receives his rents in full is not entitled to participate in compensation received by his patnidar for loss suffered by the latter in consequence of works being erected on land included in the patni. *MAHARAJAH OF BURDWAN v. WOOMA SOONDUREE DOSSES* [10 W. R., 12]

6. ———— **Sale in execution of decree—Custom—Charge on sale-proceeds.**—Where a sale took place in execution of a decree, and it was proved by custom that the zamindar's right extended to one-fourth of the sale-proceeds in cases of involuntary sale, *Held* that the zamindar had a right to recover the fourth share of the proceeds of sale from the judgment-creditor, who in truth reserved the sale price. The zamindar's right attached to the sale proceeds, and was a prior charge upon the proceeds. *BYJ NATH PRASHAD v. MAHOMED FRZ HOSSAIN* [2 Agra, Part II, 204]

7. ———— **Custom—Right to share of sale-proceeds—Calculation of amount—Zamindari huq.**—Where by custom the zamindar is entitled to a quarter share of the sale-proceeds as his huq zamindari, he is entitled to recover it on the occasion of sales, either absolute or originally conditional, but subsequently becoming absolute by foreclosure, from the vendor and the purchaser, and the latter cannot be discharged from his liability by proving that he has paid all, including zamindar's



## ZAMINDAR RIGHTS OF—concluded.

duce, to the former being incumbent on him to see that the zamindar is satisfied in respect of his dues. *Held* further that, under the circumstances, the plaintiffs, the zamindars, were entitled to one-fourth from Rs 140 the principal amount repayable and not from the amount ascertained at the time of foreclosure to be due to the mortgagee including interest, inasmuch as the deed made no provision for payment of any sum as interest. **HEERA RAM v DEO NARAIN SINGH** Agra, F B, 63 Ld. 1874, 48

8 ——— *Sale in execution of house & mohalla—Wajib ul urs—Liability of auction-purchaser—Right of zamindar to buy-backs etc.*—The zamindars of a certain mohalla claimed from the purchaser of a house situated in such mohalla, which had been sold in execution of a decree one-fourth of the sale-proceeds of such house such purchaser being the holder of such decree. Such suit was based upon the terms of the way-b-ul-urs. That document stated *inter alia*, that when a house in such mohalla was sold, a cess called *chaharam* was received by such zamindars "according to the understanding arrived at between the seller and the zamindars. *Held* that such zamindars were not entitled under the terms of the way-b-ul-urs to one-fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser could not be regarded as the "seller" and it was only the "seller" who was liable that the terms of the way-b-ul-urs were applicable only to private and voluntary sales, and not to execution sales and that, under these circumstances, the suit must be dismissed. **BENI MADHO v ZAFERUL HAQ** (I. L. R., 3 All, 797)

9 ——— *Sale of zamindar's right—Right of tenant & another house*—Where a zamindar's right is sold by auction, it does not follow that, by the sale of the zamindar's right, he forfeits his tenant-right which he had in another patta in respect of a house. **RAM BICKSH SINGH v PURDUM N KISHOR** 2 Agra, Part II, 202

## ZAMINDAR AND RAIYAT

See CASES UNDER BENGAL RENT ACT 1869

See CASES UNDER LANDLORD AND TENANT

See CASES UNDER MADRAS RENT RECOVERY ACT 1865

See CASES UNDER RIGHT OF OCCUPANCY

## ZAMINDARI DAKS.

1 ——— *Beng. Act VIII of 1862—Effect of Act on liability of patnidars.*—Bengal Act VIII of 1862 did not relieve patnidars from their liability under the old laws of paying the zamindari daks charges. **BHISONATH SINGH v. CHUNDERMOYEE** (4 W R., 6

2. ——— *Liability of patnidar*—Where the terms of a patta lease did not make the patnidar liable for the maintenance of

## ZAMINDARI DAKS—concluded

the zamindari daks, it was held that the patnidar was not liable for a tax which was imposed on the zamindar by Bengal Act VIII of 1862. **RAJHAL DOSA MOOKERJEE v. SHUBHO MOYEE**

[8 W R., 100]

3. ——— *Liability of patnidar*—The provision in a patta that if any item is laid upon the zamindar over and above the sadder jumma, the patnidar shall bear a rateable proportion of it, held not to include the charges connected with the zamindari daks. **BOHNER HAST ROY v TRIPPOORA BOODDUREE DASIA** 8 W R., 45

**SARADA GOOWDNEY DEBIA v. WOOMA CHURN SINGAR** 3 W R., S. C. Cal., 17

## ZAMINDARI DUES AND CESSSES.

— Suit for—

See SMALL CAUSE COURT MOYTESIL—JURISDICTION—CESS. (I. L. R., 1 All, 444)

## ZAMORIN OF CALICUT

See HINDU LAW—WILL—POWER OF DISPOSITION GENERALLY (I. L. R., 21 Mad., 100)

See PENSIONS ACT s. 12. (I. L. R., 21 Mad., 105)

## ZANZIBAR.

See CONSULAR COURT AT ZANZIBAR. (I. L. R., 3 Bom., 58)

— Consular Court at—

See HIGH COURT JURISDICTION OF—BOMBAY—CIVIL. (I. L. R., 20 Bom., 480)

See HIGH COURT JURISDICTION OF—BOMBAY—CRIMINAL. (I. L. R., 3 Bom., 334)

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION. (I. L. R., 19 Bom., 741)

## ZUR-I PESHGI LEASE.

See ATTACHMENT—ALIENATION DURING ATTACHMENT. I. L. R., 18 All., 123

See DECREE—FORM OF DECREE—POSSESSION. I. L. R., 18 All., 440

See LEASE—ZUR-I PESHGI LEASE.

See MORTGAGE—POSSESSION UNDER MORTGAGE.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—MODE OF ACQUISITION. (I. L. R., 24 Calc., 272; I. L. R., 23 I. A., 158; 1 C. W. N., 33)